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# *Faith in the Future: Sexuality, Religion and the Public Sphere*

CARL F. STYCHIN\*

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**Abstract**—The clash between religious freedom and equality for lesbians and gay men has become a controversial legal issue in the United Kingdom. Increasingly, claims are made that compliance with anti-discrimination norms impacts upon conscientious, faith-based objectors to same-sex sexual acts. This article explores this issue and draws insights from North American case law, where this question has been considered in the context of competing constitutional rights. It raises far-reaching issues concerning the distinction between belief and practice, as well as the role of identity in the public sphere. The author advocates that courts and tribunals should adopt a fact-specific approach which is sensitive to the rights in a particular context, and which focuses upon the values of accommodation, tolerance and mutual respect.

## *1. Introduction*

Liberal democracies are faced with what appears to be an irreconcilable clash of two conflicting rights. First, recent years have witnessed the rapid development of law reform on the basis of ‘sexual orientation’. Rights have been primarily targeted at employment, the provision of goods and services and the legal recognition of relationships. They are justified on the basis of equality, human rights and anti-discrimination. Increasingly, however, equality rights are seen to conflict directly with religious and conscientious freedom, by those who claim that anti-discrimination law in practice undermines a right to act according to their beliefs. For example, interpretation of religious doctrine leads some conservative Christians to the conclusion that same-sex sexual acts are immoral and that they must not promote them in any way. In this article, I explore how this issue is unfolding in the United Kingdom, and I provide comparative analysis with North America, where the question has generated much attention for some time. The examples I have chosen are not limited to direct clashes

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between religion and sexuality, but they all do shed light on it. I then propose a way in which this apparently intractable conflict might be managed.

## 2. *Competing Narratives of Exclusion*

Within the United Kingdom, progress towards equality for lesbians and gay men has proceeded at a remarkable pace over the past decade, and this has occurred with less dissent and controversy than has been witnessed elsewhere.<sup>1</sup> Of particular relevance is anti-discrimination in employment and the provision of goods and services, as well as the creation of the new legal status of civil partnership.<sup>2</sup> These fields provide the foci for a clash with religious and conscientious objectors. It is apparent from the structure of these 'progressive' interventions that legislators themselves recognize the existence of potential conflict. For example, limited exemptions are included in anti-discrimination law.<sup>3</sup> The preparedness of government to attempt a reconciliation of conflicting rights *ab initio* might also speak to the way in which rights discourse in the United Kingdom is understood as inevitably a product of accommodation.<sup>4</sup>

However, despite attempts by the legislature to mediate divergent claims through the delineation of rights, clashes are entering tribunals and courts with some regularity. Rights discourse lends itself to these conflicts. Freedom of religion and conscience remain central to liberal democracies, and the increasing role of human rights discourse provides the means through which the freedom can be 'framed' through the juridification of politics.<sup>5</sup> But the protection of religion within liberalism is paradoxical. While it may occupy a prominent place within liberal rights rhetoric, 'the terms of the debate about the place of religion within society are set by a secular liberalism that does not and cannot view religion through religion's own eyes'.<sup>6</sup> The freedom to hold a particular belief may be absolute—the bedrock of the right—but the *manifestation* of the belief is constrained from the outset. Once religion enters the public, it is a qualified right which is limited by liberalism's other tenets, such as potential harm to non-believers.<sup>7</sup> As Benjamin Berger argues,

<sup>1</sup> See K Nash, 'Human Rights Culture: Solidarity, Diversity and the Right to be Different' (2005) 9 *Citizenship Studies* 335–48.

<sup>2</sup> Employment Equality (Sexual Orientation) Regulations SI 2003/1661; Equality Act (Sexual Orientation) Regulations SI 2007/1263; Civil Partnership Act 2004. The issue of religious speech and incitement to homophobic hatred is another important issue, but beyond the scope of this article. See I Leigh, 'Homophobic Speech, Equality Denial and Religious Expression' in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (OUP, Oxford 2009) 373.

<sup>3</sup> See generally, R Sandberg and N Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 *CLJ* 302–12.

<sup>4</sup> See KD Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79–99.

<sup>5</sup> M Smith, 'Framing Same-sex Marriage in Canada and the United States: Goodridge, Halpern and the National Boundaries of Political Discourse' (2007) 16 *Social and Legal Studies* 5–26.

<sup>6</sup> A Bradney, *Law and Faith in a Sceptical Age* (Routledge-Cavendish, Abingdon 2009) 33.

<sup>7</sup> R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005) 163.

‘law manifests a degree of comfort with religion as belief and displays a kind of anxiety and awkwardness with religion as practice’.<sup>8</sup>

This raises the more fundamental paradox of liberalism—that it can be both liberal in its claimed neutrality regarding visions of the good life (however illiberal they might be), but only to the extent that those visions remain personal and private, closeted from public display. Religion is also constructed through liberalism as *individual* and ‘one of many rational choices’,<sup>9</sup> ‘connected to the liberty and autonomy of the subject’.<sup>10</sup> In this way, freedom of religion is processed through liberalism such that its protection as a public right is contingent on its compatibility with liberalism’s constitutive terms. The language of objective ‘balancing’ and ‘harm’ provides the means by which liberalism can then evade the charge that it is imposing itself illiberally on those who do not share its liberal values; for the law must balance the rights of all as to how they live.<sup>11</sup> This underscores that liberalism and pluralism are not necessarily synonymous.<sup>12</sup> For example, anti-discrimination laws, as pointed out by religious rights advocates, are not ‘morally neutral; they evince a judgment that certain conditions or behaviour warrant protection’,<sup>13</sup> which can lead to ‘the imposition of a societal consensus of the “common good”’,<sup>14</sup> which presumes the ‘moral neutrality of homosexuality and bisexuality’.<sup>15</sup>

In sum, freedom of religion—and of conscience more broadly—is constituted through the distinction between belief and manifestation. In legal terms, this delineation is well established. In *R v Secretary of State for Education and Employment; ex parte Williamson*,<sup>16</sup> the House of Lords considered the compatibility of the extended statutory ban on corporal punishment in schools with parents’ freedom of religion under art 9(1) of the European Convention on Human Rights. Lord Bingham of Cornhill described the right in robust terms as including ‘the right to express and practice one’s belief’ for ‘without this, freedom of religion would be emasculated’.<sup>17</sup> But when it comes to manifestation, the right is ‘qualified’ by a ‘balance’ to be struck ‘between freedom to practise one’s own beliefs and the interests of others affected by

<sup>8</sup> BL Berger, ‘Law’s Religion: Rendering Culture’ (2007) 45 Osgoode Hall LJ 277–314, 303. While some would argue that religious accommodation can fit comfortably into standard liberal discourse, my argument is that, in this field, it is an increasingly difficult relationship which presents a challenge for liberalism.

<sup>9</sup> A Fielding, ‘When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada’ (2008) 13 Appeal 28–50, 33. I am not claiming here that the liberal system has never accommodated the public manifestation of religious belief; only that to do so, when that manifestation is perceived as itself illiberal, leaves liberalism in a dilemma.

<sup>10</sup> Berger (n 8) 294.

<sup>11</sup> J Rivers, ‘Law, Religion and Gender Equality’ (2007) 9 Ecclesiastical LJ 24–52, 47.

<sup>12</sup> Fielding (n 9) 31.

<sup>13</sup> GW Dent Jr, ‘Civil Rights for Whom?: Gay Rights Versus Religious Freedom’ (2006–2007) 95 Kentucky LJ 553–647, 637–8.

<sup>14</sup> Fielding (n 9) 31.

<sup>15</sup> C Feldblum, ‘Moral Conflict and Liberty: Gay Rights and Religion’ (2006) 72 Brooklyn LJ 61–123, 87.

<sup>16</sup> [2005] UKHL 15.

<sup>17</sup> Ibid [16].

those practices'.<sup>18</sup> The right is further limited when it concerns the rights of employees to manifest religious beliefs in the workplace and the extent of reasonable accommodation demanded of the employer. In this context, infringement is difficult to establish, with an 'expectation of accommodation, compromise and, if necessary, *sacrifice* in the manifestation of religious beliefs'.<sup>19</sup> Thus, while the freedom to believe may be entirely subjective, once faith is manifested, it 'must satisfy some modest, objective minimum requirements'<sup>20</sup> and, if non-religious, be 'related to an aspect of human life or behaviour of comparable importance to that normally found with religious belief'.<sup>21</sup>

For defenders of religious freedoms, the liberal rights paradigm can be limiting and problematic. The understanding of religion which underpins it may not reflect how faith is actually experienced as a comprehensive world view.<sup>22</sup> Conscience is not an individual choice, nor may it be capable of privatization.<sup>23</sup> Indeed, according to the model of rationality that underpins liberalism, the faith experience may be incomprehensible.<sup>24</sup> The test of whether the manifestation of belief impacts upon the rights of others also may not be relevant when one is faced with the compulsion to act.<sup>25</sup> To the extent that religion presents a world view, the division between public and private, and manifestation and belief, is a meaningless and, arguably, hypocritical distinction.<sup>26</sup> As a consequence, the contours of the right—as it has been defined, for example, within European human rights jurisprudence—illegitimately constrains it. While proponents of freedom of religion may accept the need for balancing, they are more likely to advocate that it should be done openly as a majoritarian limitation on the exercise of the right, rather than *constitutively* in the definition of its scope.<sup>27</sup>

In the face of the increasing acceptance of sexuality equality, a counter-discourse on freedom of religion, belief and conscience has gained prominence in the UK, with an important role particularly for conservative Christian advocates.<sup>28</sup> Although it might be argued that, in contemporary Britain, Christian faith has become largely a private matter (during the same period in which sexual identity has saturated the public sphere), these moves are resisted

<sup>18</sup> *Ibid* [17].

<sup>19</sup> *R v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [54] [emphasis added].

<sup>20</sup> *Williamson* (n 16) [23].

<sup>21</sup> *Ibid* [24].

<sup>22</sup> *Berger* (n 8) 291.

<sup>23</sup> *Ahdar and Leigh* (n 7) 165.

<sup>24</sup> *Bradney* (n 6) 30.

<sup>25</sup> *Ahdar and Leigh* (n 7) 165.

<sup>26</sup> *Ibid* 161.

<sup>27</sup> *Ibid* 184.

<sup>28</sup> This is also the case in the USA, where 'the burden of complying with antidiscrimination rules has become one of the premier concerns of conservative Christians': A Koppelman, 'You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions' (2006) 72 *Brooklyn LJ* 125–46, 135.

by some Christians, who reject privatization, which they attribute to the unsustainable separation of belief and practice.<sup>29</sup> In fact, the dichotomy has been compared to the well known distinction between sexual identities and acts (ie the 'being' and 'doing' of homosexuality).<sup>30</sup> Thus, the regulation of both religion and sexuality, it is argued, has been facilitated by dichotomous constructions in law. There is also a similarity as between religion and sexuality in the way in which the discourse of harm has been deployed by law as a means of limiting rights claims. Historically, the harm discourse was central to resisting claims for sexuality equality and, in rights claims regarding the manifestation of religion, harm again provides a frequently deployed rhetorical device. The harm now is found in the denial of the equality rights of others, such as sexual minorities. Courts thus increasingly struggle with precisely the extent to which society should accommodate the manifestation of religion, especially when opponents can point to competing values.<sup>31</sup> Conversely, those who support freedom of religion claim that the manifestation of others' rights clash with their religious faith, and they (sometimes) argue that practices of identity in the public sphere should be open to all.<sup>32</sup> Religion, like sexuality, thus is characterized as a collective identity rather than an individual choice.<sup>33</sup> Ironically, supporters of sexuality equality at times fall back on the public-private, belief-conduct distinctions as the justification for curtailing religious freedom—relegating those of faith to the closet from which they themselves have emerged.<sup>34</sup> In so doing, equality itself becomes a world view which monopolizes the public sphere, as 'a certain paradox ensues in which the coerced adoption of certain cultural norms becomes a requisite for entry into a polity that defines itself as the avatar of freedom'.<sup>35</sup>

The construction of rights in conflict and in need of balancing pervades the relationship of sexuality and religion. For example, with respect to the exceptions in UK employment law (which are themselves derived from European employment law), the High Court has upheld their legality.<sup>36</sup> At the same time, Richards J emphasized their narrowness. Reg 7(3) for example:

has to be construed strictly since it is a derogation from the principle of equal treatment; and it has to be construed purposively so as to ensure, so far as possible, compatibility with the Directive. When its terms are considered in light of those

<sup>29</sup> See eg A Opromolla, 'Law, Gender and Religious Belief in Europe: Considerations from a Catholic Perspective' (2007) 9 Ecclesiastical LJ 161–74, 164.

<sup>30</sup> Rivers (n 11) 36.

<sup>31</sup> See eg the decision of the South African Constitutional Court in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

<sup>32</sup> See eg G Trotter, 'The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants – A Response to Professor MacDougall' (2007) 70 Saskatchewan L Rev 365–92.

<sup>33</sup> Berger (n 8) 283–91.

<sup>34</sup> See B MacDougall, 'Refusing to Officiate at Same-Sex Civil Marriages' (2006) 69 Saskatchewan L Rev 351–73; R Wintemute, 'Religion vs Sexual Orientation: A Clash of Human Rights?' (2002) 1 J L Equality 125–54.

<sup>35</sup> J Butler, 'Sexual Politics, Torture, and Secular Time' (2008) 59 BJS 1–23, 4.

<sup>36</sup> *R (Amicus – MSF section and others) v Secretary of State for Trade and Industry* [2004] IRLR 430 (Admin).

interpretative principles, they can be seen to afford an exception only in very limited circumstances.<sup>37</sup>

The Court held that the exception ‘is very narrow in scope’<sup>38</sup> and that Reg 7(3)(b)(ii) ‘is also going to be a very far from easy test to satisfy in practice’.<sup>39</sup>

Thus, the law seeks to ensure that this exceptional space<sup>40</sup> is clearly delineated with firm borders, so that *acts* of religion which undermine the principle of anti-discrimination (and thereby lead to harm) are allowed to enter the public only in the narrowest of circumstances. At the same time, Richards J accepted the impossibility of bracketing sexual acts from identity: ‘the protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in the form of sexual behaviour as it does to sexuality as such’.<sup>41</sup>

The ways in which the construction of sexuality and religion mirror each other through the public–private distinction has not been lost on those commentators who argue that faith as a world view cannot reasonably be closeted.<sup>42</sup> Rather, in its essence, religion demands manifestation in the public sphere and to require otherwise is to undermine its core. For those of faith, to demand privatization is in practice to require exit from the public sphere.<sup>43</sup> This exclusion would strike at the heart of democratic citizenship. The law thereby would repeat the historical exclusion of lesbians and gay men from those same public spaces, reproducing the metaphor of the closet.

This has become a live issue, as claims are increasingly made which appropriate the language of discrimination and oppression in support of conscientious objectors.<sup>44</sup> The judiciary has begun to grapple with this in a series of high profile cases, which have exposed liberalism’s difficulties in reconciling competing world views in their manifestation in the public sphere. In *Re The Christian Institute’s and others’ Application for Judicial Review*, the Equality Act (Sexual Orientation) Regulation (Northern Ireland) 2006, which prohibited direct and indirect discrimination *and harassment* on the grounds of sexual orientation in the field of goods and services, premises management, education and public functions, was subjected to a judicial review action.<sup>45</sup> Weatherup J quashed the harassment provision based on a lack of proper consultation.<sup>46</sup>

<sup>37</sup> Ibid [115].

<sup>38</sup> Ibid [117].

<sup>39</sup> Ibid.

<sup>40</sup> The use of the idea of exceptionality is indebted to K Attell (tr), G Agamben, *State of Exception* (University of Chicago Press, Chicago 2005).

<sup>41</sup> *Amicus* (n 36) [119].

<sup>42</sup> Rivers (n 11) 36.

<sup>43</sup> Trotter (n 32) 367.

<sup>44</sup> I develop this point in C F Stychin, ‘Closet Cases: “Conscientious Objection” to Lesbian and Gay Legal Equality’ (2009) 18 Griffith L Rev 17–40.

<sup>45</sup> [2008] NI 86 (QB).

<sup>46</sup> Ibid [34].

With respect to the claimed art 9(1) right, he adopted the distinction between belief and manifestation, and he recognized the *worth* of the belief claim:

The belief in question is the orthodox Christian belief that the practice of homosexuality is sinful. . . . The belief is a long established part of the belief system of the world's major religions. This is not a belief that is unworthy of recognition. I am satisfied that art 9 is engaged in the present case. The extent to which the manifestation of the belief may be limited is a different issue.<sup>47</sup>

While refusing to make any abstract determination on the appropriate balance of rights—finding instead that this would ‘depend on the particular circumstances’<sup>48</sup>—Weatherup J did determine that the regulations would cause ‘material interference . . . to an extent which is significant in practice’ which *would* require a ‘balance of rights’.<sup>49</sup> In other words, he acknowledged that the exemptions carved out within the regulations did not necessarily amount to the final word on balancing. There is an acceptance that reasonable accommodation will be necessary in order to protect the manifestation of religion and conscience.

But in actual factual contexts that have come before decision makers, there has been little willingness to carve out space for conscientious objectors to manifest their beliefs. A magistrate who objected to placing children with same-sex couples pursuant to the Children and Adoption Act 2002 was found not to have triggered the Religion and Belief Regulations on the facts.<sup>50</sup> The Appeal Tribunal commented in *obiter dictum*, moreover, that the Tribunal at first instance was ‘manifestly entitled’ to conclude that *even had they been relevant*, ‘the Department was fully justified in insisting that magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws to which they have a moral or other principled objection’.<sup>51</sup>

A Christian Registrar, Ms Ladele, who objected to participating in civil partnership registrations was successful in her claim of discrimination at first instance, only to be denied relief by the Employment Appeal Tribunal.<sup>52</sup> She characterized her position within the discourse of minority rights:

She emphasised that she was placed in a dilemma and had either to honour her faith or the demands of the council. She asked for the council to consider the difficulty she faced and try to accommodate her concerns so that she could combine her work with her Christian commitments. She asked for sympathetic treatment as a member of a minority.<sup>53</sup>

<sup>47</sup> Ibid [50].

<sup>48</sup> Ibid [65].

<sup>49</sup> Ibid [89].

<sup>50</sup> *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (EAT).

<sup>51</sup> Ibid [62].

<sup>52</sup> *London Borough of Islington v Ladele and Liberty* [2009] IRLR 154 (EAT).

<sup>53</sup> Ibid [9].



The Appeal Tribunal rejected the claim that she suffered either direct or indirect discrimination or harassment. Ms Ladele was not entitled to 'pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation'.<sup>54</sup> The Tribunal relied on the distinction between belief and practice, and the limit to the right was found in the rights of others: 'it necessarily follows that the manifestation of the belief must give way when it involves discriminating on grounds which Parliament has provided to be unlawful'.<sup>55</sup>

Finally, in a case involving a Christian relationship counsellor, an Employment Tribunal upheld dismissal in the wake of a refusal to serve same-sex couples, finding this to be a 'proportionate means of achieving the legitimate aim' of providing non-discriminatory services.<sup>56</sup> Accommodation of the counsellor's request could result in clients facing 'potential rejection' at the claimant's hands, which would undermine the aim of the service as a whole.<sup>57</sup>

For the Christian Institute, a non-denominational Christian charity which has sponsored these actions, faith is being socially and legally marginalized; banished from the public sphere. In a clash of rights, religion is the loser, and this has a deleterious impact on citizenship participation. Responding to *Ladele*, a spokesman for the Institute explained:

I think it will be a concern to all Christians, because it does fail to understand that religious liberty is the liberty not just to believe certain things in your head but also to act in accordance with those beliefs. If this ruling is allowed to stand, it will endanger not just registrars but workers in other situations too. We are not saying that religious belief should trump everything, but where there is a reasonable religious belief it should be accommodated.<sup>58</sup>

The Institute's Director, Colin Hart, was even more direct in his forecast, warning that '[i]f this decision is allowed to stand it will help squeeze out Christians from the public sphere because of their religious beliefs on ethical issues'.<sup>59</sup>

Rights discourse, which has proven so receptive to claims to sexuality equality in the UK, seems (to them at least) to offer little to those of faith, despite the presence of s 13(1) of the Human Rights Act 1998. Developments at the European Union level only fuel the fears of marginalization, exclusion and criminalization. A draft EU Directive aims to implement the principle of

<sup>54</sup> Ibid [111].

<sup>55</sup> Ibid [127].

<sup>56</sup> *McFarlane v Relate Avon Ltd*, Employment Tribunals, 17 December 2008.

<sup>57</sup> Ibid [46].

<sup>58</sup> M Beckford, 'Religious workers fear they could be forced from jobs in wake of tribunal appeal' *Telegraph* (20 December 2008) <http://www.telegraph.co.uk/newsttopics/religion/3851503/Religious-workers-fear-they-could-be-forced-from-jobs-in-wake-of-tribunal-appeal.htm> accessed 24 March 2009.

<sup>59</sup> M Beckford, 'Christian registrar loses appeal with Islington council over civil partnerships' (19 December 2008) <http://www.christian.org.uk/pressreleases/2008/12december/19dec08.htm> accessed 24 March 2009.

equal treatment on the basis of religion or belief, disability, age or sexual orientation, and is designed to cover access to goods and services.<sup>60</sup> It also includes a harassment provision, 'defined as taking place when someone violates another person's dignity *and* creates an intimidating, hostile, degrading, humiliating or offensive environment for them'.<sup>61</sup> Although the proposal covers a range of grounds including religion and belief, for the Christian Institute, the overriding concern is that the inclusion of sexual orientation will impact directly upon Christians across the European Union.<sup>62</sup> In particular, the harassment provision allegedly will render any speech critical of a homosexual 'lifestyle' subject to legal sanction.<sup>63</sup>

As lesbian and gay legal equality becomes increasingly mainstreamed, competing claims grounded in freedom of religion will continue. In the next two sections of this article, I explore how these claims are balanced in other jurisdictions. In the next section, I turn to the United States, a jurisdiction with a unique history of constitutional rights discourse, in which religion and sexuality have proven to be a particularly combustible combination.

### 3. *Free Exercise and Forced Messages*

The struggle for lesbian and gay legal equality in the United States has been a long and arduous journey, with varying degrees of success at federal, state and local levels.<sup>64</sup> Courts have rejected 'heightened scrutiny' of Equal Protection claims by lesbians and gay men,<sup>65</sup> although the Supreme Court has accepted that 'targeted stigmatizing exclusions' of gays and lesbians are not constitutionally permissible.<sup>66</sup> No federal statute explicitly prohibits discrimination against lesbians and gay men. Thus, 'sexual orientation antidiscrimination norms depend on cities and states for their source of law and can be trumped by federal protection for religious freedom'.<sup>67</sup> A variety of successes can be found at state and local levels, as sexuality equality gradually has come to be accepted in law and society. At the same time, 'most of these laws have exceptions for religious institutions and religious "practices" or "exercises",

<sup>60</sup> Commission (EC), 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426, 2 July 2008. The European Parliament has passed a number of amendments 'which strengthened the package of proposals and stripped out the exemptions for "organisations based on religion and belief"' as well as qualifying other religious exemptions: J Wynne-Jones, 'EU law may force faith schools to take atheists' *Sunday Telegraph* (London 12 April 2009) News 8. The draft directive has yet to receive approval of the European Council.

<sup>61</sup> Commission (EC), 'EU Directive on goods and services' (winter 2008/09) <http://www.christian.org.uk/issues/2008/eudirective/briefwinter08.pdf> accessed 24 March 2009.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> See generally E Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (University of Chicago Press, Chicago 1999).

<sup>65</sup> M Minow, 'Should Religious Groups be Exempt from Civil Rights Laws?' (2007) 48 *Boston College L Rev* 781–849, 820.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* 821.

but the scope of the exceptions varies'.<sup>68</sup> Lower courts have upheld legislative exceptions within both gender and sexuality anti-discrimination laws on the basis of religion, and the US Supreme Court has 'acknowledged the propriety of legislative accommodations' which seek to balance rights.<sup>69</sup>

Courts are guided by several key cases when considering the apparent clash between religion and sexuality. In this jurisprudence, claims are made for a judicially created exceptional space on the basis of freedom of religion and conscience. The Supreme Court, however, rigorously adopted the belief-manifestation dichotomy in determining the breadth of the right to free exercise of religion (the 'Free Exercise Clause') in *Employment Division, Department of Human Resources of Oregon v Smith*.<sup>70</sup> The majority made clear that the Clause would be given a narrow interpretation, such that no 'individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate'.<sup>71</sup> Distinguishing earlier cases—most famously *Sherbert v Verner*<sup>72</sup> and *Wisconsin v Yoder*<sup>73</sup>—the Court was loathe to require reasonable accommodation on the part of the state with respect to otherwise valid law of general application, unless Free Exercise was raised in conjunction with other rights, such as freedom of speech or the press (a 'hybrid situation').<sup>74</sup> Free Exercise claims 'unconnected with any communicative activity or parental right' do not give rise to a valid claim of exceptionality, even if the law incidentally burdens religion.<sup>75</sup> Of course, if the law is, in fact, *designed* to restrict religious practices, then a heightened test of justification by a compelling interest which is narrowly tailored, will be applied.<sup>76</sup>

*Smith* has been subject to considerable criticism, both from within the judiciary and by those who support religious rights, because of its narrow approach to religious accommodation.<sup>77</sup> This controversy is not surprising in a nation state characterized *both* by the separation of church and state, as well as by the strength of religion in the public sphere. Blackmun J described the ruling in *Smith* as 'a wholesale overturning of settled law concerning the Religion Clauses of our Constitution'.<sup>78</sup> Thus, claims for exceptional space in

<sup>68</sup> Dent (n 13) 566.

<sup>69</sup> Ibid 560.

<sup>70</sup> 494 US 872 (1989).

<sup>71</sup> Ibid 878–9.

<sup>72</sup> 374 US 398 (1963).

<sup>73</sup> 406 US 205 (1972).

<sup>74</sup> *Smith* (n 70) 882.

<sup>75</sup> Ibid.

<sup>76</sup> *Church of the Lukumi Babalu Aye, Inc v City of Hialeah* 508 US 520 (1992).

<sup>77</sup> See eg Dent (n 13) 558.

<sup>78</sup> *Smith* (n 70) 908. Congress responded with the Religious Freedom Restoration Act (and a number of states took similar decisions). This law sought to restore the broader definition of free exercise; and 'more than half the states appear to have adopted some version of the Sherbert-Yoder test': D Laycock, 'Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes by Missing the Liberty' (2004) 118 Harv L Rev 155–246, 212.

relation to religious freedom from the constraints of anti-discrimination law face high hurdles:

The Supreme Court has never granted a religious organization a free exercise exemption from any law and has on occasion denied such an exemption. Lower courts have found a free exercise exemption for religious organizations from general antidiscrimination laws with respect to employees who perform priestly functions, but they have not exempted religiously affiliated social services organizations and schools from labor laws.<sup>79</sup>

Moreover, 'religious groups largely receive no exemptions from laws prohibiting race discrimination [and] some exemptions from laws forbidding gender discrimination',<sup>80</sup> although a claim by an employer that discrimination is allowed because of a 'bona fide occupational qualification' could be raised in narrow circumstances.<sup>81</sup> Finally, an employee claiming that a requirement to 'behave toward homosexuals or homosexuality in a way incompatible with her religion' violates her conscience, will likely find that accommodation amounts to undue hardship for the employer, and therefore it will not be judicially ordered.<sup>82</sup> Additional complications arise in the context of private employers receiving public funding—such as grants or vouchers—and 'it remains an open question whether federal law permits employers subsidized by the government to avoid statutory and constitutional restrictions on the use of religion in employment decisions'.<sup>83</sup>

In contrast, claims for exceptional spaces of discrimination in the face of sexuality equality laws have found some judicial favour when grounded in the First Amendment rights of free speech and association. This potentially could be useful to faith-based objectors in the future. The case law also underscores the power of free speech rights in US constitutional law, which can easily override competing claims. In *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,<sup>84</sup> at issue was the applicability of the Massachusetts public accommodation law, which prohibited 'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement'.<sup>85</sup> GLIB was a lesbian and gay group of Irish American ancestry who demanded the right to participate in the Boston St Patrick's Day Parade. They had been excluded by parade organizers because of the 'message' that

<sup>79</sup> Dent (n 13) 559.

<sup>80</sup> Minow (n 65) 782.

<sup>81</sup> *Corporation of the Presiding Bishops v Amos* 483 US 327 (1987).

<sup>82</sup> Dent (n 13) 564.

<sup>83</sup> Minow (n 65) 814. This situation is analogous to the debate surrounding adoption by same-sex couples and Catholic adoption agencies in the UK. I consider the question in CF Stychin, 'Faith in Rights: the Struggle Over Same-Sex Adoption in the United Kingdom' (2008) 17 *Constitutional Forum Constitutionnel* 7–15.

<sup>84</sup> 515 US 557 (1994). For a thorough analysis of the decision see CA Yalda, 'Walking the Straight and Narrow: Performative Sexuality and the First Amendment After Hurley' (1999) 8 *Social and Legal Studies* 25–45.

<sup>85</sup> *Hurley* (n 84) 561.

their inclusion would convey. State courts found in favour of GLIB, but the US Supreme Court disagreed. Souter J, for a unanimous Court, reasoned that petitioners had no intention of excluding:

homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.<sup>86</sup>

The Court characterized GLIB's claim as involving the public accommodation of the 'sponsors' speech itself',<sup>87</sup> which would violate the First Amendment right 'that a speaker has the autonomy to choose the content of his own message'.<sup>88</sup> Public accommodation gives way because the right in issue is collective, associational, and expressive. This becomes a clash of groups seeking to control the message of one of them. Of course, the Court easily could have described the parade in terms which would have led to the opposite result. The parade could have been interpreted, not as an organized act of speech in which each unit was chosen for its contribution to a harmonious message, but instead as a cacophony of diverse voices in which any members of the public could participate by right.<sup>89</sup> In that scenario, accommodation might well have been a compelling claim.

Sexuality equality rights, and the right of expressive association, again came in conflict in *Boy Scouts of America v Dale*.<sup>90</sup> The Supreme Court considered whether the application of New Jersey's public accommodation law violated the First Amendment right of the Boy Scouts of America. Dale was a scout leader and his membership was revoked solely because of his sexual orientation. Here again, the Court characterized the right in collective, expressive and associational terms, which demanded a constitutionally mandated exception from anti-discrimination law:

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. . . . But to come within its ambit, a group must engage in some form of expression, whether it be public or private.<sup>91</sup>

<sup>86</sup> Ibid 572-3.

<sup>87</sup> Ibid 573.

<sup>88</sup> Ibid.

<sup>89</sup> I explore this point in detail in CF Stychin, 'Celebration and Consolidation: National Rituals and the Legal Construction of American Identities' (1998) 18 OJLS 265-91.

<sup>90</sup> 530 US 640 (1999).

<sup>91</sup> Ibid 648.

According to Rehnquist CJ, this limit to public accommodation was directly applicable on the facts: 'Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behaviour'.<sup>92</sup> This would undermine the Scouts' assertion that same-sex sexual conduct runs counter to the 'Scout Oath and Law'. Once a group is found that 'speaks' a coherent message, then it cannot be forced to accommodate an unwanted person who would distort it (even if that message is contrary to the principle of equality).<sup>93</sup> For religious rights advocates, this reasoning is useful, since it characterizes rights, not in individualistic terms, but collectively. It could provide the means of avoiding the narrowness of *Smith*.<sup>94</sup>

However, the Supreme Court has placed limits on the compelled speech doctrine, and that perimeter was reached in a claim made on behalf of a group of law schools and professors in *Rumsfeld v Forum for Academic and Institutional Rights (FAIR)*.<sup>95</sup> They claimed that the federal Solomon Amendment forced them to speak a message that ran against their beliefs. The Amendment provides that 'if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution will lose federal funds'.<sup>96</sup> It had been enacted in response to the refusal of some universities to allow the military to recruit on campuses because of its policy of excluding homosexuals. Roberts CJ reasoned that 'accommodating the military's message does not affect the law school's speech, because the schools are not speaking when they host interviews and recruiting receptions'.<sup>97</sup> Law schools are not forced to accept members they do not desire, and the Amendment seeks to affect *conduct* rather than *speech*.<sup>98</sup> Thus, the reasoning in *Hurley* and *Dale* was inapposite.

But the clash between religious freedom, speech and equality came together most vividly in the California Supreme Court case of *North Coast Women's Care Medical Group v Superior Court of San Diego County; Guadalupe T Benitez, Real Party in Interest*.<sup>99</sup> A claim for exemption was made by a medical clinic's physicians from compliance with California's prohibition against discrimination based on sexual orientation. The facts turned on a lesbian woman's request for intrauterine insemination treatment. The Court applied the *Smith* test, holding that the objectors had 'no federal constitutional right to an exemption from

<sup>92</sup> Ibid 653.

<sup>93</sup> Ibid 654.

<sup>94</sup> In dissent, Stevens J queried whether the Boy Scouts had a sufficiently clear message regarding sexual orientation in the first place and found 'no shared goal of disapproving of homosexuality': *ibid* 684. In light of this finding, the right to associate was not infringed since the application of the public accommodation law would not impose a serious burden. Dale's inclusion 'sends no cognizable message to the Scouts or to the world', unlike the facts in *Hurley*: *ibid* 694.

<sup>95</sup> 547 US 47 (2006).

<sup>96</sup> Ibid 51.

<sup>97</sup> Ibid 64.

<sup>98</sup> Ibid 60.

<sup>99</sup> 44 Cal 4th 1145 (2008).

a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs'.<sup>100</sup> With respect to the California Constitution, Kennard J held that—for the sake of argument—even under the standard of strict scrutiny, the claim would fail, as the compelling state interest in 'ensuring full and equal access to medical treatment irrespective of sexual orientation' could only be furthered through this means.<sup>101</sup> He also rejected the 'hybrid claim' of free speech plus free exercise of religion.<sup>102</sup> In so doing, the Court narrowed the potential for ever expanding exceptional space: '[f]or purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose'.<sup>103</sup> It thus refused to accept that a requirement to obey anti-discrimination law to which one has a conscientious objection *constitutively* raised a speech claim, as legal obedience in itself does not force one to articulate a message. The logic behind this argument is compelling, but no doubt disappointing to potential conscientious objectors.<sup>104</sup>

What the case law suggests, above all else, is the deep divergence in world views around sexuality that characterizes the American polity. For example, it remains academically acceptable to articulate an anti-equality viewpoint in an American law review in inflammatory and derogatory terms:

Disapproval of homosexuality is not irrational bigotry. Most adults are instinctively sexually attracted to members of the other sex and not to members of their own sex. Because of reproduction, there are compelling evolutionary reasons for this attitude. Some heterosexual acts are also non-reproductive, but few heterosexuals completely eschew heterosexual intercourse, as homosexuals do. Most people are repelled by homosexuality. Given its propensity to transmit disease, this revulsion, too, makes biological sense. This makes it unlikely that distaste for homosexuality will soon vanish. Laws promoting acceptance of homosexuality are also less needed than laws promoting racial harmony. Discrimination against gays is not uncommon, but it is hardly pervasive, it varies by location and industry and is rare in many places and fields where gays live and work. . . . [E]ven if sexual preference cannot be altered, public behaviour can be; people can be encouraged to keep their sex lives private.<sup>105</sup>

While the unexplored assumptions which underpin this (admittedly extreme) passage are too numerous to explore and rebut here, it does provide a useful

<sup>100</sup> Ibid 1155.

<sup>101</sup> Ibid 1158.

<sup>102</sup> Ibid 1156.

<sup>103</sup> Ibid 1157.

<sup>104</sup> In a concurring judgment, Baxter J pondered in *obiter dictum* whether the result might be different in the case of a sole medical practitioner. In that scenario, the balancing of interests might lead to a different outcome: *ibid* 1159. It is clear that the judiciary's approach to exceptionality depends upon the anti-discrimination ground. For example, religious organizations cannot legally discriminate on the basis of race, which reflects the fundamental character of the governmental interest in eradicating racial discrimination, and the unacceptability of exceptions: *Bob Jones University v United States* 461 US 574 (1982).

<sup>105</sup> Dent (n 13) 631–2 [emphasis added].

summary of a world view which continues to be held by many in the United States, most usually for reasons grounded in religious faith. It promotes the public–private dichotomy as a regulatory device for lesbians and gay men, while rejecting it for the religious. For those who subscribe to this set of beliefs, developments in anti-discrimination law will be resisted, and a range of legal claims no doubt will continue to appear.

A more reasoned justification for religious exceptions from the principle of equality has been succinctly described by Martha Minow:

Exemptions of some sort can be justified out of respect for the liberty of conscience at the core of the free exercise clause, acknowledgment of the contributions religious organizations have brought to individuals and society over time, and prudential avoidance of direct confrontation between the government and influential religious groups over controversial issues.<sup>106</sup>

The central question though remains: ‘how can a pluralistic society commit to both equality and tolerance of religious differences?’<sup>107</sup> The American experience suggests that there is no simple answer, and a balancing of rights implicitly underpins the application of constitutional doctrine. Although the focus on expression and association may appear to have the benefit of certainty, the arbitrariness of the speech-conduct distinction undermines that apparent advantage.

#### *4. Accommodating Pluralism*

Although Canadian political culture diverges significantly from that of the United States, particularly around the combination of sexuality and religion, claims for accommodation have also played an important role. The Canadian jurisprudence demonstrates a more ‘expansive and robust’ approach to religious freedom, in that religious pluralism is explicitly a good to be promoted by the state,<sup>108</sup> and ‘symbolizes Canadian constitutionalism’s commitment to multiculturalism and the protection of plural cultural forms’.<sup>109</sup> Freedom of conscience and belief was explicitly included in the enumerated Charter rights (s 2(a)), and religion has played a significant role in rights discourse throughout Canadian history, long before the Charter’s enactment.<sup>110</sup> Unlike the USA, ‘[t]he Canadian courts have held that section 2(a) of the Charter can be violated by the indirect effects of facially neutral laws’.<sup>111</sup>

<sup>106</sup> Minow (n 65) 782.

<sup>107</sup> *Ibid* 783.

<sup>108</sup> B Ryder, ‘State Neutrality and Freedom of Conscience and Religion’ (2005) 29 S Ct L Rev (2d) 169–99, 173. See also, M Sinclair, ‘Freedom of Religion in Canada and France: Implications for Citizenship and Judgment’ (2006) 15 Dalhousie JLS 39–68.

<sup>109</sup> Berger (n 8) 279.

<sup>110</sup> Fielding (n 9) 33–4.

<sup>111</sup> Ryder (n 108) 173.



But rights claims around sexuality have fared particularly well in the Charter years, despite the fact that sexual orientation was not included as an explicit basis for protection under the equality rights guarantees.<sup>112</sup> Having been ‘read into’ s 15 of the Charter by the Supreme Court of Canada, sexuality equality has come to be one of the success stories of Charter politics, most famously demonstrated by the acceptance of the right to same-sex marriage by the Canadian government.<sup>113</sup> However, it would be a misunderstanding to construct Canadian constitutional politics as a linear tale of progress for lesbian and gay rights campaigners, in which the ‘irrationality’ of faith-based opponents has been swept aside. Freedom of religion continues to play a significant role in Charter jurisprudence: ‘respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy’.<sup>114</sup> Recent years have demonstrated the contentiousness of balancing religious rights against sexuality equality claims.

Two Supreme Court of Canada cases have explicitly addressed the apparent clash of rights within the context of administrative law. In *Trinity Western University v College of Teachers*,<sup>115</sup> the Court considered a decision by the British Columbia College of Teachers (BCCT) to refuse an application by Trinity Western University (TWU) to assume complete responsibility for a teacher training program, as a consequence of which, students would no longer be required to undertake a final year at Simon Fraser University prior to accreditation. TWU’s aim was to ensure ‘the full program reflect the Christian world view of TWU’.<sup>116</sup> The rejection of the application by BCCT was based upon the ‘Community Standards’ document that TWU students were required to sign as a condition for admission, which—amongst many other prohibitions—obliged members of the TWU community to refrain from same-sex sexual acts.<sup>117</sup> BCCT argued that their power to regulate in the public interest required them to consider discriminatory practices on the part of applicants, a point on which the Supreme Court agreed.<sup>118</sup> However, the majority disagreed with BCCT’s conclusion that the admissions policy was exclusionary, and that future teachers would be insufficiently prepared ‘for the diversity of public school students’.<sup>119</sup> Iacobucci and Bastarache JJ, for the majority, reasoned that the admissions policy alone did not evidence s 15 Charter discrimination, and to conclude otherwise would unbalance the competing rights at issue: ‘to state that the voluntary adoption of a code of conduct based

<sup>112</sup> See KA Lahey, *Are We Persons Yet: Law and Sexuality in Canada* (University of Toronto Press, Toronto 1999).

<sup>113</sup> Smith (n 5). The Supreme Court of Canada upheld the validity of same-sex marriage: *Reference re Same-Sex Marriage* [2004] 3 SCR 698 [finding no effect from the civil marriage legislation on religious marriage].

<sup>114</sup> *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [1].

<sup>115</sup> [2001] 1 SCR 772.

<sup>116</sup> *Ibid* [2].

<sup>117</sup> *Ibid* [3].

<sup>118</sup> *Ibid* [14].

<sup>119</sup> *Ibid* [11].

on a person's own religious beliefs, in a private institution, is sufficient to engage s 15 would be inconsistent with freedom of conscience and religion which co-exist with the right to equality'.<sup>120</sup> The rights were not in conflict because no concrete evidence had been presented that TWU graduates would be impaired in their role as school teachers.<sup>121</sup> According to the majority, this was a case about *belief* rather than *conduct*, and 'the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected'.<sup>122</sup>

But the manipulability of the belief–conduct dichotomy was underlined in the dissenting judgment of L'Heureux-Dubé J. After finding that a high level of deference should be given to BCCT, she reasoned that its decision fell well within the bounds of reasonableness.<sup>123</sup> Although TWU as a religious institution may have been exempt from the British Columbia Human Rights Code in this respect, nevertheless this was not simply a matter of private belief, but a *manifestation* that warranted the concern of BCCT:

Signing the Community Standards contract... makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. With respect, I do not see why my colleagues classify this signature as part of the freedom of belief as opposed to the narrower freedom to act on those beliefs... [I]t is not patently unreasonable for the BCCT to treat their public expressions of discrimination as potentially affecting the public school communities in which TWU graduates wish to teach.<sup>124</sup>

L'Heureux-Dubé J highlighted the importance of supportive classroom environments for lesbian and gay students, drawing on a wealth of social science evidence.<sup>125</sup> In the context of a history of discrimination, BCCT's decision was 'a reasonable proactive measure'.<sup>126</sup> While she accepted that her decision would impact upon the freedom of expression of TWU students—by requiring them to undertake a year of their training at another, secular institution—the violation was saved under s 1 of the Charter: 'once graduates ask to be accredited for public school teaching, the public interest comes to the fore and reasonable secular requirements can be imposed without infringing the freedom of religion'.<sup>127</sup>

A contrasting judgment of the Supreme Court of Canada is *Chamberlain v Surrey School District No 36*.<sup>128</sup> This case turned on the Surrey School Board's decision to refuse to authorize three books for primary school classrooms because they presented same-sex parented families (amongst a range of

<sup>120</sup> Ibid [25].

<sup>121</sup> Ibid [32].

<sup>122</sup> Ibid [36].

<sup>123</sup> Ibid [83].

<sup>124</sup> Ibid [72].

<sup>125</sup> Ibid [82].

<sup>126</sup> Ibid [86].

<sup>127</sup> Ibid [106].

<sup>128</sup> [2002] 4 SCR 710.

family forms). Writing for a majority, McLachlin CJ held that the School Board failed to conform to the secular requirements of the School Act, which rendered the decision unreasonable.<sup>129</sup> The Chief Justice explored what a requirement of secularism entailed in this context, and she explicitly engaged in a balancing of rights:

Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community.<sup>130</sup>

Instead of following this approach, the Board had permitted itself to act as 'the proxy of a particular religious view',<sup>131</sup> which failed to respect the value of diversity, and 'gave no consideration to the needs of children of same-sex parented families'.<sup>132</sup> Moreover, the Board failed to consider the objective of making all children fully aware of the diversity of family forms in society.<sup>133</sup>

In contrast, in a wide ranging dissent, Gonthier J (writing for himself and Bastarache J), balanced the rights in a radically different fashion. For him, this was an issue of responsiveness to parental concern about the 'age appropriateness' of classroom material,<sup>134</sup> and the Board was 'acting as an elected, representative body'.<sup>135</sup> As well, *conduct* (as opposed to *identity*) was of relevance, not only to faith, but *also* to same-sex sexuality:

[P]ersons who believe that homosexual behaviour, manifest in the conduct of persons involved in same-sex relationships, is immoral or not morally equivalent to heterosexual behaviour, for religious or non-religious reasons, are entitled to hold and express that view. On the other hand, persons who believe that homosexual behaviour is morally equivalent to heterosexual behaviour are also entitled to hold and express that view. Both groups, however, are not entitled to act in a discriminatory manner. . . . *Adults in Canadian society who think that homosexual behaviour is immoral can still be staunchly committed to non-discrimination.*<sup>136</sup>

It is this characterization of a separation of identity from act—the sinner from the sin—which distinguishes Gonthier J in *Chamberlain* from L'Heureux-Dubé J in *Trinity Western University*. His reasoning mirrors that of some conservative Christians, who claim to be increasingly marginalized in the private sphere by

<sup>129</sup> Ibid [3].

<sup>130</sup> Ibid [19].

<sup>131</sup> Ibid [27].

<sup>132</sup> Ibid [60].

<sup>133</sup> Ibid [61].

<sup>134</sup> Ibid [117].

<sup>135</sup> Ibid [118].

<sup>136</sup> Ibid [126-127] [emphasis added].

the 'political correctness' of liberal elites.<sup>137</sup> However, Gonthier J's rhetoric may prove too much, as it is unclear how the presentation of same-sex parented families as *existing* in Canadian society is inextricably linked to sexual acts, unless the simple fact of existence gives rise to an assumption of sexual activity. If so, then all representations of lesbians and gay men become necessarily sexual. But then it is logically the case that belief in the immorality of same-sex sexual acts *is* a form of discrimination on the basis of sexual orientation, as L'Heureux-Dubé J contends in *Trinity Western University*, since the dichotomy collapses.

Nevertheless, for Gonthier J, the accommodation that was struck by the Surrey School Board adequately and appropriately balanced the rights. The case also provided Gonthier J with the opportunity to embark upon a consideration of the meaning of diversity, pluralism and tolerance, and his conclusions contrast sharply to those of the Chief Justice. For Gonthier J, the reasonable accommodation of views 'must reflect a two-way street in the context of conflicting beliefs'.<sup>138</sup> It demands that religion, like sexuality, be allowed space within the public sphere, and Gonthier J does recognize how the public-private distinction has a regulatory function, no matter which group is potentially relegated to the closet:

It is often suggested . . . that religious belief and practice, and public policy decisions based on such views, ought to effectively be privatized, retreated into the religious 'closets' of home or church . . . perhaps so too should the development of beliefs as to what is or is not appropriate sexual conduct be undertaken in the private sphere, since it is clear that the nature of both kinds of belief, although constitutionally protected, are publicly contested. In my view, however, it is preferable that no constitutionally protected right be forced exclusively into the private sphere. . . . An acceptable resolution is accommodation or balancing.<sup>139</sup>

Of course, the decision of the Surrey School Board *did* relegate same-sex parented families to the private sphere, in that it made them invisible in the classroom. Consequently, it is difficult to comprehend how Gonthier J's reasons lead to access to all, instead of a hijacking of the public sphere, as McLachlin CJ contends. Nevertheless, I want to hang on to the usefulness of the idea(I) of a public sphere in which competing views can be represented, for consideration in the next section of this article.

### 5. *Towards an Inclusive Public Sphere*

The contrasting judgments in *Chamberlain* highlight divergent ways in which the clash between sexuality and faith can be understood. The Chief Justice's

<sup>137</sup> See Stychin (n 83).

<sup>138</sup> *Chamberlain* (n 128) [134].

<sup>139</sup> *Ibid* [135].

resort to the values of liberalism, tolerance, and the inherent good of being exposed to a range of lifestyles, will appeal to many liberals. Indeed, it is the language that lesbian and gay rights campaigners have themselves frequently deployed. Furthermore, the banning of books in the classroom strikes at the heart of liberalism. Nevertheless, Gonthier J's dissent points us towards key issues that reappear throughout this article. In order to make sense of faith, liberalism has interpreted it through its own frame of reference, and it does this through the fundamental distinctions between belief and conduct; private and public: 'law's rendering of religion strongly aligns it with the private and, given legal liberalism's commitment to the public/private divide, this association creates identifiable tensions for law's treatment of public expressions of religious commitment'.<sup>140</sup>

For lesbians and gays, these distinctions are not novel—they are precisely the same ones that have been (and, I would argue, continue to be) deployed to regulate sexual identities. Queer theory and politics have powerfully demonstrated the bankruptcy of these analytical categories<sup>141</sup> and, for those of faith, they are no less impoverished. So too, critical scholars of law have long understood that liberal neutrality can never be truly liberal, nor genuinely neutral.<sup>142</sup> Queer legal theorists have reiterated that liberal law is illusory.<sup>143</sup> Therefore, 'we' should not be surprised when faith-based communities now make the same argument about liberalism, namely that, rather than being neutral, it is a world view that ultimately imposes itself.<sup>144</sup> Reason and rights are the lenses through which all competing views are judged, which must only speak in the public sphere when they abide by the terms of liberalism.<sup>145</sup>

My question is whether a richer form of liberalism could provide better answers.<sup>146</sup> In particular, could we aspire to a vision that recognizes that deeply held world views may not be reconcilable but nevertheless could be accommodated? To the extent that we reject the closeting of the private sphere, can there be some basis on which meaningful accommodation in the public sphere can proceed? I have argued in this article that, for those of faith, one of the fears is marginalization and ghettoization. For lesbians and gays, the fear is that hard fought rights victories could be eviscerated by the creation of an ever expanding exceptional space of discrimination. The newly emergent

<sup>140</sup> Berger (n 8) 305–6.

<sup>141</sup> See eg JE Halley, 'The Construction of Heterosexuality' in M Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press, Minneapolis 1993) 82.

<sup>142</sup> See eg C Gearty, 'Sex and the Secular Liberal' *The Tablet* (London 10 February 2007) 8.

<sup>143</sup> See eg W Morgan, 'Queering International Human Rights Law' in C Stychin and D Herman (eds), *Sexuality in the Legal Arena* (Athlone, London 2000) 208.

<sup>144</sup> Rivers (n 11) 51–2.

<sup>145</sup> *Ibid.*

<sup>146</sup> On the different forms of liberalism, see Fielding (n 9) 31.

'sexual citizen' thus could find her rights are very hollow.<sup>147</sup> How can this zero sum game be resolved?

While those of faith—and their proponents such as Gonthier J—resort to the language of balancing and accommodation, there is rarely any consideration of *how* this balancing would actually be undertaken in hard cases.<sup>148</sup> Some advocates of gay rights find the balance to be remarkably easy; the closeting of discriminatory views in the private sphere, particularly when they are held by servants of the state: '[r]eligious individuals are perfectly free and welcome to participate in public decision making, on the condition that they leave their religious arguments at home'.<sup>149</sup> This approach is consistent with the narrowed scope of the Free Exercise Clause under *Smith*. But such an interpretation corrodes any idea of genuine pluralism, and ignores the fact that liberal rights were intended to be founded on a vision which recognizes 'that religious belief has special value and deserves special protection'.<sup>150</sup> In contrast, the claim of religious rights advocates that they should be entitled to a *general* exception—as the only alternative to the ghetto—in order to manifest their deeply held beliefs,<sup>151</sup> could create a patchwork of rights protection, and undermine the equality rights of sexual citizens. After all, exceptions can become the rule.

I want to argue, in the alternative, that balancing and accommodation demands some form of contextual analysis, which engages with the competing interests on the particular facts. Compromises will be inevitable in this exercise, and the analysis is perhaps best characterized in terms of the values of mediation rather than litigation.<sup>152</sup> Central will be the goal of civility and the hope that areas of common ground might be found. It also requires a recognition that rights discourse can rely on 'solidarity and shared values', as opposed to the pursuit of victory at all (social) cost.<sup>153</sup> For example, in *Ladele*, lesbian and gay rights campaigners may need to accept that Ms Ladele's views are deeply and genuinely held and deserve tolerance, and that Islington Council should try to accommodate her. It should be reluctant to demand that she act against her conscience even though she is employed by the state, because her departure from the public sphere would be a loss. Of course, this result will depend upon whether accommodation of Ms Ladele *in fact* is possible,

<sup>147</sup> On sexual citizenship, see eg D Bell and J Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity, Cambridge 2000).

<sup>148</sup> It will certainly 'require very careful interrogation of the competing claims': N Bamforth, 'Same-sex Partnerships: Some Comparative Constitutional Lessons' [2007] EHRLR 47–65, 65. Fielding insightfully describes what is required as 'a contextual, fact-specific analysis': (n 9) 50. I am indebted to his framing of the question in this way.

<sup>149</sup> Wintemute (n 34) 140.

<sup>150</sup> J Webber, 'Understanding the Religion in Freedom of Religion' in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP, Cambridge 2008) 26, 26.

<sup>151</sup> Rivers (n 11) 52.

<sup>152</sup> See Fielding (n 9) 30; M Malik, *From Conflict to Cohesion: Competing Interests in Equality Law and Policy* (Equality and Diversity Forum, London 2009) 43.

<sup>153</sup> Nash (n 1) 337.

or whether it would undermine the rights of lesbians and gays in Islington. Only a factual analysis can answer that question.

In contrast, contextual balancing of interests might lead to different results in the case of a small business proprietor who objects to being required to serve lesbian and gay clients when the transaction is not in any obvious way 'sexualized'. A useful example can be found in the Canadian case of *Ontario Human Rights Commission v Brockie*.<sup>154</sup> Mr Brockie owned a small printing business. He also held:

a sincere religious belief... that homosexual conduct is sinful and, in the furtherance of that belief, he must not assist in the dissemination of information intended to spread the acceptance of a gay or lesbian ('homosexual') lifestyle. Mr Brockie draws a distinction between acting for customers who are homosexual and acting in furtherance of a homosexual lifestyle.<sup>155</sup>

Thus, the *being* and *doing* of homosexuality are immediately implicated. The complainant was a director of the Canadian Lesbian and Gay Archives, who sought Mr Brockie's commercial printing services for some letterhead, envelopes and business cards. Mr Brockie refused to contract with the Archives because of his conscientious objection to furthering the homosexual lifestyle.<sup>156</sup> The Board of Inquiry held that it was reasonable to limit freedom of religion and conscience, which 'does not extend to the practice of religious beliefs in the public marketplace in Ontario', in which sexual orientation is a prohibited ground of discrimination.<sup>157</sup> Legislation embodies the 'community standards' which all are required to respect.<sup>158</sup> On appeal, Mr Brockie argued that his dignity would be demeaned were he 'conscripted to support a cause with which he disagrees because of an honestly held and sincere religious belief'.<sup>159</sup>

The High Court upheld the Board ruling but its reasoning is particularly useful for its contextual analysis. The Court appreciated the need for a balancing of the conflicting Charter values of freedom of religion against 'the historical and continuing prejudice against homosexuals resulting in social prejudice and economic disadvantage'.<sup>160</sup> But the Court went further and considered exactly *how* that balancing would be performed. It reasoned that, on these facts, commercial services offered to the public are at the periphery of freedom of religion.<sup>161</sup> The ability to obtain services on a non-discriminatory basis in the public sphere, however, is significant and far more central to the

<sup>154</sup> *Ontario Human Rights Commission v Brockie* (2002) 222 DLR (4th) 174 (HC).

<sup>155</sup> *Ibid* [3].

<sup>156</sup> *Ibid* [15].

<sup>157</sup> *Ibid* [16].

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid* [19].

<sup>160</sup> *Ibid* [46].

<sup>161</sup> *Ibid* [54].

competing interest.<sup>162</sup> The limitation on the right to freedom of religion—and the Court recognized that a right *was* infringed—was justifiable.

The Court held, in *obiter dictum*, that there would be cases in which the balancing process would lead to the opposite outcome, and it imaginatively considered the hypothetical situation in which a request for printing services could impair the core of freedom of religion:

If any particular printing project... contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr Brockie's religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in *direct conflict with the core elements* of Mr Brockie's religious beliefs.<sup>163</sup>

The fact situation in *Brockie* provides a useful illustration of the potential for balancing, because of the way in which commercial printing can impart an expressive message and thereby indirectly implicate expressive rights (which is of such central concern in the American jurisprudence). What it suggests is that there are no answers in the abstract, and courts will need to engage sensitively with the interests at stake. But balancing also ensures that compromises will be inevitable, and rights advocates on all sides may be disappointed by outcomes.

For example, advocates of freedom of religion are critical of *Brockie*, reasoning that Mr Brockie's conscientious objection was comprehensive, such that *any* 'cooperation' with the 'entire project' of the Archives was deeply offensive to him.<sup>164</sup> Thus, his freedom was constrained, potentially limiting his ability to enter the public sphere. In contrast, many lesbian and gay rights advocates would be highly critical of a sympathetic hearing of Ms Ladele's claim. Given her role as government employee—and given the legal duty that local government finds itself under to ensure the availability of civil partnerships—to require reasonable accommodation of her religious beliefs will seem to them to be of dubious merit.

In fact, an analogous issue has been considered at length by academic commentators in Canada, concerning whether 'marriage commissioners' should be able to exercise a conscientious exemption to the performing of same-sex marriages.<sup>165</sup> Some advocates of lesbian and gay rights are highly sceptical of this claim, expressing concern that it could lead to lesbian and gay rights being undermined to such an extent that they become 'citizen pariahs'.<sup>166</sup> However, advocates of religious freedom argue that the reasonable accommodation of

<sup>162</sup> Ibid [55].

<sup>163</sup> Ibid [56] [emphasis added].

<sup>164</sup> IT Benson, 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities' (2007) 21 Emory Intl L Rev 111–65, 149.

<sup>165</sup> See McDougall (n 34); Trotter (n 32).

<sup>166</sup> McDougall (n 34) 357.



employees would be entirely eviscerated if commissioners are forced to perform same-sex marriages, leading to their exclusion in practice from the public sphere in a religious ghetto, unable to participate in civic life.<sup>167</sup> If reasonable accommodation is to mean anything, it requires consideration of whether it is *practicable*.<sup>168</sup> The fact that an individual is employed by the state does not mean that she has foregone the right to act on beliefs and to have a conscience.<sup>169</sup> While same-sex couples may have gained the right to marry in Canada, they have not gained the right to insist on being married by a particular marriage commissioner, nor have they gained the right to insist that all marriage commissioners forego the exercise of their religious objections to same-sex marriage *in practice*.<sup>170</sup>

My analysis would suggest here again that a nuanced analysis is in order, and this would focus upon the sincerity of subjective belief; a consideration of whether the right in issue is core to the system of beliefs (secular or religious); the degree of difficulty involved in accommodation by the employer; whether accommodation would significantly impair the exercise of the competing right; and the material consequences of any impairment. This might require a decision maker to reflect on, for example, whether a minimal delay in getting a scheduled date for a marriage ceremony is a significant burden on a same-sex couple. In contrast, a delay in being able to obtain a medical procedure because of the conscientious objection of doctors and nurses is a far more serious concern that might weigh heavily against the right of conscientious objectors, as it did in *North Coast Women's Care*.

Furthermore, a court might consider whether the legislature *already* has engaged in a balancing exercise in the accommodation of rights, which might lead to judicial deference. In the case of the Goods and Services Regulations, exemptions have been created.<sup>171</sup> As well, the Civil Partnership Act can be understood as the outcome of a balancing of rights, in that the institution of marriage remains the sole preserve of opposite-sex couples and civil partnership lacks any legal requirement of consummation.<sup>172</sup> In that context, a court might find conscientious objection to same-sex marriage to be too remote from this new, secular (and potentially non-sexual) legal status so as to warrant legal recognition.

While some argue that the analysis in *Brockie* is unprincipled, I would argue that it is both intuitively appealing and justifiable.<sup>173</sup> Engaging with context, and accommodating what otherwise would appear to be irreconcilable

<sup>167</sup> Trotter (n 32) 367.

<sup>168</sup> Ryder (n 108) 191.

<sup>169</sup> Trotter (n 32) 385.

<sup>170</sup> Benson (n 164) 158.

<sup>171</sup> See generally, Sandberg and Doe (n 3).

<sup>172</sup> See generally, N Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugality?' (2006) 14 *Feminist L S* 241–59.

<sup>173</sup> The decision was cited with approval in *Re Christian Institute* (n 45) [115]–[117]. As Martha Minow argues, 'the effort to balance competing principles itself should not be viewed as a departure from

world views, will not necessarily satisfy anyone, and it may appear to be the triumph of pragmatism over principle. It also may be ill suited to an adversarial rights forum.<sup>174</sup> But it seems well suited to the social reality of pluralism around religion and sexuality today.<sup>175</sup> There are good reasons to eschew the privatization of religion, both because it is recognized as of value in a pluralistic society,<sup>176</sup> and also pragmatically to avoid ghettoization.<sup>177</sup> Real pluralism is about the reality of the irreconcilable existing side by side, civilly, in the public sphere, and of finding ways of living together.<sup>178</sup> But what this also demands is recognition that religion represents, not simply the exercise of a choice, but an identity and even an alternative to reason, which may not be comprehensible in liberal terms.<sup>179</sup> In that context, we are left with tolerance as a basis for moving forward.<sup>180</sup>

In this regard, Jennifer Nedelsky argues, drawing on Hannah Arendt's idea of the 'enlarged mentality', that we can approach public policy issues through 'our imaginative capacity to put ourselves in the position of another'.<sup>181</sup> I find her analysis useful as a means by which rights advocates can be persuaded of the need for compromise. Nedelsky argues that religion can provide an 'important countervailing norm' to the rational, self-interested subject of rights,<sup>182</sup> and she notes that Arendt posited that 'reflective judgment' demands 'taking others' perspectives into account in order not to be limited by one's own interests and idiosyncracies'.<sup>183</sup> Of particular value is Nedelsky's observation that those who claim conscientious objection do so from a perspective that embodies 'a sense of loss and anger' at the marginalization of their world view in the face of 'deep social transformation'.<sup>184</sup> She argues that the enlarged mentality requires 'taking loss seriously',<sup>185</sup> although she recognizes that, in the conflict over same-sex marriage, 'it is not clear to me what exactly one should

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principle': M Minow, 'Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod' (2008) 40 Connecticut L Rev 1287-313, 1300.

<sup>174</sup> Fielding (n 9) 30.

<sup>175</sup> See generally, M Davies, 'Pluralism in Law and Religion' in Cane, Evans and Robinson (n 150) 72.

<sup>176</sup> Webber (n 150) 26.

<sup>177</sup> Davies (n 175) 76; Fielding (n 9) 31.

<sup>178</sup> See Koppelman (n 28) 142: 'It is possible for gay people and conservative Christians to live together, each following their own deepest allegiances'.

<sup>179</sup> Fielding (n 9) 45.

<sup>180</sup> See Y Nehushtan, 'Secular and Religious Conscientious Exemptions: Between Tolerance and Equality' in Cane, Evans and Robinson, (n 150) 243, 248. But see also, Bradney (n 6) 40, wherein accommodation is distinguished from tolerance.

<sup>181</sup> J Nedelsky, 'Legislative Judgment and the Enlarged Mentality: Taking Religious-Perspectives' in R W Bauman and T Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP, Cambridge 2006) 93, 98. See generally, H Arendt, *Lectures on Kant's Political Philosophy* (University of Chicago Press, Chicago 1982).

<sup>182</sup> Ibid 101.

<sup>183</sup> Ibid 105.

<sup>184</sup> Ibid 106-107.

<sup>185</sup> Ibid 108.

do with such understanding'.<sup>186</sup> What I think it requires is some level of mutual respect, tolerance for viewpoints that are incomprehensible to oneself, and a recognition that the public-private dichotomy of the closet is damaging to all humanity.

But Nedelsky also favours seeking out common ground from what may, on the surface, seem to be incommensurable world views, and she shares this aim with Martha Minow.<sup>187</sup> This seems a tall order when dealing, for example, with conservative Christianity and lesbian and gay activism. As Judith Butler notes, on first glance, 'it would appear that there are no points of cultural contact between sexual progressives and religious minorities that are not encounters of violence and exclusion'.<sup>188</sup> Nevertheless, both Nedelsky and Minow argue that it is the normatively preferred position. On reflection, it strikes me that the task may not always be as difficult as it initially seems. For example, opponents of same-sex marriage often deploy similar arguments to those articulated by queer and feminist theorists in terms of the deprivileging of the sexualized couple in favour of the legal recognition and social valuing of a range of different relationships of care.<sup>189</sup> While I fully appreciate the radical differences between the two positions, they also display a remarkable similarity. Martha Minow points out that this can play itself out in policy formation, but only by bracketing the marriage issue completely and emphasizing common ground.<sup>190</sup> The analysis can be taken further, focusing on critical perspectives on neoliberalism and the importance of the social dimension of care in a capitalist society.<sup>191</sup> Here too, there might be important points of commonality between at least some of faith and some queer activists. Finally, as I have argued in this article, both positions share a rejection of the public-private dichotomy, which serves to marginalize, silence and closet, hollowing out rights by separating belief from manifestation.

But there must also be conditions attached to entry into the public sphere, which ultimately are grounded in the principles of liberalism. In particular, ethical rules of engagement will need to be accepted as a condition of entry:

openness to the Other, reciprocity, mutual respect, the ability to listen, good faith, the ability to reach compromises, and a willingness to rely on discussion to resolve stalemates. The institution of a culture of compromise largely centres on all of these factors that foster the coordination of action and the peaceful, concerted resolution of disputes.<sup>192</sup>

<sup>186</sup> Ibid 107.

<sup>187</sup> Minow (n 65) and (n 173).

<sup>188</sup> Butler (n 35) 6.

<sup>189</sup> CF Stychin, 'Family Friendly? Rights, Responsibilities and Relationship Recognition' in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish, Abingdon 2006) 21.

<sup>190</sup> Minow (n 173) 1300–3.

<sup>191</sup> J Conaghan and E Grabham, 'Sexuality and the Citizen Carer: The "Good Gay" and the Third Way' (2007) 58 NILQ 325–42.

<sup>192</sup> G Bouchard and C Taylor, *Building the Future: A Time for Reconciliation Abridged Report* (Government of Quebec, Quebec 2008) 55. For an example of a Canadian case dealing with the clash between sexuality and

I would argue that rights politics in the UK is well disposed to such a model of rights based on 'democratic dialogue and compromise', in which pragmatic solutions will be preferred to ideological stalemates.<sup>193</sup> This is pluralism at the coalface, in which purity is foregone, solutions may not be pleasing to participants, and agreements are contingent and partial. Nevertheless, I believe that this is a model of society that allows people to live together, if not in harmony, then at least in civility.

### 6. *Concluding Thoughts*

The conflict between religion, sexuality and rights is of increasing importance in the United Kingdom today. In this article, I have explored how liberal democracies grapple with this seemingly intractable issue, using examples drawn from North America to enrich our emerging UK jurisprudence. I have attempted to find a way forward which not only recognizes liberalism's limitations in terms of the public-private dichotomy, but also its strengths in terms of the need for respect and civility in the public sphere. My 'faith' is that rights politics in the UK may lend itself to a model of accommodation and compromise which avoids intransigence and instead seeks out common ground. Although the task may be challenging, the consequences of failure, to my mind, justify the effort.

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religion, in which compromise and apology was emphasised, see *Smith v Knights of Columbus* (2005) 55 CHRR D/10 (BCHRT).

<sup>193</sup> Nash (n 1) 336.