‘RADICAL ORTHODOXY’ AND DEBATING THE FOUNDATIONS OF THE LEGAL PROTECTION OF RELIGIOUS LIBERTY

DPHIL THESIS (LAW)

JOEL THOMAS HARRISON
MAGDALEN COLLEGE
HILARY 2013

ABSTRACT

This thesis examines the rationale for religious liberty in England and Wales. Currently, United Kingdom religious liberty literature shows very little sustained interrogation of the topic. Authors are likely to assume religious liberty is, most notably, a species of personal autonomy. This fails to explain why we should care about *religious* liberty and deepens religion's privatisation, its separation from politics or public life.

Drawing from a theological sensibility known as Radical Orthodoxy (RO), this thesis criticises current assumptions and argues that religious liberty discourse should be re-envisioned.

The Introduction and Chapter One explore the current problems facing religious liberty discourse and map rationales given by prominent authors. Chapter Two argues that the main problem is that current discourse is shaped by a secularisation narrative: the differentiation of religious and secular spheres. Chapter Three relates the RO argument that this differentiation is underpinned by three themes, all of which have theological components: the rise of secular order as the protection of individual rights; the invention of private religion in modernity; and the contemporary shift to 'authenticity' or diffuse individual experiences as the hallmark of religion. Chapter Four contends that these three themes are echoed in religious liberty discourse and jurisprudence, leaving us with the question of why *religious* liberty matters.

Chapters Five and Six explore the RO-influenced alternative, in theory and with reference to common questions in religious liberty discourse: the relationship between an individual claimant and the group; the reality of plural religious traditions; and the tension between sexual orientation non-discrimination and religious liberty. On the RO-influenced account, religious liberty concerns, against sphere differentiation, a commitment to the flourishing of multiple groups contributing to desirable social ends, understood ultimately as participating in the life of 'charity', the love of God and of others. This encapsulates two themes, both rooted in the Christian tradition: judgement against politics (as reflected in the secular order), and transformation of society along social pluralist lines. These two themes, the thesis argues, better explain why religious liberty matters.

ACKNOWLEDGEMENTS

I am immensely grateful to many people, without whom this thesis would not exist and I would be a much poorer person.

Without my supervisors, Professor Christopher McCrudden and Dr John Perry, I would not have had license to do this work. They have been encouraging, insightful, interested, and good-humoured. If this thesis echoes their own thinking and writing in any way, both in form and substance, then it is much better for it.

The genesis and development of this thesis is deeply embedded in friendships cultivated at Oxford. I am grateful for the following people, who pushed me to think harder and more imaginatively, ask questions, or always remember the hilarity of life: Stefan and Linda Fisher-Høyrem, Peter and Bethany Eckley, Daniel and Charlotte Maughan, Daniel Cojocaru, Andrew Kerr, Nathan Rose, Joses Ho, Rob Heimburger, Jill Wheeland, Roger Revell, Ryan Lang, Rachael Burke, Zack and Michelle Baize, Simon Cuff, Luke Martin, Richard Park, Saleema Rahim, Ammara Maqsood, and Claire Stead.

Colleagues and friends in Law have been encouraging conversation partners, whether in reading and commenting on my work, introducing me to new ideas, or helping me navigate some of the DPhil waters. In particular, I would like to thank: Jane Norton, Farrah Ahmed, Angela Wu Howard, Paul Yowell, Richard Ekins, Paul Brady, Jarrod Hepburn, Malcolm Birdling, Will Partlett, Claudia Haupt, and Yvonne Tew.

I was incredibly privileged to be involved with and supported by a number of groups while at Oxford. This thesis was only possible because of funding and complete support from the Woolf Fisher Trust (NZ). Dr Nigel Evans, the Trust's Secretary, was unceasingly encouraging and understanding. I am continually grateful for and amazed by such generosity. The political theology reading group convened by Rob Heimburger and shared with Peter Eckley, Libby Longino, Päivi Neuvonen, Alex Sidhu, Angela Wu Howard, and Peter Howard was always illuminating and inspiring. The Oxford GCU introduced me to the possibilities of this work, while the postgraduate community at St Aldates and the community at St Mary Magdalen ensured it remained grounded in charity.

I am also grateful for conversation and input from commentators at several venues: the *Law and Religion Scholars Network* conference, Cardiff (and its postgraduate division at Brookes University, with thanks to the organisers, Professor Peter Edge and Dr Russell Sandberg); the *Rethinking Rights in a Plural Age* conference, Marcianum Institute, Venice; the *Equality and the Common Good* conference, Lincoln Inn (with thanks to Dr Paul Yowell); and the *Understanding Human Dignity* conference, Oxford.

My thanks also to Professor John Milbank who generously shared several works in draft; to Sir Justice Grant Hammond who encouraged me to apply; and to Anne Winnall who gave a high school student a vision for joyful inquiry and teaching.

Finally, to Kate Brennan, who got me running (and keeps me going). To my parents, Paul and Penelope, who first taught me the language of divine love. And to my cousin Andrew and my brothers, Jeremy, Luke, Benjamin, and Daniel, who understand that the world must be enchanted. Thank you.

TABLE OF CONTENTS

Introduction 1

I The Problem 4

II Methodology 10

(a) Legal Scope of the Thesis 10
(b) The Turn to Theology 13
(c) Radical Orthodoxy: Who, What, and Why? 16
(d) A Dialogical Account – Two Political Imaginaries 20
(e) Use of 'the Church' 23
(f) Audience and Comparisons 28
(g) Chapter Structure 31

1 Rationales for Religious Liberty 34

I Civil Peace 36

II Neutrality 44

(a) Disambiguating Neutrality 47
(b) Some Difficulties with Neutrality 52

III Personal Autonomy 57

(a) Cultivating Reason Against Religion 62
(b) Religion's Diffusion into 'Choice' 66
(c) Individualism and Multiculturalism 76

IV Truth and Conscience 79

V The Necessity of Intermediary Groups 85

(a) Social Capital and Public Benefit 86
(b) Political Challenge and Civic Virtue 89

VI Conclusion 94

2 Secularisation 97

I Secularisation Narratives 101

(a) Decline and Differentiation 101
(b) Secularisation and Religious Liberty Discourse 105
(c) Challenging the Secularisation Narrative 107

(d) Conclusion 111

II Post-War Catholic Thought and Differentiation 112

(a) New Natural Law 113
(b) Maritain and Vatican II 122

III The 'Post-Secular' View: Church as the True Politics 131

(a) Alasdair MacIntyre and Stanley Hauerwas 132
(b) RO and the Post-Secular Claim: The Church as Central to the Body Politic 138

IV Conclusion 142

3 Secular Order and Private Religion 144

I The Rise of Secular Order 149

(a) Reform Master Narrative 149
(b) Intellectual Deviation: 'Rights' and the New Science of Politics 157

II 'The Migration of the Holy' 176

(a) Religion in Modernity 180
(b) Conclusion: The State as Salvation 186

III The Spiritualising of Subjectivity 189

IV Conclusion 198

4 Containment and Privatisation 207

I The *Forum Internum*, Neutrality, and Pluralism 210

(a) Neutrality in European Jurisprudence 212
(b) Domestic Analogues 220
(c) Conclusion 225

II The Belief-Manifestation Divide 227

III Autonomy and the Religious Market 239

(a) Individual Autonomy in the Age of Authenticity 240
(b) Religious Freedom as a Market: Goods and Symbolic Capital 243

IV Conclusion 253

5 Group Rights 258

I The Group in Religious Liberty Jurisprudence 260

II Group Rights Discourse 265

(a) Multiculturalism 266
(b) Facilitating Individual Rights? 269
(c) Group Rights? 271
(d) Conclusion 277

III Simple Space 278

IV The Radical Orthodoxy Alternative: Judgement and Transformation 288

(a) Judgement 302
(b) Transformation 307

V Conclusion 321

6 Pluralism 322

I The Individual Claimant 324

(a) 'Hands-Off' Individual Construal of Belief 325
(b) The Individual within a Communal Frame 336

II Plural Religious Traditions 342

III An Example of Complex Space: Catholic Adoption Agencies 357

(a) The Case 358
(b) Religion's 'Hostility' 362
(c) Religious Liberty and the Differentiation Thesis Problem 369
(d) A Discrimination-Based Analysis 373

IV Conclusion 376

Conclusion
Post-Secular Religious Liberty: Beyond Differentiation 378

TABLE OF CASES

Canada

Alberta v Hutterian Brethren of Wilson County [2009] 2 SCR 567 …… 341

Chamberlain v Surrey School District [2002] 4 SCR 710 ……... 231

Egan v Canada [1995] 2 SCR 513 ……... 365

Multani v Commission scolaire Marguerite-Bourgeoys and A-G of Quebec [2006] 1 SCR 256 …… 356

R v Big M Drug Mart Ltd [1985] 1 SCR 295 …… 83, 107

Syndicat Northcrest v Amselem [2004] 2 SCR 551 …… 241, 325

England and Wales

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 AC 546 …… 385

Azmi v Kirkless MBC [2007] ICR 1154 (EAT) …….. 221

Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales [2010] EWHC 520, [2010] PTSR 1074 (Ch) ……..... 233, 357

Catholic Care (Diocese of Leeds) (Charity Commission, 21 July 2010) ……. 357

Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales CA/2010/0007 (Charity Tribunal, 26 April 2011) ……... 5, 88, 222, 230, 357

Duke v Reliance [1988] 1 All ER 903 (HL) …….. 13

Eweida v British Airways plc [2010] EWCA Civ 80, [2010] ICR 890 ……. 13, 224, 373

Ghai v Newcastle City Council [2009] EWHC 978 (Admin) …….. 267, 340

Ghai v Newcastle City Council [2010] EWCA Civ 591 …….. 340

Grainger v Nicholson [2010] ICR 360 (EAT) …….. 230, 247

Hashman v Milton Park, Dorset Ltd No 3105555/2009 (ET, 4 March 2011) ……. 247

Ladele v Islington LBC [2009] EWCA Civ 1357, [2010] 1 WLR 955 …… 4, 13, 222, 228, 338, 356, 362

M v Secretary of State for Work and Pensions [2006] UKHL 11, [2006] 2 AC 91 …… 225

Mandla v Dowell-Lee [1983] 2 AC 548 (HL) ……. 373

Marshall v Graham [1907] 2 KB 112 …….. 387

McClintock v Department of Constitutional Affairs [2008] IRLR 29 (EAT) …… 235, 251

McFarlane v Relate Avon Ltd [2010] EWCA Civ 880, [2010] IRLR 872 … 13, 177, 222, 380

Preddy v Bull [2012] EWCA Civ 83, [2012] 1 WLR 2514 ……. 224, 365

R (Amicus) v Secretary of State for Trade and Industry [2007] 1 ICR 1176 (Admin) …… 264

R (E) v Governing Body of JFS [2009] UKSC 15, [2010] 2 AC 728 ……. 8, 285, 349

R (E) v The Governing Body of JFS [2009] EWCA Civ 626, [2009] PTSR 1442 ……. 236

Reaney v Hereford Diocesan Board of Finance Case
1602844/2006 (ET, 17 July 2007) ……... 262, 339

R (Johns) v Derby City Council [2011] EWHC 375,
[2011] HRLR 20 (Admin) ……... 224, 359, 365, 374

R (National Secular Society) v Bideford Town Council
[2012] EWHC 175, [2012] HRLR 12 (Admin) ……... 224, 384

R (Playfoot) v Governing Body of Millais School [2007] EWHC 1698,
[2007] HRLR 34 (Admin) ……... 324, 334

R (SB) v Governors of Denbigh High School [2005] EWCA Civ 199,
[2005] 1 WLR 3372 ……. 221

R (SB) v Governors of Denbigh High School [2006] UKHL 15,
[2007] 1 AC 100 …….. 213, 221, 270, 324, 340

R (Swami Suryananda) v Welsh Ministers [2007] EWCA Civ 893 …….. 51, 264, 345

R (Watkins-Singh) v Aberdare Girls' High School Governors
[2008] EWHC 1865 (Admin) …… 13, 267, 340

R (Williamson) v Secretary of State for Education and Employment
[2002] EWCA Civ 1926, [2003] QB 1300 …… 36, 241, 326

R (Williamson) v Secretary of State for Education and Employment
[2005] UKHL 15, [2005] 2 AC 246 …… 177, 224, 325

South Place Ethical Society [1980] 1 WLR 1565 (Ch) …….. 81, 246

European Court of Human Rights and European Commission of Human Rights

97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia (2008) 46 EHRR 30 ……... 37, 261

Ahmad v United Kingdom (1981) 4 EHRR 126 (Commission Decision) ……... 340

Angelini v Sweden (1988) 10 EHRR 123 (Commission Decision) ……. 211

Arrowsmith v United Kingdom (1981) 3 EHRR 218 (Commission Decision) ……... 249

Bayatyan v Armenia (2012) 54 EHRR 15 (Grand Chamber) …….. 355

C v United Kingdom (1983) 37 D&R 142 (Commission Decision) ……..... 177, 210, 232

Campbell and Cosans v United Kingdom (1982) 4 EHRR 293 ……... 251

Church of Scientology Moscow v Russia (2008) 46 EHRR 16 ……... 246

Dahlab v Switzerland App no 42393/98 (ECtHR, 15 February 2001) ……..... 213

Darby v Sweden (1991) 13 EHRR 774 …….. 47, 211

Divine Light Zentrum v Sweden (1981) 25 DR 105 (Commission Decision) ……. 249

Dogru v France (2009) 49 EHRR 8 ……. 213

EB v France (2008) 47 EHRR 509 (Grand Chamber) ……. 229, 360

Eweida v United Kingdom App no 48420/10 (ECtHR, 15 January 2013) …… 49, 228, 335, 340, 373

Folgerø v Norway (2008) 46 EHRR 47 (Grand Chamber) …….. 217

H v United Kingdom (1993) 16 EHRR CD44 (Commission Decision) …….. 249

Hasan and Chaush v Bulgaria (2002) 34 EHRR 55 ……. 37, 47, 212, 264

IA v Turkey (2007) 45 EHRR 30 ……... 37

ISKCON v United Kingdom (1994) 18 EHRR CD133 (Commission Decision) ……..... 249

Ivanova v Bulgaria (2008) 47 EHRR 54 …….. 210

Kalaç v Turkey (1997) 27 EHRR 552 ……..… 249

Karaduman v Turkey (1993) 1 EHRR 711 (Commission Decision) ……..... 213

Kervanci v France App no 31645/04 (ECtHR, 4 December 2008) ……. 213

Kjeldsen v Denmark (1979-80) 1 EHRR 711 …….. 217

Knudsen v Norway (1985) 8 EHRR 45 ……... 260, 334

Kokkinakis v Greece (1994) 17 EHRR 397 ……. 3, 210, 249, 323

Lautsi v Italy (2010) 50 EHRR 42 ……... 218

Lautsi v Italy (2012) 54 EHRR 3 (Grand Chamber) …….. 47, 218

Manoussakis v Greece (1997) 23 EHRR 387 …… 47, 212, 263

Metropolitan Church of Bessarabia v Moldova (2002) 35 EHRR 13 …… 37, 249

Otto-Preminger Institute v Austria (1995) 19 EHRR 34 …… 37

Pichon and Sajous v France App no 49853/99 (ECtHR, 4 October 2001) …….. 232

Refah Partisi (The Welfare Party) v Turkey
(2003) 37 EHRR 1 (Grand Chamber) …… 48, 215, 343

Religionsgemeinschaft Der Zeugen Jehovas v Austria (2009) 48 EHRR 17 ……. 47, 260, 343

Şahin v Turkey (2007) 44 EHRR 5 (Grand Chamber) ……... 48, 212, 249, 323, 341, 344

Salguiero da Silva Mouta v Portugal (2001) 31 EHRR 47 …….. 359

Schüth v Germany (2011) 52 EHRR 32 ……... 283, 334, 349

The Moscow Branch of the Salvation Army v Russia (2007) 44 EHRR 46 …… 249, 263

Thlimmenos v Greece (2001) 31 EHRR 15 ……. 360

Valsamis v Greece (1997) 24 EHRR 294 …….. 43

Vejdeland v Sweden App no 1813/07 (ECtHR, 9 February 2012) …….. 365

X and Church of Scientology v Sweden (1976) 16 DR 68 (Commission Decision) ... 246, 264

Zengin v Turkey (2008) 46 EHRR 44 …….. 217

Scotland

Free Church of Scotland v Overtoun [1904] AC 515 (HL) ……. 261, 314

South Africa

Christian Education of South Africa v Minister of Education 2000 (4) SA 757 (CC) …….. 89

MEC for Education, Kawzulu-Natal v Pillay 2008 (2) BCLR 99 (CC) ……. 49

Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs (2006) 1 SA 524 (CC) ……. 49

Prince v President, Cape Law Society 2002 (2) SA 794 (CC) ……. 224, 328

United States of America

Davis v Beason 133 US 333 (1890) ……... 81

Employment Division v Smith 494 US 872 (1990) ……... 49, 380

Estate of Thornton v Caldor 472 US 703 (1984) ……... 79

Everson v Board of Education 330 US 1 (1947) ……..... 80

Jones v Opelika 316 US 584 (1942) ……. 236

Lawrence v Texas 539 US 558 (2003) ……. 242

Loving v Virginia 388 US 1 (1967) ……. 368

Lynch v Donnelly 465 US 668 (1984) ……... 11, 245

Planned Parenthood v Casey 505 US 833 (1992) …….. 73, 190, 243

Sherbert v Verner 374 US 398 (1963) …….. 243

State v Hodges 695 S W 2d 171 (Tenn 1985) …… 84

Thomas v Review Board of the Indiana Employment Security Division 450 US 707 (1981) …….. 327

United States v Seeger 380 US 163 (1965) …….. 246

TABLE OF LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11
s 2 83

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework of equal treatment in employment and occupation 13, 249

Equality Act 2006 ..... 248, 340

Equality Act 2010
s 10 ..... 13, 249
s 19 229
s 29 ..... 13, 357
s 149 ..... 5, 359
s 193 319
sch 3, part 2, para 11 262
sch 9, part 1, para 2 ..... 262, 339
sch 9, part 1, para 6 235
sch 11, part 2, para 5 235
sch 23, para 2 ..... 5, 262, 359

Human Rights Act 1998
s 1 12
s 2 12
s 6 359
s 13 264

Local Government Act 1972
s 111 384

Promissory Oaths Act 1868
s 4 235

Race Relations Act 1976 340

Statistics and Registration Services Act 2007 236

Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660
reg 3(1) 229

Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263
reg 3 357
reg 4 357
reg 18 359

TABLE OF TREATIES

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49
Article 17 ……. 263
Article 19 ……... 13

Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief (adopted 25 November 1981) UNGA Res 36/55 ……... 36, 261

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
Article 3 ……. 37
Article 8 ……... 283, 360
Article 9 …….. 10, 12, 37, 47, 208, 210, 214, 231, 253, 260, 341
Article 11 ……. 246, 263
Article 14 ……. 359, 374

European Convention, Optional Protocol 1, Enforcement of certain Rights and Freedoms not included in Section I of the Convention, 1952
Article 2 ……...… 217

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) ……...… 37

Introduction

This thesis is a post-secular inquiry into the rationale for religious liberty in England and Wales. It explores how legal religious liberty discourse is arguably moving towards its exhaustion as a distinct tradition of inquiry. Increasingly construing religion as one private good amongst others, a choice in the individual's cultivation of a 'lifestyle', and arguably one harmful to others, legal discourse struggles to understand why *religious* liberty matters. That is, why it matters other than as a personal choice sometimes to be protected and often to be protected against. Against this, I contend that a renewal of theological argument within religious liberty discourse offers resources both to explain the problem with the current discourse and point towards a richer rationale for religious freedom. After examining contemporary justifications for religious liberty, this thesis considers a more associational account drawn from a theological sensibility known as 'Radical Orthodoxy' ('RO'). Here, within this account, religion is centrally concerned with the formation of groups that appeal to and instantiate a higher good or judgement beyond politics as the management of competing interests. I will argue that religious liberty, on this view, becomes an institutional manifestation of the commitment to the flourishing of new groups appealing to a life of 'charity', which transforms society itself.

A sustained examination of the rationale for religious liberty is rare in UK legal literature. More often than not, writers will offer a brief excursion into different rationales

before moving on to their more substantive project, analysing different legal spheres (education, property, employment, and so on) and how they relate to religious liberty.[1]

Understanding religious liberty's purpose is, however, important. It lies at the heart of several fundamental legal questions. What are the boundaries of permissible state 'involvement' in religion (for example, in the election of religious leaders)? Or state 'use' of religion (for example, confessional education, church taxes, or public symbols)? And why are state relations with religion a matter for examination? Should the law accommodate religious beliefs and practices within any generally applicable prohibitions? If, for example, a law is passed prohibiting gender discrimination in employment, should the law exempt a church that only accepts male priests, or a convent that hires only women? Must any exemption be extended to anyone else who holds a different view on gender? How should the law recognise structuring marriage and family, property ownership, or the internal discipline of leaders and members along religious lines, if at all? When faced with competing considerations – for example, a company's desire to have a single standard dress policy and a Muslim's desire to wear a headscarf, a Sikh a turban, a Christian a cross – what weight should be given to religious manifestation?

Given these questions, it is open to interpretation why there is this relative gap in the literature – the absence of sustained examinations of the rationale for religious liberty in the UK. Steven Smith has referred to the 'daunting challenge' of articulating a rationale.[2] Put

[1] See, e.g., Carolyn Evans, *Freedom of Religion Under the European Convention of Human Rights* (OUP 2001); Peter Edge, *Religion and Law: An Introduction* (Ashgate 2006); and Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008). Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) offer a more sustained treatment in chs 1 ('Christian Perspectives') and 2 ('Liberal Perspectives').

[2] Steven Smith, 'Discourse in the Dusk: The Twilight of Religious Freedom?' (2009) 122 Harv L Rev 1869, 1887.

simply, it may be easier to treat religious liberty as a given, enshrined in human rights texts, and then get on with the task of analysing case law. Such an approach might rely on an apparent convention or custom of protecting religious liberty, one embedded in the cases. Religious liberty, we might say, has a broad appeal in the legal and wider community. To quote the European Court of Human Rights, it 'is one of the foundations of a "democratic society" …'.[3]

The difficulty with this approach is that it usually contains hidden assumptions. Authors implicitly (and sometimes unthinkingly) 'plunge into the prevailing secular current',[4] which understands religious liberty as a form of personal autonomy and 'religion' as separate from 'politics'. But this 'current', I argue, is at the heart of the discourse's difficulty with articulating why we should care about *religious* liberty.

To be sure, religious liberty discourse is not unidirectional. In this thesis, I also discuss associational accounts developed by theorists and European and UK courts. Further, as Rex Ahdar warns, there is a danger in 'crying wolf'.[5] Speaking out against curtailing religious practices can sound apocalyptic. This seems especially problematic in an environment like the UK where '[r]eligious liberty is not in imminent peril'.[6] Unlike in other countries, religious communities in the UK are generally free from violent persecution.[7] Further, religion remains part of public discourse and life. The UK is still a country where

[3] *Kokkinakis v Greece* (1994) 17 EHRR 397 [31].

[4] Steven Smith, 'Dusk' (n 2) 1885.

[5] Rex Ahdar, 'Slow Train Coming: Religious Liberty in the Last Days' (2009) 12 Otago LR 37, 57.

[6] ibid

[7] On the rise of religious persecution internationally, see Pew Forum on Religion & Public Life, *Global Restrictions on Religion* (December 2009) <http://www.pewforum.org/uploadedFiles/Topics/Issues/Government/restrictions-fullreport.pdf> accessed 29 May 2012.

the sovereign is anointed head of state by the Archbishop of Canterbury, where the words of the Archbishop and other religious leaders often make the mainstream press, where the recent election to the See of Canterbury itself was a matter of public interest, where the twenty-six most senior bishops of the Church of England sit in the House of Lords, and where faith groups are regularly engaged in education and welfare programmes. Still, as Ahdar continues, 'there is no need for complacency'.[8]

I The Problem

'[R]eligion and belief', writes Malcolm Evans, 'has not fared particularly well within the human rights framework.'[9] UK jurisprudence tends to support this assessment. Notably, case law shows that religious groups and individuals are increasingly subjected to a single, universal standard understood as requiring that all groups or individuals demonstrate mutual respect for the equal rights of citizenship. And this extends, for example, beyond a concern that persons have access to the service in question. Knowledge of the existence of the group's ethos is understood as potentially harming others' dignity.[10] For example, civil registrars who object to officiating over same-sex unions can fall foul of a universal equality policy, despite the availability of alternative registrar.[11]

[8] Ahdar (n 5) 57.

[9] Malcolm D Evans, 'Does God Believe in Human Rights? A Reflection' in Nazila Ghanea, Alan Stephens and Raphael Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers 2007) 1, 9.

[10] See Chapter Four, Part I (b).

[11] See *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955.

Within this frame, groups can be treated as a vehicle for fulfilling abstract individual rights. This means they sometimes have to serve or employ individuals regardless of compatibility with their religious ethos. So, for example, a Christian adoption agency cannot refuse adoption services to same-sex couples, nor can it claim that its employees must share a particular sexual ethic (married, celibate, single, or dating someone of the opposite sex, for example).[12] The issue is only heightened when the religious group is contracting with government authorities.[13] And this position, which leads to religious groups retreating from the 'secular' realm of welfare provision, is arguably in tension with successive governments' attempts to partner with religious groups in welfare provision.[14]

Fundamentally, this 'neutrality' – the application of a single standard – parallels many writers' scepticism over singling out religion for concern at all. Some have contended that permitting religious exceptions to discrimination law, for example, would give support to 'irrational' or 'bigoted' beliefs.[15] Others have contended that 'privileging' religion would simply be favouring arbitrarily one form of 'deep concerns', 'deep commitments', or, indeed 'lifestyle'.[16]

---

[12] On adoption, see *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007 26 April 2011 (Charity Tribunal). I discuss this case at length in Chapter Six, Part III. On sexual orientation discrimination by a religious employee, see Vickers (n 1) 138, 216.

[13] See the Equality Act 2010, sch 23 para 2(10) (prohibiting sexual orientation discrimination in the provision of services when contracting with a public authority). See also Equality Act 2010, s 149. This imposes a 'public sector equality duty' on all public authorities when exercising any of its functions. Arguably, this extends to public contracting. See *Catholic Care* (Tribunal) (n 12) [62]. See generally Julian Rivers, 'Promoting Religious Equality' (2012) 1 Ox J Law Religion 386.

[14] See Julian Rivers, *The Law of Organized Religions* (OUP 2010) 288.

[15] Gwneth Pitt, 'Religion or Belief: Aiming at the Right Target?' in Helen Meenan (ed), *Equality Law in An Enlarged European Union* (CUP 2007) 202, 213.

[16] See, e.g., Christopher L Eisgruber and Lawrence G Sager, *Religious Freedom and the Constitution* (Harvard University Press 2007) 4, 89, 103 (arguing for 'equal liberty' as regards 'deep commitments') and Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 61 (arguing a 'tolerant secular society' does not privilege religion, but rather choice).

On this view, religion, like any other choice, is entitled to rights of free expression, equality (as against targeted legislation, for example), privacy, and assembly. We might think this is unproblematic. Considering religion under other categories might simply mean considering the importance of '*religious* speech', '*religious* association', and so on.[17] But the drift of these arguments is to relativize religion as one choice amongst many. Following this, several conclusions can, and have been, reached. Some have contended that religion, as it is like any other choice, should accordingly be subject to general secular laws without accommodation. But even if accommodation arguments are still permitted or appealed to, they are unlikely to be successful within this paradigm of relativized religion. Religious liberty jurisprudence has generally relied on a proportionality analysis. The question a court faces is whether the public authority's application of a (typically general) law against a conflicting religious practice pursues a legitimate aim in a proportional manner having regard to the pressing nature of any social need and the importance of the right. In other words, accommodation generally focuses on the *weight* of competing concerns. The problem then is this: if religion is one manifestation amongst others of the individual's capacity for individual choice or the cultivation of a lifestyle, it is difficult to see it carrying much weight against competing state interests that have been formulated, presumably, so as to 'maximize the public interest in spite of [any burden] to the individual'.[18]

However, despite this relativizing impulse, which exhibits at times scepticism over singling out religion, the same commentators often want to maintain religion as a special category in respect of government action.[19] Religion remains a form of choice, but it is perceived as a kind of subjective alignment to divine command (itself a form of subjective

[17] See, e.g., James W Nickel, 'Who Needs Freedom of Religion?' (2005) 76 U Colo L Rev 941, 952-53.

[18] Rivers, *Law of Organized Religions* (n 14) 320.

[19] See, e.g., Eisgruber and Sager (n 16) 126-27 and Dworkin, *Is Democracy Possible* (n 16) 60.

will, if it exists).[20] Translated politically, it therefore threatens 'theocracy' – the imposition of a monolithic, partial, and subjective account of truth upon others.[21] Such an imposition may arise through violence, which is commonly associated with religion.[22] Or it may be experienced as political or personal pressure and coercion, a point often reflected in headscarf debates.[23] Religion must, accordingly, be separated from political authority, which has the task of maintaining 'respect for individual autonomy' and consequently limiting 'the imposition of collective identities.'[24] I call this the *containment thesis*.

Combining these dynamics – religion is a species of individual choice, which should be subjected to neutral laws protecting others' rights and freedoms or dignity and distinguished from political authority – potentially leads to a new thought: religion should be reformed. Malcolm Evans has argued that more individualistic religions fair better under human rights regimes.[25] He contends that this is unsurprising, given 'more communitarian-orientated religious traditions tend to challenge the State's ordering of society'.[26] Jürgen Habermas has contended that this is an explicit expectation.[27] The 'consciousness of the faithful' must be 'modernised', accepting 'the individualistic and egalitarian nature of the laws of the secular community'.[28] Julian Rivers, critical of this development, has similarly

---

[20] See, e.g., Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 194-95 (describing religion as a 'moral rule book', helpful for some).

[21] See, e.g., Timothy Macklem, *Independence of Mind* (Oxford University Press 2006) 148, discussed further in Chapter One, Part III, (a).

[22] See Chapter One, Part I.

[23] See Chapter Four, Part I (a).

[24] Ronan McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 5.

[25] Malcolm Evans (n 9) 13.

[26] ibid 13.

[27] Jürgen Habermas, 'Intolerance and Discrimination' (2003) 1 ICON 2.

concluded that, within the UK, there are a number of indications the law is forcing a remoulding of religions into variants of late twentieth-century liberal Protestantism – private, individualised, and in general conformity with what we might call a norm of undifferentiated equality.[29] As Rivers discusses elsewhere, such a remoulding need not be anti-religious.[30] Rather, as religion increasingly comes to be viewed as a matter of individual construction or lifestyle choice, it has 'little weight against the collective judgments of the community expressed through law.'[31] Rivers argues that the law currently displays: decreasing respect for religion as a ground of conscientious action; less deference to religious law; and a diminishing scope for religions offering public service consistent with their own ethos.[32] Rivers contends that British law, as it developed in the nineteenth century, reflected something of a settlement: a vision of religious institutional autonomy or self-government applied equally to different groups who may then engage in areas of 'concurrent jurisdiction' with secular authority (education, welfare provision, participation in formal public discourse).[33] But the present health of law and religion reflects a drift towards religion's trivialisation.[34] Religion is an option or hobby like any other hobby, constructed by the individual and capable of reconstruction; it need not point to 'the idea that there might actually be a God, who might really be calling people into relationship with himself, who

---

[28] ibid 6.

[29] Rivers, *Law of Organized Religions* (n 14) 343. *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728, discussed in Chapter Six, Part II, is a prominent example of this dynamic.

[30] Julian Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecc LJ 371, 396.

[31] ibid 391.

[32] ibid 396.

[33] ibid 372-6.

[34] ibid 396. Rivers at this point draws from Charles Taylor's account of secularisation. I discuss this account in Chapter Three, especially Part III, and relate it further to the law in Chapter Four, Part III.

might make real demands on his worshippers.'[35] In short, for the purposes of the law, religion has no 'publicly cognisable weight'.[36]

Should this homogenisation and trivialisation concern us? Several scholars have characterised this as complicit with the state's claim to complete authority.[37] Steven Smith argues that reducing religion to one (often problematic) choice amongst others means it is equally the subject of regulation. And, on this basis, 'the church will ultimately enjoy as much freedom or immunity, and only as much, as the state and its (secular) constitution see fit to grant.'[38] Smith argues that this contrasts the historical approach to religious liberty, which focused on 'two dimensions or realms' of authority ordained by God.[39] He labels the shift the beginnings of 'exhaustion' in the tradition.[40] No longer trusting to its 'hitherto trusted methods of enquiry', the tradition of religious liberty discourse has become 'sterile'.[41] It serves no distinct purpose, other than (we can add to Smith's account) still maintaining the autonomy of the political community against the dangers of religion.

This thesis does two things. First, it explores how these dynamics are related to theorists and courts' rationales for religious liberty. Second, it contests these dynamics, and conventional rationales, by posing an alternative vision for religious liberty. In taking these two steps, the thesis brings to bear on religious liberty discourse a theological movement

[35] ibid 398.

[36] ibid 396.

[37] See, e.g., Paul Horwitz, 'The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond' (1996) 54 U Toronto Fac L Rev 1, 14, 28; Ahdar and Leigh (n 1) 6; Stephen Carter, 'Liberalism's Religion Problem' (March 2000) 121 First Things 21.

[38] Steven Smith, 'Dusk' (n 2) 1882.

[39] ibid 1874.

[40] ibid 1872 n 15.

[41] ibid, quoting Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth 1988) 362.

known as 'Radical Orthodoxy'. Combined, these two steps and the adopted lens raise several methodological questions.

II Methodology

(a) Legal Scope of the Thesis

The thesis debates 'the legal foundations of religious liberty', that is, the rationale for religious liberty within England and Wales law.[42] This is a broad topic. I do not claim, therefore, to address, let alone answer, all questions that may arise from this inquiry. In particular, I do not examine the relative competencies and structural relationship between courts, administrative, and legislative bodies addressing religious liberty issues. Rather, I focus largely on theoretical debates and on courts examining Article 9 of the European Convention on Human Rights (ECHR).[43] That said, the arguments developed cast a general, political vision, one which can be developed in different venues and shape political deliberation. Further, although I discuss a social pluralist account of religious liberty, I am not concerned in this thesis with questions of religious law or jurisdiction. The thesis may have implications for this area, but issues of canon law, shari'a, halakha, and so on deserve separate treatment.

I examine rationales for religious liberty, as discussed by prominent theorists and within UK and ECHR jurisprudence. My discussion of prominent theories of religious

[42] Hereafter I refer to the United Kingdom or UK. The term is technically over-inclusive (I do not discuss Northern Ireland or Scotland), but simpler.

[43] European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ('ECHR').

liberty could be characterised as 'trans-Atlantic'. This approach is not unusual. As we will see, religious liberty scholars often appeal to arguments developed by political and legal theorists who have straddled the United States and the UK. Moreover, theorists from both countries will often appeal to similar starting points when broaching religious liberty (church and state crises of the Middle Ages or Reformation, Wars of Religion, or John Locke's writing, for example). That said, there are important differences, and this thesis is ultimately concerned with the UK. For example, the UK has an established church and a history of religiously plural education and social welfare provision.[44] It does not have the strongly separationist history of the United States, or the latter's tendency to focus on an open marketplace of religion.[45]

My treatment of case law and domestic legal frameworks is not exhaustive. I discuss certain cases at length as advancing central tropes examined in the thesis – public-private and secular-religious divisions, neutrality, impartiality, value pluralism, and social pluralism. This is different, as noted, from the structure of many religious liberty texts, which orientate the reader around particular areas of concern – education, charities, property ownership, employment, for example – and the relevant case law for each.[46] While I draw from much of this literature, I do not repeat their detailed examination of domestic law. Instead, this thesis could be described as remaining within what is ordinarily 'chapter one' of these works – an articulation of the rationale(s) for religious liberty. However, looking to case law, rather than simply remaining in the realms of political, legal, and theological theory is important. Part of

[44] For a brief historical perspective on the law of church and state in the UK, including Establishment, see Rivers, *The Law of Organized Religions* (n 14) ch 1.

[45] On the marketplace theme in US religious liberty discourse, see, e.g., *Lynch v Donnelly* 465 US 668, 723 (1984) (Brennan J, dissenting) (arguing the religion clauses of the United States Constitution 'ensure a benign regime of competitive disorder among all denominations') and Michael McConnell and Richard Posner, 'An Economic Approach to Issues of Religious Freedom' (1989) 56 U Chi L Rev 14.

[46] See above n 1.

the purpose of this thesis is to explore how different arguments, from Radical Orthodoxy writers and from writers conventionally discussed in religious liberty debates, map on to the court's own reasoning. If religious liberty discourse really is experiencing 'exhaustion' then we should see signs of this in the case law.

Within this focus, the term 'religious liberty' as it relates to case law needs some unpacking. My focus is on UK and European human rights jurisprudence. The Human Rights Act 1998 effectively incorporates the rights contained in the ECHR.[47] Domestic courts are directed to 'take into account' Strasbourg jurisprudence.[48] This includes case law under Article 9, as decided by the European Court of Human Rights (ECtHR) and, before it was dissolved, the European Commission on Human Rights (ECmHR). Given its centrality to this thesis, I set out Article 9 in full:

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

However, questions of 'religious liberty' extend beyond Article 9 jurisprudence, and the ECHR more generally. In particular, one fundamental debate that has developed in recent years is the relationship between discrimination law and ECHR jurisprudence. Several

[47] Human Rights Act 1998, s 1.

[48] Human Rights Act 1998, s 2.

notable UK 'religious liberty' cases have been decided under non-discrimination law.[49] Domestic legislation providing for non-discrimination on the grounds of religion, now the Equality Act 2010, was passed in part to fulfil responsibilities under European Union Equality Directives.[50] And domestic law must be interpreted consistently with Directives.[51] Perhaps then it would be better to use the term 'religious liberty and non-discrimination'. However, as I discuss in the thesis, religious non-discrimination law has largely adopted Article 9 jurisprudence.[52] Whether these regimes should be conflated is one debate concerning the 'legal foundations of religious liberty'. But the conflation does permit the more general banner of 'religious liberty'.[53]

(b) The Turn to Theology

In examining the rationale for religious liberty, the thesis goes beyond legal theorists and current UK and European Article 9 jurisprudence. I appeal to a strand of contemporary theology, 'Radical Orthodoxy', to offer an account of why religious liberty discourse is arguably 'exhausted' and to provide an alternative. This raises two questions: why theology, and why Radical Orthodoxy? I consider each question in turn.

---

[49] See *Ladele* (n 11); *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872; *Eweida v British Airways plc* [2010] EWCA Civ 80, [2010] ICR 890; and *R (Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (QB).

[50] See Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49 (Article 19 empowering the European Union to 'combat discrimination based on … religion or belief'); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework of equal treatment in employment and occupation; and the Equality Act 2010 (expanding the non-discrimination duty outside of employment to include, for example, the supply of goods and services (see ss 10, 29)).

[51] See, e.g., *Duke v Reliance* [1988] 1 All ER 903 (HL).

[52] See Chapter Six, Part III (d)

[53] Throughout the thesis, I use 'religious liberty' and 'religious freedom' interchangeably.

Methodologically, this thesis follows what John Perry calls 'dialogic and disciplinary pluralism'.[54] I consider below how the thesis is 'dialogical'; here, I elaborate on 'disciplinary pluralism'. Adopting Perry's line of thought, I consider that the term 'interdisciplinary' does not necessarily capture the approach of this thesis.[55] Perry notes that 'interdisciplinary' writing *can* take the shape of different disciplines commenting on one another.[56] This might be valuable, but I suggest it can also problematically assume distinct spheres of knowledge or disciplines. This is certainly the case with 'law *and* religion'. For example, Russell Sandberg has promoted the study of 'religion, law, and society' as an 'interdisciplinary approach'.[57] He contends this aims for integration, but his description is fundamentally governed by a sociological mind-set.[58] 'Law', 'religion', and 'society' are distinct artefacts, exhibiting distinct logics that parallel different disciplines, and are then to be analysed as inter-relating.[59] In contrast, 'disciplinary pluralism', as I develop it in this thesis, entails bringing theological argument to bear upon how the very debates of 'religious liberty' are structured and answered from the outset. Put another way, the goal is not simply to superimpose theology onto legal discourse as an external lens but rather to examine how theology is already 'inside' legal debates.

Rowan Williams' recent thoughts on law provide a useful example, as well as pointing to themes in this thesis. He has encouraged a 'theology of law'.[60] Law, he argues,

---

[54] John Perry, *The Pretenses of Loyalty: Locke, Liberal Theory & American Political Theology* (OUP 2011) 11.

[55] ibid

[56] ibid

[57] Russell Sandberg, 'Church-State Relations in Europe: From Legal Methods to an Interdisciplinary Approach' (2008) 1 Journal of Religion in Europe 329, 341.

[58] ibid 340.

[59] ibid 341.

fundamentally concerns the protection of the human person, who is endowed with a dignity that surpasses 'any and every actual system of human social life.'[61] And he contends that this has historically pointed towards a new universalism, experienced in a new society, in which persons live in relationship with God and 'in free and constructive collaboration with others'.[62] Law is consequently the handmaiden of this new society – it makes a peaceful space for the flourishing of persons in constructive relationships. For some, this may be interpreted as a separation of law and religion (or the religious society). And in one sense this is true; law has an instrumental tinge, pointing to something other to itself. But, more fundamentally, Williams defines law wholly within the discourse of theology. Theology, on his account, provides law with its *raison d'être*.

Embedded in this argument is a claim to explanatory power, a claim echoed by a number of writers. Oliver O'Donovan, arguably the UK's most influential contemporary political theologian, contends, 'Western civilization finds itself the heir of political institutions and traditions which it values without any clear idea why, or to what extent, it values them.'[63] He contends Christian faith, as a tradition of reasoning, illuminates how current dilemmas have been generated *and* what 'the goods of our institutions and traditions are'.[64] Kristen Deede Johnson reflects this when discussing a contemporary 'turn to theology' in political theory.[65] She argues the 'inner themes of Christianity' are emulated in

---

[60] Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 Ecc LJ 262, 272.

[61] ibid

[62] ibid 273.

[63] Oliver O'Donovan, *The Ways of Judgment* (William B Eerdmans 2005) xiii.

[64] ibid xiv-xv.

[65] Kristen Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Difference* (CUP 2007) 138.

contemporary political theory's questions of toleration and pluralism. These themes concern the relationship between 'community, unity, diversity, difference, and harmony'.[66]

The turn to theology in this thesis then is not so much for the purpose of elaborating the identity perspective of one community. It is not simply to promote understanding, so that such a community can 'live out their own pursuit of what they see as being the good life' within a secular society.[67] Rather, it is done with the hope of providing the tools to understand religious liberty. As Perry contends, religious liberty discourse is 'incomplete' without the resources of theology, given the discourse's history and its inherited concepts.[68] In itself, this is not a novel claim (although it is one that most contemporary religious liberty authors try to avoid). A few legal scholars have similarly contended some kind of theological argument is necessary to understand religious liberty.[69] This thesis, however, attempts to analyse religious liberty discourse in conversation with a particular group of theologians who write in support of a perspective they term Radical Orthodoxy.

(c) Radical Orthodoxy: Who, What, and Why?

Who or what is Radical Orthodoxy (RO)? Pinning down a precise definition is no easy task. One of its leading writers, Catherine Pickstock, has referred to it as 'a hermeneutic

---

[66] ibid 5.

[67] Anthony Bradney, *Law and Faith in a Sceptical Age* (Routledge 2009) 143, quoted in Zachary R Calo, 'Religion, Human Rights and Post-Secular Legal Theory' (2011) 85 St John's L Rev 495, 504.

[68] Perry (n 54) 12.

[69] See, e.g., John Garvey, 'An Anti-Liberal Argument for Religious Freedom' (1996) 7 J Contemp Legal Issues 275 and Steven Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' (1991) 140 U Pa L Rev 149.

disposition and a style of metaphysical vision'.[70] Another of its founders, Graham Ward, has both explicitly avoided the language of 'school' (instead at one point referring to 'theological sensibility') and has, more recently, lamented being pre-judged by the label.[71] Certainly, it has institutional features. RO arguably began as a book series.[72] Its central figures (and those most commonly engaged with in this thesis) remain spread across different universities,[73] but this is balanced by the establishment of the Centre of Theology and Philosophy at Nottingham University under the directorship of John Milbank, undoubtedly RO's most prolific figure.[74] Further, a RO journal was established in 2012.[75] Despite these institutional features, capturing who is 'in' RO and who is not is difficult.

Milbank has described RO as 'fundamentally Catholic in its orientation, yet attracting many who would consider themselves as "post-Protestants".'[76] Most RO writers are Anglican (usually Anglo-Catholic) or Roman Catholic, but their work has been picked up by Christians of other denominations (evangelical and neo-Calvinist, for example) interested in

[70] Catherine Pickstock, 'Radical Orthodoxy and the Meditations of Time' in Laurence Paul Hemming (ed), *Radical Orthodoxy? A Catholic Enquiry* (Ashgate 2000) 63.

[71] See Graham Ward, 'In the Economy of the Divine: A Response to James K.A. Smith' (2003) 25 Pneuma 115, 117 and Graham Ward, 'Response to Kuipers and Bretherton' (Annual Meeting ot the American Academy of Religion, Montréal, November 2009) 3.

[72] See Routledge Radical Orthodoxy Series <www.routledge.com/books/series/routledge_radical_orthodoxy_SE0084/> accessed 14 March 2013.

[73] John Milbank is Professor in Religion, Politics, and Ethics at the University of Nottingham; Graham Ward is Regius Professor of Theology at the University of Oxford; Catherine Pickstock is a Fellow at Emmanuel College, Cambridge; and William Cavanaugh is Professor of Theology at DePaul University in Chicago.

[74] See Centre of Theology and Philosophy <http://theologyphilosophycentre.co.uk/> accessed 11 March 2013.

[75] See Radical Orthodoxy: Theology, Philosophy, Politics <http://journal.radicalorthodoxy.org/index.php/ROTTP> accessed 11 March 2013.

[76] John Milbank, 'The Grandeur of Reason and the Perversity of Rationalism: Radical Orthodoxy's First Decade' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 367.

the recovery of more 'catholic' themes found in patristic and medieval writing.[77] And although RO largely developed in Britain, it has influenced US theologians. Given this expansiveness, I often refer to 'RO and related writers' in this thesis. The term reflects how writers like Milbank and Ward share a theological sensibility with others. William Cavanaugh, whose work I discuss at length as contributing to the RO sensibility, prefers to describe himself as 'an admirer and fellow traveller'.[78] Beyond this, I will on occasion also discuss work from Stanley Hauerwas, Rowan Williams, Oliver O'Donovan, and Joan Lockwood O'Donovan. While they are not RO writers in a strict sense, they nevertheless develop similar ideas (sometimes explicitly in conversation).[79]

What then are these ideas? What constitutes the 'sensibility'? And why bring *this* sensibility to bear on religious liberty discourse? The terms 'radical' and 'orthodoxy' provide an introduction. What is meant by 'orthodox'? RO writers argue that a 'richer more coherent Christianity', found in Patristic and Medieval writing, was 'gradually lost sight of after the late Middle Ages'.[80] In particular, RO writers emphasise a recovery of *methexis* or 'participation', inherited from Plato and developed in Christian thought, as central to theology.[81] 'Participation' holds that existence obtains for creatures 'insofar as they

[77] See, e.g., Robert E Webber, *The Younger Evangelicals* (Baker Books 2002) 72-75 (on younger evangelicals appealing to RO); and James K A Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker Academic 2004) (developing a conversation between RO and the Reformed tradition).

[78] Simon Oliver, 'Introduction – Politics and Theology' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 311, 312.

[79] See, e.g., Rowan Williams, *Faith in the Public Square* (Bloomsbury Press 2012) 6 (acknowledging Milbank's influence). The O'Donovans' writing is referenced throughout RO literature and Hauerwas is a central antecedent influence.

[80] John Milbank, Catherine Pickstock and Graham Ward, 'Suspending the Material: The Turn of Radical Orthodoxy' in John Milbank, Catherine Pickstock and Graham Ward (eds), *Radical Orthodoxy: A New Theology* (Routledge 1999) 1, 2

[81] ibid 3.

participate in the gratuity of God's *gift* of being'.[82] God, RO writers contend, is the single source of life and 'being'. Creatures and the created order perpetually, moment to moment, 'borrow' existence from God, or are 'suspended' from God.[83] This, RO writers contend, reconfigures and secures our understanding of basic concepts of human life. For example, 'reason', RO writers argue, is understood in Augustinian terms as 'divine illumination'. Rather than being autonomous, human reason participates in God's own reason or *logos*, as mediated through tradition and social practices.[84] Only this, RO writers argue, secures the idea that reason has an end or a purpose to which it is directed, dimly anticipated because God has already 'illuminated' our minds, rather than reason being (in a more post-modern vein) a mere projection of our self-contained wills.[85]

Why is this 'radical'? Milbank, Ward, and Pickstock write, 'Participation … refuses any reserve of created territory … every discipline must be framed by a theological perspective; otherwise these disciplines will define a zone apart from God, grounded literally in nothing.'[86] In part, this reflects the explanatory claim noted above – Christian thought seeks to give a 'self-confident account of the whole world' or how created order (which different disciplines investigate) is interwoven with the transcendent.[87] But, as this thesis

---

[82] Simon Oliver, 'Introducing Radical Orthodoxy: From Participation to Late Modernity' in John Milbank and Simon Oliver (eds) *The Radical Orthodoxy Reader* (Routledge 2009) 1, 17 (emphasis in original).

[83] ibid 18.

[84] ibid 5.

[85] See John Milbank, 'Truth and Vision' in John Milbank and Simon Oliver (eds) *The Radical Orthodoxy Reader* (Routledge 2009) 69, 86. RO writers characterise 'illumination' as standing against any foundationalism based on the poles of 'faith' and 'reason'. Fideism, which stresses the givenness of faith through revelation, and autonomous 'reason', which focuses, in an immanentist vein, on the boundedness of human thought, are both rejected.

[86] Milbank, Ward, and Pickstock (n 80) 3.

[87] Rupert Shortt, 'Radical Orthodoxy: A Conversation' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 28.

discusses, the 'radical' claim that there is no reserved or autonomous territory apart from God extends to a political vision.

(d) A Dialogical Account – Two Political Imaginaries

Fundamentally, at the heart of this thesis, I discuss and develop two political imaginaries as they relate to religious liberty.[88] The first is a 'secular' vision, in which the purpose of state authority is to negotiate and protect individual autonomy. Charles Taylor describes this as the 'modern moral order' – the 'idea of society as existing for the (mutual) benefit of individuals, and the defense of their rights'.[89] On this vision, religious liberty is valued because we value individuals and their capacity to develop conceptions of the good or what I describe as individual belief narratives. But this also means that the political community itself – the state – should stand for nothing other than neutrality or else protecting value pluralism so as to allow these narratives to flourish. This evokes a political imagination based on spatial boundaries, in which 'religion' and 'politics' occupy distinct spheres.

From the RO perspective, this political imagination is structured by a secularisation-as-differentiation of spheres narrative. But this narrative, RO writers argue, developed out of deviant changes in theology or how persons came to understand their relationship to creation, each other, and God. In short, RO writers argue that secular space developed as the regulation of competing wills, represented in and settled by the will of the sovereign centre. They contend that this was supported by a theology that understood God and persons as

[88] Daniel Bell refers to 'political imagination' as concerning our arrangement of social bodies dealing in the '(re)production of a vision, a *mythos* [a narrative-based construal], of community'. Daniel M Bell, 'State and Civil Society' in Peter Scott and William T Cavanaugh (eds), *The Blackwell Companion to Political Theology* (Blackwell Publishing 2007) 424. The description echoes Taylor's discussion of the 'social imaginary', see Chapter Three, n 14 and accompanying text.

[89] Charles Taylor, *A Secular Age* (Belknap Press 2007) 160.

separate individual wills, imbued with a self-ownership that ensured their autonomy. Parallel to this development, whereby the state was increasingly seen as the site where we transcend religious difference, RO writers contend 'religion' as private belief was 'invented'.[90] In this way, RO's account is 'post-secular'. Rather than reflecting the pure reason of secular discourse, or a neutral vantage point, RO interprets the development of secular space as a modern faith in competing wills as ontologically basic.[91]

In contrast to this 'invention' of autonomous secular space and reason and private religion, the RO political imagination contends 'the epiphany of God makes a difference to everything.'[92] For politics, this 'epiphany' is expressed as developing a particular 'habit of association'.[93] Participation in God's life entails, RO writers argue, being caught up in establishing a new social existence based on exchanging gifts and the harmonious blending of talents.[94] This new community is the life of the Church. But, against spatial boundaries, RO writers argue that this logic of 'Church' should be established everywhere, including family life, economics, and politics, as the shape of what it means to be truly human. Temporal authority, on this vision, is tasked with supporting and coordinating these associations. Without a vision of this kind, they argue, politics is inherently nihilistic – the clash or management of relativized choices, each equally available, each equally meaningless.

Each of these visions employs 'religion' in different ways. The first casts it as occupying its own sphere separable from politics and increasingly porously defined in terms

---

[90] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (2nd edn, Blackwell Publishing 2006) 10.

[91] On this understanding of 'post-secular', see James K A Smith (n 77) 42.

[92] Shortt (n 87) 30 (quoting Milbank in interview).

[93] Milbank, 'Grandeur' (n 76) 393.

[94] See, e.g., Oliver, 'Introducing Radical Orthodoxy' (n 82) 7.

of individual experiences of ultimate concern, depth, or 'style'. The second gives religion a more architectonic role, the pursuit of right relationship with God and each other or relationships of charity. This difference has at least one methodological consequence: I do not offer a *definition* of religion in this thesis. Perhaps this is problematic; given the thesis examines the rationale for *religious* liberty, we might need to understand what religion is. I do not deny this, but I do not think a definitional approach would be fruitful. This thesis illustrates that how we understand religion is intimately tied to a wider political imagination – what is the 'secular'; what is the relationship between individuals, groups, and the whole political community; and what is the relationship of all of this to the transcendent? Attempts to define religion more often than not simply adopt a secularisation-as-differentiation narrative: religion is defined by what it is not, namely secular politics or economics.[95] This further reflects a dubious claim: that there is a transhistorical and transcultural understanding of 'religion'.[96] Against these problematic assumptions, a better approach is to examine how different rationales for religious liberty construe religion.[97] Such an approach, I contend, leads to the following conclusion: there is no religion as such, but there can be a central case that points to the purpose of religious liberty.

[95] See, e.g. Jesse J Choper, 'Defining "Religion" in the First Amendment' [1982] U Ill L Rev 579, 580 (arguing for a definition of religion that 'frames the structure of our secular government').

[96] Typically, such an understanding is framed in either essentialist terms (religion is 'transcendental', 'supernatural', based on 'faith' or the 'spiritual') or in functionalist terms (religion is what binds society together, provides relief from death anxiety, or fulfils a need for meaning in life). See William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP 2009) 113-21.

[97] See also Kent Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72 Cal L Rev 753, 765 (arguing any full inquiry into identifying what is and is not religion must attend to 'the fundamental purposes that underlie the constitutional concept of religion').

(e) Use of 'the Church'

The thesis argues that religious liberty discourse should draw from ideas, themes, and stories within Christianity. In doing so, I often discuss or appeal to 'the church' or 'the Church'. I use the term in three senses. First, the church as institutional. Second, the church as universal. Third, the Church as practice or performance.

The church as institutional concerns visible, corporate bodies. It is, following Jacques Maritain's description, seen through a group's 'professed creeds, its worship, its discipline and sacraments and in the refraction of its supernatural personality through its human structure and activity.'[98] There are many institutional churches, reflecting schisms, denominations, and national or provincial boundaries. These churches are often related, whether by official communion or pan-church organisations and connections. And, as I note below, they remain connected as a matter of theological dogma. In this thesis, however, I most often discuss developments and writing within the Church of England and the Roman Catholic Church when discussing an institutional church.[99] This reflects the affiliation of Radical Orthodoxy (and related) writers, as well as an often more closely shared discourse of sacramental life and political theology between members of these two bodies.

Connected to this close association, I also at times discuss 'the church' as *the church universal*. Although there may be different institutional churches, there is also a sense in which we may speak of the unity of the different churches. For example, Oliver O'Donovan discusses the 'worldwide community of Christian believers, associated by the word and

[98] Jacques Maritain, *Man and State* (Chicago University Press 1951) 151.

[99] See, e.g., Chapter Two, Part II (b) and Chapter Six, Part III (b).

sacraments.'[100] On this basis, he refers to the Anglican Communion as 'simply a specific modulation of being a Christian'.[101] The church is 'catholic', meaning different institutional manifestations remain united by a common endeavour, common practices, and shared belief over time and geography.[102] This is not to deny division (as distinguished from difference, which may simply reflect creativity or location, for example). Rather, division is seen as a failure to manifest catholicity, which, in hope, is to be restored.[103] For example, the Roman Catholic Church at the Second Vatican Council considered that 'truly Christian endowments for our common heritage … the riches of Christ and virtuous works' are to be found in churches outside the Roman communion.[104] But it also lamented divisions as against the character of the universal church.[105]

RO writers also appeal to universality. They claim that ecumenism reflects being already part of one church. And they argue that 'interconfessional cultural bodies like Radical Orthodoxy itself' are attempts to manifest this unity.[106] For this thesis, this claim translates into references to 'the church' as an ideal or claimed shape for the universal body that, although manifest in particular institutions (as above), is not limited to any single institution. This is the most common use of 'the church' throughout the thesis and is distinguished from other references to 'the church' in a particular institutional setting. Such

[100] O'Donovan, *Ways* (n 63) 264.

[101] Oliver O'Donovan, *A Conversation Waiting to Begin: The Churches and the Gay Controversy* (SCM Press 2009) 23. See further Chapter Six, Part I (a).

[102] O'Donovan, *Ways* (n 63) 254.

[103] ibid 265.

[104] Unitatis Redintegratio*: Decree on Ecumenism* (The Vatican, 21 November 1964) <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19641121_unitatis-redintegratio_en.html> [4] accessed 17 August 2013.

[105] ibid

[106] Milbank, 'Grandeur' (n 76) 395-6.

ideal characterisation or attempts to identify the shape of the church are not unusual. For example, in Chapter Three, I discuss Martin Luther's identification of the church, as a universal and ideal body, with the limited office of preaching the Word.[107] More generally, I refer to the church universal when noting particular claims. For example, the thesis refers to the mediating 'work of the church' in contrast to claims of individual conscience.[108] In Chapter Two, particular claims as to the work and role of the church are expanded to a wider claim – that the church universal signals a body of people forming a distinct kind of community characterised by particular rites.[109] And this argument precedes RO's own claim: that 'the shape of the church' should provide the logic and basis for re-shaping all public life as such. Put another way, ecclesiology (what characterises the church universal) should become social theory.[110]

The movement outwards, from the institutional church to the church universal as a claim to represent a distinct community forming the basis for re-shaping public life as such, gives rise to a third meaning: *the Church as practice or performance*. In Chapter Five in particular, I discuss Augustine's characterisation of the *civitas Dei*, the city of God.[111] I develop RO's argument that Augustine envisaged the re-shaping of all social order in light of the love of God and love of neighbour. For Augustine, the city of God is not limited to the institutional church (indeed Augustine considered it may not always be found there), but the church does provide its central witness. I consequently on occasion refer to 'the Church', while also maintaining the 'city of God' as synonym and amplifier, to maintain this

[107] See Chapter Three, Part II (a).

[108] See, e.g., Chapter One, Part IV (discussing Steven Smith's argument of a Reformation shift to individual conscience).

[109] See Chapter Two, Part III (a) (discussing Stanley Hauerwas).

[110] See Chapter Two, Part III (b).

[111] Chapter Five, Part IV.

connection to the church-as-witness. Spurred on by this witness, 'the Church' develops as a practice or performance, entailing pursuing love of God and neighbour in different places and spheres of life.

There are various related ways to understand this. For example, Oliver O'Donovan refers to the development of a different social order,[112] one forming a *koinōnia*, to take a term St Paul often uses.[113] The *koinōnia* is both, concretely, a community and, dynamically, a communion or communication. Combined, it is forming a community through the common bestowal of gifts.[114] As O'Donovan argues, the Church in this sense expands beyond any particular institutional boundary. It is the enlarged household of the early church, the monastic community, or the guild, town, or village engaged in the sharing of resources through work and charity.[115] Each is characterised by the practice of 'Church' – formation through gift exchange and charity.[116] In similar vein, Milbank argues that identifying the Church as practice, forming the city of God, entails 'judicious narratives of ecclesial happenings'.[117] Different institutions and persons will appeal to participating in its life and it must constantly be enacted, discerned, and worked-out in the contemporary context.[118] Ward

---

[112] O'Donovan, *Ways* (n 63) 240. See also Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009) 202 (arguing the Church is 'creating the world anew, reassembling the social').

[113] O'Donovan, *Ways* (n 63) 242. See also James K A Smith (n 77) 237.

[114] O'Donovan, *Ways* (n 63) 242-4. The language of gift is, as we will see, prevalent in these descriptions. For RO writers, it reflects the centrality of Eucharistic practice (and thus the centrality of the life of the church, in the second sense above) which entails the receiving of God as a gift that must be transmitted to others. See further Chapter Five, Part IV (b)(i). See also John Milbank, 'Enclaves, or Where is the Church?' in *The Future of Love: Essays in Political Theology* (SCM Press 2009) 133-34 and Ward, *Politics* (n 112) 170.

[115] O'Donovan, *Ways* (n 63) 269-280. O'Donovan notes a perennial concern for education and work.

[116] William Cavanaugh, 'From One City to Two: Christian Reimagining of Political Space' in *Migrations of the Holy: God, State, and the Political Meaning of the Church* (William B Eerdmans 2011) 46, 59 (arguing '[t]he city of God is not so much a space as a performance').

[117] Milbank, 'Enclaves' (n 114) 135. He further refers to 'a persuasive attempt to recite particular cases, particular biographies as authentic embodiments of the … logic of the cross' (139).

[118] See Luke Bretherton, *Christianity and Contemporary Politics* (Wiley-Blackwell 2010) 20.

takes this to mean that the Church is ultimately more a 'tradition' – the history of practices of charity within particular church institutions, but also within work, education, and service.[119]

Importantly, this understanding of changing social order in various contexts, of the Church as a practice, contrasts what this thesis will discuss as the secularisation narrative of differentiated religious and secular spheres.[120] Nevertheless, a differentiation of a kind is affirmed in this thesis, namely, a dialogical tension between temporal authority and the city of God. RO writers argue the law and ruling authorities must tragically at times engage in coercion and punishment. But they frame this entirely within the ends of the city of God. They consider that this power is exercised to secure the peace necessary for the performance of a higher end, namely the life of charity.[121] For RO writers, this relationship – of temporal authority exercising power for the sake of the city of God – translates into a social pluralist vision. Here, a lurking question raised by the breadth of the third understanding of 'the Church' is most apparent: does the city of God, so construed, simply collapse into a particular political argument without a 'religious' character; is it consequently impossible to identify church life? For Milbank and Ward, as we will see, there is a sense in which all human life is understood as participating in 'the Church'.[122] James K Smith criticises this, arguing that if Church and society are coextensive then we may struggle to identify the difference made by the Christian community, its distinctive form of sociality.[123] In this thesis, I do not follow the conflation thread Smith perceives. Rather, I engage with the RO claim that the Church re-orders social life, but I consider that such a claim, pointing to a change, requires identifying a

[119] Ward, *Politics* (n 112) 189.

[120] See Chapter Two, Part I (a).

[121] See Chapter Five, Part IV.

[122] See Chapter Two, Part III (b). See also Milbank, 'Enclaves' (n 114) 144 and Graham Ward, *Cities of God* (Routledge 2000) 258.

[123] James K A Smith (n 77) 257-9.

difference embodied in the universal church as central witness. I trace this re-ordering through the RO contention that the city of God entails a social pluralist argument – multiple, relatively independent groups pursuing goods in common.[124] But, translated into the context of religious liberty claims, I argue that central to the social pluralist vision are groups appealing to a religious identity or purpose – understood as participation in the life of charity and embodied most typically in the central case of the church (visible and universal) but instantiated elsewhere. I contend that this provides the impetus for the wider social pluralist argument.

(f) Audience and Comparisons

Given the expansive meaning of 'the Church', the RO sensibility has unsurprisingly begun to have explicit political connections. Different figures influenced by RO have advocated 'Red Tory' or 'Blue Labour' within British politics.[125] The latter especially, more consistent with Christian socialism, is developed by prominent RO figures like Milbank.[126] But little mention has been made of RO arguments in legal discourse.[127] This thesis should

[124] See Chapter Five, Part IV (b)(ii).

[125] See Phillip Blond, *Red Tory: How Left and Right Have Broken Britain and How We Can Fix It* (Faber and Faber 2010) and John Milbank, 'Blue Labour, One-Nation Labour and Postliberalism: A Christian Socialist Reading' (2012) Centre of Theology and Philosophy Working Papers <http://theologyphilosophycentre .co.uk/papers/Milbank_BlueLabourOneNationLabourAndPostliberalism.pdf> accessed 12 March 2013. Both movements echo many themes of Catholic Social Teaching. See Matthew Taylor, 'Catholic Teaching The New Zeitgeist for Britain's Left' *BBC* (London 4 November 2012) <www.bbc.co.uk/news/uk-politics-20154986> accessed 12 March 2013.

[126] See Milbank, 'Blue Labour' (n 125).

[127] Milbank himself has authored at least three pieces in conversation with legal scholars. See John Milbank, 'Shari'a and the True Basis of Group Rights: Islam, the West, and Liberalism' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 135; John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 Ox J L and Religion 203; and John Milbank, 'Dignity Rather than Rights' in Christopher McCrudden (ed) *Understanding Human Dignity* (OUP 2013) (forthcoming). Other than this, Zachary Calo appears to be the only other legal scholar who has picked-up this conversation. See especially Zachary R Calo, 'Pluralism, Secularism and the European Court of Human Rights' (2011) 26 J L & Religion 261.

consequently be of interest to legal religious liberty commentators and those interested, from a theological or political standpoint, in the work of RO. The former audience is primary for this thesis. My hope is that RO thought offers useful resources for explaining current problems in religious liberty discourse and for recovering the theologically-informed underpinnings of the discipline itself. But there is a secondary audience. RO writing is often abstract, and sometimes impenetrably complex. In recent years, this has been shifting, arguably as RO relates to political movements. However, for those interested in RO writing there is an on-going need to consider its work within applied contexts. This thesis contributes to this endeavour, probing both connections and contrasts to legal religious liberty discourse. But offering RO as a potential resource raises another methodological question: to what extent am I claiming the RO account is exhaustive, both in terms of critiquing strands of contemporary religious liberty discourse and in offering an alternative rationale for religious liberty?

This thesis maps the themes of an engagement, asking how religious liberty discourse can be read in light of a particular theological sensibility. Other theological sensibilities could potentially contribute to this conversation. Paul Fiddes, for example, contends that both the Christian and Muslim tradition (and we could add Jewish) have an interest in moving 'the concept of religious freedom from the essentially individualistic approach … to a more corporate and social concept'.[128] It may be that the Christian tradition has cultivated certain themes central to this endeavour – distinguishing between secular (as in time-bound and coercive) authority and the promotion of a new association based on charity, for

[128] Paul Fiddes, 'The Root of Religious Freedom: Interpreting Some Muslim and Christian Sacred Texts' (2012) 1 Ox J Law Religion 169, 183.

example.[129] But there may be potential analogies. While noting the potential for analogy, I discuss this solely from within the RO perspective.[130]

This fits with the wider approach of the thesis. I do offer points of comparison with other 'schools' or writers prominent in Christian legal debate – noting, for example, themes from post-World War II Catholic thought and the 'New Natural Law', a school of jurisprudence. But the comparisons are limited to the purpose of mapping RO as a body of thought.

The more limited exercise – mapping RO as a body of thought as it engages with religious liberty discourse – is what Alasdair MacIntyre calls '[a] necessary first step'.[131] For MacIntyre, a conversation between different traditions of moral enquiry entails first understanding how each tradition thinks, a requirement of 'philosophical imagination'.[132] Engaging in this mapping, rather than claiming comprehensiveness as against all rival traditions, consequently permits identifying points of tension and insight, as well as allowing for potential replies and further refinement.

That said, it would be misleading to claim that this mapping is value neutral or simply a presentation of opposing voices. As James K Smith writes in respect of his own mapping of RO thought, 'a cartographer hopes to be more than merely a surveyor'.[133] The choice of what to investigate points towards the possibility of learning something valuable, making

[129] See Chapter Five, Part IV.

[130] See Chapter Six, Part II.

[131] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (3rd edn, Duckworth 2007) x.

[132] ibid xi.

[133] James K Smith (n 77) 25.

new connections, or providing the possibility for a 'reorientation' or 'renavigation' and pursuit of 'previously untraveled paths'.[134] Thus while this thesis does not claim to be comprehensive – that, for example, the RO view is a complete solvent for any contemporary dilemmas in religious liberty discourse – I *do* offer it as a step towards 're-imagining' the purpose of religious liberty. Put another way, I contend that by paying attention to the post-secular literature of RO and related writers we will learn how to approach religious liberty better. The thesis, however, is better described as RO-inspired rather than a sub-project of the RO-brand. I do not claim, for example, that RO writers would adopt my conclusions wholesale.

(g) Chapter Structure

The thesis's chapters largely trace this movement between the two visions. Chapter One discusses rationales for religious liberty offered by contemporary legal authors. It is a 'critical mapping', exploring how these rationales often contribute to the problems noted in this Introduction – notably, understanding religion as a threat to be contained, and also, relativistically, as a matter of personal style. While these rationales might offer insights into religious liberty, I contend that they are often framed by a secularisation narrative that demarcates separate spheres of religion and politics. This is explored further in Chapter Two. Introducing the 'standard secularisation narrative', Chapter Two then goes on to discuss ways in which certain strands of contemporary thought in the Christian community have accepted or rejected this narrative. My focus is on post-World War II Catholic thought – Jacques Maritain, Vatican II, and the New Natural Law Tradition – accepting the narrative, with caveats, and two of RO's antecedents, Alasdair MacIntyre and Stanley Hauerwas, rejecting

[134] ibid

the narrative. Contrasting these writers opens up a discussion on what 'religion' is and introduces a central RO claim: against the autonomy of the 'secular', ecclesiology (the theory and development of Church practice) should provide the shape of social and political theory.

Chapters Three and Four discuss RO's account of secularisation and consider how this account offers explanatory insights into contemporary jurisprudence. Chapter Three presents RO's challenges to the secularisation narrative in the terms discussed above. The chapter has three parts, examining: RO's critique of secular space as the protection of subjective rights; the complementary invention of a privatised notion of religion in contrast to pre-modern conceptions; and the subsequent development of religion, along subjective lines, into a diffuse notion of individual experience of 'depth' or 'authenticity'. Chapter Four considers three ways in which UK and European religious liberty law parallels the critiqued narrative, whereby secular order is supported at the expense of religion's containment or privatisation. It considers: a broadening requirement of 'neutrality' that insists on the protection of value pluralism, both in terms of state and non-state action; an emphasis on 'belief', distinguished from 'manifestation', as the sphere of religion; and how the personal autonomy rationale for religious freedom points towards religion's contemporary diffusion and potential trivialisation.

Chapters Five and Six develop the RO-inspired alternative account of religious liberty. RO points towards an institutional or group account of religious liberty, more in keeping with social pluralism. This fits, I argue, with religious liberty rationales that understand religious associations as exercising an authority capable of challenging the state. But I contend that such an account, which has virtue ethic overtones, must ultimately be underpinned by an acceptance that the group is pointing to something real and desirable. In

Chapter Five, I explore how RO offers this 'thicker' vision of religion. The RO account, I suggest, offers a re-envisioning of religious liberty in terms of a commitment to the flourishing of new groups appealing to a life of 'charity'. The chapter consequently offers a shift in focus for religious liberty discourse – from value pluralism to *social pluralism*, from individual autonomy to *group autonomy*, from neutrality as to the good to *the exercise of judgement and transformation in aid of charity*.

Chapter Six considers some of the tensions this account raises in respect of central questions within religious liberty discourse. How does the account, strongly associational, treat individual claimants? Given its particular theological perspective, does the account turn a deaf ear to religious pluralism? And how might an RO-influenced account deal with the seemingly common 'conflict' between religious liberty and sexual orientation non-discrimination? Here, I also suggest that religious liberty depends on central or paradigmatic cases. Being neutral as to religions, I contend, creates its own central case: the writing of individual belief narratives. In contrast, I argue religious liberty should draw from paradigmatic ideas and stories developed within Christianity, pointing towards the appeal of eternal truth against politics and the establishment of communities of charity.

Christopher McCrudden has suggested religious liberty's 'scope and meaning … is anything but settled'.[135] Through this thesis's six chapters, the goal is to move from exploring dominant paradigms, to unsettling them, and finally, to offering resources for a renewed vision, one which construes religious liberty as central to the life of the UK political community.

[135] Christopher McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecc LJ 26, 38.

1

Rationales for Religious Liberty

This chapter critically explores rationales for religious freedom provided by prominent writers. My focus is on the works of legal religious freedom scholars. However, this also necessitates considering writers who, crossing disciplines, provide a number of the underlying ideas that shape religious freedom discourse. The arguments discussed are largely trans-Atlantic, reflecting at the normative level a degree of common conversation.

Part I discusses religious freedom as a means of obtaining and maintaining civil peace. This argument takes two forms: a concern for the persecution of religious groups and identifying the category 'religion' as uniquely conducive of violence and therefore to be contained. Part II discusses arguments for religious freedom based on the neutrality of the state, the cultivation of reason, and equality of respect for individual's conceptions of the good life. These arguments extend the case for strictly demarcating the boundaries of permissible public engagement with religion, deepening an understanding of public order as 'secular' order based on 'reason'. Part III discusses religious liberty as a species of personal autonomy. Related to the equal concern and respect account, personal autonomy arguments contend that religious liberty is an instance – perhaps an important instance – of cultivating a culture in which the person is a self-author of his or her own life. Part IV discusses truth and conscience. This explores religious liberty as protecting a higher duty, most typically the conscience responding to the dictates of God. I argue that conscience has been deconstructed

over time, with the external duty to God being revealed to be 'duty' to one's own sense of authenticity. Part V explores religious liberty as supporting intermediary associations as producing 'social capital', exercising a check on political authority and cultivating civic virtue.

Each of these rationales is critically examined. Although divided into five categories, it will become clear that there are common themes pointing towards some central problems. Civic peace and neutrality as rationales for religious liberty can participate in the promotion of politics as an autonomous sphere distinct from religion. Religion is construed as a threat to be contained, being perhaps irrational, and promoting a monolithic value. Personal autonomy as the reason for religious liberty arguably supports this characterisation, promoting an understanding of religion as an increasingly diffuse notion of privatised choice. The state, on these rationales, is understood as managing personal conceptions of the good (while also protecting us from them). Religious liberty is, on this view, not in aid of pursuing any particular end or good, other than individual choice. But this, I argue, is in tension with understanding religious liberty as supporting institutions or groups capable of challenging the exercise of government authority or cultivating civic virtue. This understanding, I contend, requires us to accept that religious associations can both exercise their own authority and be pointing to something real and desirable.

I Civil Peace

Steven Smith once argued that civil peace is the most commonly articulated justification for religious freedom.[1] Certainly, judges are keen to emphasise religion's potential for violence, even where the case itself does not concern religious conflict. Rix LJ, for example, once commented, '[I]t is impossible to shut one's eyes to the great dangers which exist and have always existed in the very potency of religious belief and in its potential for conflict.'[2] But the civil peace rationale may take two, not necessarily complementary, forms. For some, it refers to permitting the accommodation of religious belief and practices in order to challenge persecution and avoid resentment. For others, the civil peace rationale supports the view that religion should be excluded from matters public or political, as a matter of religious liberty. I call this a *containment thesis*. Often it relies on an argument that religion, conceptually and historically, is uniquely violent. Where religion is seen as fomenting conflict, excluding non-believers from a polity, or as somehow coercive in its presence (that is, infringing the right of others to a freedom *from* religion), religious freedom adjudication can take on the character of a bulwark against, and response to, perceived religious indoctrination and the threat of religiously-based politics or public action.

Persecution is undoubtedly a real concern. Religious liberty scholars often note rising levels of oppressive restrictions on religious groups internationally.[3] The United Nations Declaration of Human Rights, including Article 18's commitment to freedom of religion, was

[1] Steven Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' (1991) 140 U Pa L Rev 149, 163. Personal autonomy is now, I argue, the more frequently cited rationale.

[2] *R (Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, [2003] QB 1300 [95].

[3] See, e.g., Malcolm D Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change' (2012) 1 Ox J Law Religion 5.

adopted following the 'disregard and contempt for human rights' and 'barbarous acts which have outraged the conscience of mankind' that were characteristic of the Nazi regime and the Holocaust.[4] The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief similarly locates its principles in the 'wars and great suffering to mankind' brought about by the disregard for 'the right to freedom of thought, conscience, religion or whatever belief'.[5] Within Europe, the European Court of Human Rights (ECtHR) has considered cases where religious communities have been denied public registration (resulting in, for example, an inability to protect collective property) against a backdrop of persecution in the society, and cases where the state's intervention in a leadership dispute is coupled with acts of violence.[6] Further, the Court has recognised a positive duty on states to 'take the necessary measures' to protect religious communities against violence committed by members of society. Recently, in *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*, the Court examined violence against a Jehovah's Witness congregation committed by a fanatical Orthodox splinter group in Georgia.[7] The congregation was severely beaten during a worship service and forced to watch as their religious literature was burned. Authorities showed complete indifference to the violence. The Court held the state must prosecute offenders, protect the community, and ensure 'extremists … tolerated the existence of the applicants' religious community.'[8]

---

[4] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) Preamble.

[5] Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief (adopted 25 November 1981) UNGA Res 36/55 Preamble.

[6] See, e.g., *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 and *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55.

[7] (2008) 46 EHRR 30.

[8] ibid [134]. The Court also concluded the state had failed in its positive duty under Article 3 of the ECHR to protect the congregants against 'inhuman or degrading treatment' ([110], [124]). The level of violence in this case, preventing the group from continuing its worship, contrasts the Court's more contestable claim that a 'pressing social need for the preservation of religious peace' and the state's positive duty under Article 9 justifies prohibiting films and novels with 'provocative', 'malicious', or 'insulting' portrayals of objects of religious veneration. See *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 [47], [48], [52] and *IA v*

Potential violence should, therefore, be a concern for religious liberty adjudication when it arises. However, this is unlikely to provide a full picture of the aims of religious liberty. Not all claims of religious liberty arise in a context of, or will necessarily result, if unanswered, in violence and persecution. But, beyond this, the civil peace rationale often goes beyond specific acts of persecution. Rather, more often than not, this rationale is directed at a broader argument: that 'religion' is a category that uniquely precipitates violence and must, accordingly, be managed in some manner.

This argument has an empirical or historical component and a conceptual component. The editors of a major collection of papers on religious freedom provide an example in their introduction to the collection.[9] They open with a series of conflicts both ancient in the telling and recent in memory. Cain slaying Abel (we are told 'following a dispute about the proper form of sacrifice'). Antigone's conflict with Creon. The terrorist actions in New York and Washington DC on September 11, 2001. The attacks in Spain on March 11, 2004. Certainly, further examples could be added: the London bombings on July 7, 2005, or, more generally, oppressive nationalism, often in the name of Christianity, highlighted in Hungary.[10] By opening their collection in this manner, the authors build an indictment against religion's violent history. They go on to adopt 'ambivalence of the sacred' as an appropriate characterisation.[11] Here, they appeal to a field of literature that understands religion as a

---

Turkey (2007) 45 EHRR 30 [44]. See generally Ian Leigh, 'Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 Res Publica 55.

[9] Tore Lindholm and others, 'Introduction' in Tore Lindholm, W Cole Durham Jr and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004) xxvii.

[10] See, e.g., Hari Kunzru, 'The Frightening Hungarian Crackdown' *The New Yorker* (New York, 8 January 2013) <www.newyorker.com/online/blogs/books/2013/01/the-hungarian-crackdown.html> accessed 10 February 2013.

particular, identifiable category or concept that, while capable of peaceable fury against social ills, is also uniquely prone to cause violence or 'holy wars'. Within this literature, various reasons for this unique status are given.[12] Religion appeals to an absolute standard of sacredness. This creates a binary of insiders-outsiders in a particular community (or, in a 'theocratic' turn, the nation state), casting 'outsiders' as enemies of the sacred. The norms of logic and empirical or reason-based evaluation that ordinarily constrain social interaction are unavailable because religion is ultimately irrational. Accordingly, religion is inherently intolerant.

What are the legal implications of these claims? Arguably they point in favour of robust religious accommodations to prevent resentment or the development of ghettoised groups. But more often this characterisation of religion casts it as a problem for public order, threatening, as Stephen Gey argued, 'the democratic theory of the modern state'.[13] This precipitates 'containment'. Religion, understood as sectarian, potentially violent, and imposing a monolithic conception of value, must be separated from what is general, reasonable, plural, and secular. Through the development of particular tropes – secular-religious; public-private – religious freedom adjudication contributes to the characterisation and enforcement of the public domain as a space of autonomous reason, emancipated from religion.

---

[11] Quoting R Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (Rowman and Littlefield Publishers 2000).

[12] See William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP 2009) ch 1 (reviewing the literature adopting this characterisation, focusing largely on prominent religious studies and sociology works.)

[13] Steven Gey, 'Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment' (1990) 52 U Pitt L Rev 75, 173. See also Kathleen M Sullivan, 'Religion and Liberal Democracy' (1992) 59 U Chi L Rev 195, 201 and William P Marshall, 'Religion as Ideas: Religion as Identity' (1996) 7 J Contemp Legal Issues 385, 390-91.

The containment argument draws support from a common historical narrative, in which the liberal state is construed as rescuing people from the 'war of all sects against all'.[14] John Rawls was particularly influenced by this narrative. He considered that the 'Wars of Religion' and the Protestant Reformation of the sixteenth and seventeenth centuries raised a new problem: 'How is society even possible between those of different faiths? What can conceivably be the basis of religious toleration? For many there was none, for it meant the acquiescence in heresy about first things and the calamity of religious disunity.'[15] For Rawls, when the unity of Christendom gave way to three salvationist and equally intolerant religions – Catholicism, Lutheranism, and Calvinism – the result was inevitably social conflict. Each religion included a 'transcendent element not admitting of compromise' in its conception of the good. 'This element', he considered, 'forces either mortal conflict moderated only by circumstance and exhaustion, or equal liberty of conscience and freedom of thought.'[16] The necessary conclusion, Rawls argued, was the separation of church and state, a clear division between the religious and the secular.[17]

Religious liberty scholars have often adopted this narrative.[18] In its strong form, some have argued that this history points to the necessary privatisation of religion, lest its inherent intolerance capture public power.[19] But there is also a weaker form, discussed by Malcolm Evans, in which the lesson is more focused on the toleration of minorities. Evans argues that

---

[14] Sullivan (n 13) 198.

[15] John Rawls, *Political Liberalism* (Expanded edn, Columbia University Press 2005) xxiv.

[16] ibid xxvi.

[17] See John Rawls, 'The Idea of Public Reason Revisited' in *The Law of Peoples* (Harvard University Press 1999) 129, 166-67.

[18] See, e.g., Tore Lindholm, 'Philosophical and Religious Justifications of Freedom of Religion or Belief' in Tore Lindholm, W Cole Durham Jr and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004) 19, 24-26.

[19] See above n 13.

in the sixteenth and seventeenth centuries, the pretence of an Empire held together by a universal Catholic faith ended in the need to secure inter-state peace, forced by a backdrop of religious division and persecution.[20] Religious liberty consequently develops as a technique for avoiding religious conflict. There remains a degree of continuity between these strong and weak forms, however. Both, with Rawls, envisage a 'political' solution to the theological problem of warring sects. This may be the state, transcending religious difference, or, in Evans' case, international human rights law doing similarly.

There are several problems with the tidiness of this narrative, both historical and conceptual. Cavanaugh has argued that the narrative of the 'Wars of Religion' and rescue by the liberal state is deeply questionable. He contends that it depends on the following contestable propositions: that combatants opposed each other based on religious difference; that the primary cause of the wars was religion, and this is analytically separable from political, economic, and social causes; and the modern state was a solution to the wars, rather than a cause.[21] He provides an extensive recital of the various conflicts, noting too many examples of members of the same church killing each other and members of different churches collaborating in the various power-struggles of emergent nations.[22] Perhaps most relevantly for the purposes of this thesis, Cavanaugh develops the argument that it is difficult to identify 'religion' as the unique cause of violence in this period because religion as a distinct category, focused on belief, only takes root in this period. He contrasts this with the violence of nation-building, appealing to what sociologist Thomas Ertman says is a 'generally accepted' view: that the territorial state triumphed over other political forms,

[20] Malcolm D Evans, 'Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflicts' in Tore Lindholm, W Cole Durham Jr and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004) 1, 5-6.

[21] Cavanaugh (n 12) 141-2.

[22] ibid 142-151.

internally absorbing by violent means estates, cities, clergy, and local associations and externally asserting itself against other states.[23] I discuss Cavanaugh's arguments (the development of 'religion' and the rise of the nation-state) and the implications these hold for religious liberty discourse further in Chapter Three.

The historical narrative is undoubtedly a contested field, but quite aside from this there remains a conceptual problem. What is meant by 'religion'? The civil peace theory and ideas of containment often appear to identify religion through particular negative characteristics – absolutism, insider-outsider mentalities, and irrationality or non-verifiability. The difficulty here is twofold.

First, those claiming that religion is uniquely violent appear to adopt a particular version of religion (one linked with absolutism, for example) as the basis for a generic category 'religion'. But this generic category can often be unmasked as simply one form of belief, one characterised by its *unmediated* nature. Arguably, contemporary fundamentalist violence has a modern hue. Religious literalism is a mirror to modern rationalism: a clear, non-negotiable, ahistorical message deemed to fall from God to the individual, presenting revealed facts that sit alongside natural facts.[24] It is such direct communication of divine will, outside of the mediations of a community, history, or reason (and therefore ironically the most *private* kind of religion) that is complicit in violence.

Second, particular groups or systems of belief (for example, Christians, Muslims, and Jews) are included within the defining characteristics to the arbitrary exclusion of other

[23] ibid 162-63 quoting Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (CUP 1997) 4.

[24] See John Milbank, 'The Grandeur of Reason and the Perversity of Rationalism: Radical Orthodoxy's First Decade' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 367, 395.

groups or systems of belief.[25] If absolutism, divisiveness, and a fervency of identification (to the point of irrationality) are seedbeds for violence and conflict and the basis for identifying religion, then it is unclear why, for example, nationalism should not be considered religious.[26] Certainly, this would fit with the detailed study of 'political religions' and 'civil religion'.[27] This is not to suggest that Christian and Muslim violence, for example, does not exist. Indeed, as noted, certain theologies can cultivate violent stances. But this is a different, more specific argument than the identification of a generic category, 'religion', which by its nature is peculiarly conducive of violence. To examine violence and conflict requires looking at what Cavanaugh calls the 'lived historical experience' of Christians, Muslims, Jews and so forth.[28] At such a step, we are arguably removed from discussing 'religion' as a category distinct from consideration and categories of politics, the social, and economics. Rather, we would be more concerned with the practices and experiences of particular communities exercising an unalloyed mixing of such categories. The violent threat of religion, however, also feeds into our next rationale for religious liberty: maintaining the neutrality of the state and, on some accounts, public spaces more generally.

[25] Cavanaugh (n 12) 21.

[26] That nationalism is treated differently is clear from a case like *Valsamis v Greece* (1997) 24 EHRR 294, 305-07 (holding that Jehovah's Witness children compulsory participation in a school military parade was not religious or philosophical indoctrination, but rather a neutral national act of patriotism).

[27] See notably Eric Voegelin, 'The Political Religions' in *The Collected Works of Eric Voegelin: Modernity Without Restraint*, vol 5 (University of Missouri Press 2000) 19 and Robert N Bellah, 'Civil Religion in America' (1967) 96 Daedalus 1.

[28] Cavanaugh (n 12) 5.

II Neutrality

In this section, I discuss arguments that see religious freedom as a component of, perhaps the prime component of, a requirement that public authorities remain neutral as to conceptions of the good. This justification informs religious freedom adjudication in three ways. First, it shapes what is considered permissible in political life, determining the legitimate space or sphere that religion may occupy. In this the neutrality argument continues the characterisation of the state developed through the civil peace rationale. The state, or 'political' life, is where the controversy of religion can be transcended, creating a scepticism of state involvement in religion. Second, this transcending cultivates a vision of public and political life as formed by 'reason'; a common life is created outside of religious difference by a culture of justification based on 'reasonable' arguments. In this sense, religious freedom adjudication participates in shaping obligations of citizenship. Third, underlying the exclusion of religion from political life and the appeal to a common reason is the idea that each individual should be treated with equal respect as to his or her conception of the good life. Society, this argument continues, is characterised by a pluralism of reasonable ways of life. Each should be permitted to flourish at the private level, only curtailed by political authority when our commonly held or commonly available reason would find this reasonable.

I discuss, in particular, aspects of the work of Rawls and Ronald Dworkin, beginning with the former and focusing on how their writing has shaped arguments for religious freedom. Rawls and Dworkin are identified not to provide an exhaustive account of 'theories of liberalism', but rather in recognition of their influence on the discourse of law and religion and religious freedom scholars. Writing of Rawls, Kristen Deede Johnson makes a statement that could equally apply to Dworkin: his work 'serves as a benchmark of most current

political thought [or religious liberty discussion], providing a common basis for discussion and dissent.'[29] After discussing the theories of neutrality, equal concern and respect, and reason-based decision-making developed by Rawls and Dworkin, I turn to the difficulties faced by religions on these accounts.

For Rawls, the central problem of a modern democratic society is how to maintain a common political life against the backdrop of the 'fact of reasonable pluralism', a contention echoed in religious freedom literature.[30] Rawls discussed two possible solutions to what he described as the threat of religious-based mortal conflict.[31] First, a prudential response to the spectre of warring sects. Here, the state might simply be agreed to as 'a common Power to keep them all in awe'.[32] Second, a moral response, in which, for reasons of respect, free and equal citizens give up 'comprehensive doctrines of truth or right' when addressing each other as citizens.[33] The latter was Rawls' own approach.[34]

Rawls considered that it was too contingent for a group to accept that it cannot impose its own orthodoxy simply out of a desire for stability and the avoidance of conflict.[35] This kind of acceptance raised the possibility that the group was simply waiting in the wings for a more opportune time. Rawls consequently wanted different groups and individuals within

[29] Kristen Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Difference* (CUP 2007) 28.

[30] See Rawls, 'Public Reason Revisited' (n 17) 129, 131; Rawls, *Political Liberalism* (n 15) xvi. For its echo, see e.g., Lindholm (n 18) 19, 22.

[31] See Rawls, *Political Liberalism* (n 15) xxxvi.

[32] See Stanley Fish, 'Mission Impossible: Settling the Just Bounds Between Church and State' (1997) 97 Colum L Rev 2255, 2273 quoting Thomas Hobbes, *Leviathan* (CB Macpherson edn, Penguin Books 1968) 185.

[33] Rawls, 'Public Reason Revisited' (n 17) 132.

[34] Rawls, *Political Liberalism* (n 15) xxvi.

[35] Rawls, 'Public Reason Revisited' (n 17) 150.

society to give up on the quest to shape political life with their own 'comprehensive doctrines of truth and right' for the 'right reasons'.[36] A 'comprehensive doctrine' is a doctrine adopted by the individual which covers the 'major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner', and which determines conflicts of value in pursuit of a good life.[37] And 'right reasons', according to Rawls, entail the adoption of a procedure, whereby the exercise of political power is proper only when its justification rests on reasons that are acceptable to other citizens acting reasonably.[38] This, he contended, would ensure that the exercise of political power was characterised by 'civic friendship', the treating of others as 'free and equal citizens' through the offering of reasons commonly available to all persons, rather than being 'dominated or manipulated, or under the pressure of an inferior political or social position'.[39]

On this basis, Rawls contended, an 'overlapping consensus' would develop between reasonable doctrines agreeing on 'principles of political justice'.[40] By 'political' Rawls meant the application of arguments by, most notably, courts and legislatures, but also by citizens when voting (as a moral if not legal duty) considering 'constitutional essentials' (political rights and liberties within a constitution) and matters of basic justice.[41] Importantly, each reasonable citizen, according to Rawls, would accept within this

[36] ibid

[37] Rawls, *Political Liberalism* (n 15) 59.

[38] See Rawls, 'Public Reason Revisited' (n 17) 136-37.

[39] ibid

[40] ibid 143 and Rawls, *Political Liberalism* (n 15) xx-xxi.

[41] Rawls, 'Public Reason Revisited' (n 17) 133, 135-36, 143.

overlapping consensus that reason requires a 'political' conception of justice, understood as neutrality towards '[s]ystems of ends'.[42]

The primary goal of political life according to this type of argument is, to quote Judith Shklar, securing 'the political conditions that are necessary for the exercise of personal freedom'.[43] The state must, accordingly, be neutral as to conceptions of the good in order to respect the adoption of differing conceptions by autonomous, equal individuals.

(a) Disambiguating Neutrality

There are different ways in which the 'neutrality' argument might be applied. In the European context, some have argued that a requirement of neutrality challenges church establishment, a position never accepted by the ECtHR.[44] Of course, a non-discrimination obligation in respect of public law privileges given to one or more religions may put pressure on any establishment or close church-state relationship.[45] Neutrality has at times been appealed to in specific contexts, for example state attempts to prevent the ownership of property or to interfere with the appointment of leaders within a religious group.[46] Neutrality,

---

[42] See John Rawls, *A Theory of Justice* (Harvard University Press 1971) 19 and the discussion in William A Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (CUP 1991) 80.

[43] See Peter Berkowitz, *Virtue and the Making of Modern Liberalism* (Princeton University Press 1999) 4-5 quoting Judith Shklar, 'The Liberalism of Fear' in *Political Thought and Political Thinkers* (Chicago University Press 1998) 3.

[44] See Heiner Bielefeldt, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1 Ox J Law Religion 15, 24 (arguing against established churches). On European law, see *Darby v Sweden* (1991) 13 EHRR 774 [45] (noting the existence of state churches at the time the ECHR was drafted, and no 'non-establishment' clause in Article 9) and *Lautsi v Italy* (2012) 54 EHRR 3 [68] (Grand Chamber) (stating it is for a member state to decide whether to perpetuate a religious tradition).

[45] See *Religionsgemeinschaft Der Zeugen Jehovas v Austria* (2009) 48 EHRR 17 [96] (any difference of treatment must have an 'objective and reasonable justification').

[46] See e.g., *Manoussakis v Greece* (1997) 23 EHRR 387 [47] and *Hasan* (n 6) [78].

in this respect, could perhaps better be understood as respecting institutional or group autonomy as part of a vision for civil society. But the Court also states, in more Rawlsian tones, that the requirement of religious freedom creates a 'duty of neutrality' that is 'incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed'.[47] The state is 'the neutral and impartial organiser of the exercise of various religions, faiths and beliefs.'[48] Arguably, these statements point towards neutrality as required for equal flourishing of different beliefs. But how this should be operationalized is debated.

Galston provides the following useful breakdown of possible neutrality meanings: (a) neutrality of opportunity; (b) neutrality of outcome; (c) neutrality of aim; and (d) neutrality of procedure.[49]

The first two forms of neutrality can broadly be characterised as focusing on consequences, whether the political order allows different ways of life to exist and whether these ways are not favoured or hampered. This form of neutrality is familiar to religious freedom jurisprudence through accommodations of religious practices in response to a conflicting generally applicable law or policy. Laws may indirectly favour a, most likely majority, position, impacting minority practices in a disproportionate manner. For example, if a law determined that for the health of the society Sunday would be a national day off from work this would, perhaps unintentionally, disproportionately impact Jews and Muslims compared to Christians or atheists. The former would potentially be required to take an additional day off of work, the new Sunday requirement adding to the Jewish Sabbath or

[47] See, e.g., *Şahin v Turkey* (2007) 44 EHRR 5 [107] (Grand Chamber).

[48] See, e.g., ibid and *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1 [91] (Grand Chamber).

[49] Galston (n 42) 100-01.

Muslim Friday prayers. The law itself may not be illegitimate but, in the argument of Jocelyn Maclure and Charles Taylor, 'inasmuch as [majority norms] indirectly favor the majority, measures of accommodation must sometimes be taken'.[50]

Why might this be important? Certainly it is contested amongst different courts.[51] The ECtHR has historically been unfavourable to claims of religious liberty against laws of general applicability, but this appears to have changed.[52] A number of reasons have been offered for this kind of accommodation. First, accommodation may recognise that the law was not intended to apply to the particular case.[53] A Sikh's kara bangle may not fall within the reasons for banning jewellery in schools (avoiding indications of wealth, for example). Second, accommodation re-establishes 'equity within the terms of social cooperation'.[54] A policy may not have intentionally favoured a particular group, but the act of policy-making is more generally shaped by majority norms. To ensure continual inclusion of different groups in public life may require exceptions to this public norm through accommodations.[55] Third, in a related way, some have made an identity claim. The Constitutional Court of South Africa argues accommodation is a requirement of 'common citizenship' which 'depends on recognising and accepting people with all their differences'.[56] Fourth, accommodation may

---

[50] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 68.

[51] See *Employment Division v Smith* 494 US 872, 888 (1990) (Scalia J) (requiring accommodation for religious practice against neutral, general laws would be 'courting anarchy').

[52] See *Eweida v United Kingdom* App no 48420/10 (ECtHR, 15 January 2013) [94] (concluding the UK court's upholding of British Airway's general employee uniform policy, without exception for the claimant's cross, was contrary to Article 9).

[53] See Maclure and Taylor (n 50) 75.

[54] ibid 68, 75.

[55] ibid

[56] *MEC for Education, Kawzulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) [60] quoting *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* (2006) 1 SA 524 (CC) [60].

reflect the reality of competing loyalties. State-law may not be the only normative pull on a person's life; he or she may experience a conflict with the law as a conflict with a social reality, a group's order that existed prior to state-law.[57] These reasons need not be tied to a neutrality argument; each one can be discussed with reference to other rationales (social cohesion, personal autonomy, a competing normative order). But they can also form the basis for a general argument, identified by Douglas Laycock, requiring that the government 'minimize the extent to which it either encourages or discourages religious belief or practice'.[58]

William Galston notes that the argument for *complete* consequences-based neutrality is now largely repudiated as practically unworkable.[59] Government policies will almost invariably create conditions in which some ways of life are afforded more space than others. Moreover, this is desirable. General prohibitions against assault or types of assault may cover female genital mutilation, with *wanted* adverse consequences for some traditions. For these reasons, where a general law conflicts with a religious practice, any accommodation is typically assessed through a proportionality lens; for example, asking whether the application of the general law to the practice in question pursues a legitimate aim in a proportional manner having regard to the pressing nature of the social need and the right in question. It is here in this type of assessment, however, that 'neutrality of procedure' receives more attention.[60]

---

[57] See Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) 59 Wash & Lee L Rev 3, 15 and 24.

[58] Douglas Laycock, 'Formal, Substantive, and Disaggregated Neutrality Toward Religion' (1990) 39 DePaul L Rev 993, 1001.

[59] See Galston (n 42) 100-01.

[60] See Gidon Sapir, 'Religion and State – A Fresh Theoretical Start' (1999) 75 Notre Dame L Rev 579, 612.

Whether the government can or cannot curtail the religious practice of a person, a liberty interest, is said to depend on *reasons* that are 'neutral' or 'public'. Dworkin expresses this as a requirement imposed on government authority that any constraint on a citizen must be for reasons 'consistent with equal concern and respect'.[61] He argues justice requires as a 'constitutive morality' that the government be neutral as between individuals' different conceptions of the good.[62] This promotes, he continues, 'ethical freedom', the freedom of the individual to develop 'convictions' that identify 'the value and point of human life and the relationships, achievements, and experiences that would realise that value in his own life.'[63] For Dworkin, consistency with equal concern and respect means that reason must appeal to infringements of the political rights of others when curtailing a practice.[64] Such a reason would, in Denise Meyerson's words, 'speak to everyone's perspective'.[65]

An example might help.[66] When a Hindu community in Wales claims that the slaughter of its temple bullock infected with tuberculosis would be an act of sacrilege, the court appeals to the harm to others' livestock as a 'neutral' acceptable ground for slaughter. In contrast, if the court dismissed the community's challenge on the basis that the bullock was not sacred such that killing it would not be 'a serious desecration of the temple',[67] or that

[61] Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 209.

[62] ibid 203.

[63] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 72.

[64] Dworkin, *A Matter of Principle* (n 61) 196, 206.

[65] Denise Meyerson, *Rights Limited* (Juta & Co Ltd 1997) 17.

[66] See *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893.

[67] ibid [3].

treating the bullock as such was not indicative of a good life, this would show 'contempt for the value of other people's lives.'[68]

(b) Some Difficulties with Neutrality

On this account of neutrality of procedure or reasons, religious freedom guarantees serve two roles. First, they are a species – perhaps the primary or prototypical species – of a more general concern for personal freedom. As noted, the purpose of neutrality is to secure the conditions for exercising personal freedom, including typically religious freedom.[69] This view will be discussed further below when considering personal autonomy as a rationale for religious freedom.[70] Second, religious freedom guarantees inculcate within the polity a culture of 'reason'.[71] Fundamentally, this frames religious freedom adjudication as transcending difference through reason in the face of pluralism. Jeremy Waldron refers to the demand posed by theorists of public reason: that 'social order should in principle be capable of explaining itself at the tribunal of each person's understanding'.[72] For Rawls and Dworkin, questions of liberty, concerning an ordered polity, are structured around a natural, common reason available to all persons regardless of different traditions. In this sense, the tribunal is 'neutral'. This can be understood as continuous with the civil peace rationale: the state secures the polity against the threat of difference, establishing civil peace and Rawls'

[68] Dworkin, *Is Democracy Possible* (n 63) 21.

[69] See above n 43 and accompanying text.

[70] See below Part III.

[71] See also Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 48 (arguing constitutional adjudication is typically characterised by a brand of 'public reason').

[72] Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 Phil Q 127, 149. See also Avihay Dorfman, 'Freedom of Religion' (2008) 21 Can J L & Juris 279, 289-90.

'civic friendship' through common reason.[73] Neutrality, then, has two roles: securing personal freedom and limiting personal freedom by publicly acceptable reasons.

Is it neutral to base religious freedom on the promotion of personal freedom, equality of respect and concern, and a prohibition against the adoption of comprehensive views?[74] Dworkin and Rawls' theories of neutrality, with concomitant focus on individual conceptions of the good, have been criticised on a number of bases. Here, I focus on two: the conception of the person and the conception of justice at work in these theories.

Dworkin argues that equal concern and respect is simply the shape of justice, in contrast to the adoption of a conception of the good life. But this has been criticised. Galston, for example, characterises theories of neutrality, such as Dworkin's, as containing a theory of the good. He calls this 'rationalist humanism'.[75] Central to rationalist humanism is an understanding of the person as driven by a capacity to form and revise his or her conceptions of the good in light of rational constraints.[76] Communitarians like Michael Sandel go a step further, and directly critique this view of the person. Sandel's target is Rawls, who he argues promoted a 'deontological liberalism'.[77] Here, Sandel argues, the person is defined by a form of Kantian metaphysics, in which the right of independent selves to self-legislate identity is prioritised over any attachment to the good or particular aims. The

[73] See also András Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 ICON 605, 609 ('[t]he idea of the modern constitution reflects a consolidation of the state based on national rather than religious identity').

[74] See, e.g., Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (2006) 55 ICLQ 929, 935.

[75] Galston (n 42) 92-93.

[76] ibid

[77] See Michael Sandel, *Liberalism and the Limits of Justice* (CUP 1982) and the discussion in Deede Johnson (n 29) 36.

conception of the person is non-teleological – there are no specific ends to which the person's actions are ultimately orientated. And, moreover as Sandel emphasises, identity on the deontological liberalism view is prior to any constitutive attachments that would form or determine teleological ends – family, community, nation, people, or religion.[78] (Dworkin and others have responded to these arguments, and I discuss this further below.)[79]

This understanding of the person, pursuing his or her own conception of the good, also gives rise to a particular understanding of justice. For Rawls, the primary good necessary for the advancement of all reasonable conceptions of the good and for political stability was self-respect. He characterised this as self-confidence to pursue our own conception of the good.[80] To challenge a person's view of the good is therefore contrary to 'self-respect'. One could query whether this works against dialogue, challenge, and persuasion between different conceptions of the good.[81] Luke Bretherton, for example, describes Rawlsian 'self-respect' as the 'modern attempt to replace politics with procedure.'[82] Rather than politics concerning a contested question over how to pursue the common good, understood, for example, as the pursuit of human flourishing (Bretherton's description), Rawls' concept of public reason characterises the political as a secular space; that is, a space empty of collective goals other than maintaining 'self-respect' regulated by public reason.

Indeed, Rawls' political conception of justice would intentionally exclude 'politics' as described by Bretherton, which has overtones of a Thomistic understanding of justice. For

[78] See Sandel, *Liberalism* (n 77) 179.

[79] See Part III (c).

[80] Rawls, *Political Liberalism* (n 15) 318.

[81] See Deede Johnson (n 29) 63.

[82] Luke Bretherton, *Christianity and Contemporary Politics* (Wiley-Blackwell 2010) 50.

Aquinas, justice as a general virtue entailed coordinating the proper good or end of individual persons with the common good or end of the human community. Society consists in a community united in a shared, but continually innovated, understanding of individual and collective goods.[83] Adopting such a comprehensive view, on the Rawlsian account, risks the political stability achieved by equal respect.[84] It threatens a spectre of perpetual conflict or, by appealing to an apparently monolithic conception of value, becoming in Richard Rorty's pithy phrase a 'conversation stopper'.[85] The Thomistic conception of justice is accordingly 'unreasonable'.[86] On this basis, MacIntyre labelled 'liberalism' a particular tradition, in which every individual is free to 'live by whatever theory or tradition he or she may adhere to, unless that conception of the good involves reshaping the life of the rest of the community'.[87]

In religious liberty terms, this furthers containment. To be sure, as this thesis discusses, the Christian tradition has always promoted a kind of distinction between cultivating a life of complete virtue and the role of coercive law. Aquinas, for example, considered that the law should not overburden those lacking in virtue.[88] Augustine considered coercive rule is foreign to the city of God.[89] One could read this as consistent with Rawls' view that comprehensive, religious traditions may contribute to the 'background

[83] See Thomas Aquinas, *The Summa Theologiae of Saint Thomas Aquinas* (NovAntiqua 2008) II-II.58 and the discussion in Daniel M Bell, *Liberation Theology After the End of History: The Refusal to Cease Suffering* (Routledge 2001) 78.

[84] See Deede Johnson (n 29) 54.

[85] Richard Rorty, 'Religion as Conversation-Stopper' (1994) 3 Common Knowledge 1.

[86] See, e.g., Rawls, 'Public Reason Revisited' (n 17) 132 (political liberalism does not engage those who 'struggle to win the world for the whole truth').

[87] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth 1988) 336 (*WJWR*).

[88] See Tracey Rowland, *Culture and the Thomist Tradition: After Vatican II* (Routledge 2003) 139-40.

[89] See Chapter Five, Part IV.

culture' of civil society, distinct from politics. But what is lost in this reading is the idea that the church can be the shape of political society. That is, that rather than being one participant in civil society, church can be, in MacIntyre's terms, the shape of the *polis*, the 'form of social order'.[90] On this view, the limited role of law is entirely within the Christian tradition's understanding of moral instruction and community formation.[91]

There is a common thread running through these criticisms: equal concern and respect or self-respect would rob us, through a fictional account of the person, of the traditions and communal patterns or narratives necessary for debating and building a common life. But we can add to this. Arguably, the neutrality or equality conception can also lead to 'religion-free zones'. I discuss this further in Chapter Four.[92] Courts and some commentators have concluded that religion, exercised publicly by state and sometimes non-state actors through words, deeds, or symbol, challenges the freedom of others not to adopt a religious persuasion or challenges their way of life, their dignity. In other words, it denies equal respect to other inhabitants of the public square. Neutrality then takes the form of eliminating religion from a particular context.

One does not need, however, to see religious expression as contrary to the dignity of a person or equal concern and respect in order to create a 'religion-free zone'. Rivers discusses secularism-as-separation and secularism-as-indifference and argues that the former carries within it the roots of the latter.[93] Neutrality, as Rivers critically discusses, could simply mean

[90] MacIntyre, *WJWR* (n 87) 133; Bretherton (n 82) 47-48.

[91] See further Chapter Five, Part IV.

[92] See Chapter Four, Part I.

[93] Rivers, *The Law of Organized Religions* (OUP 2010) 330-34.

indifference 'towards religious expression as purely personal ornamentation'.[94] Religion is separated from politics to ensure civil peace and also to ensure respect for all equally personal conceptions of belief, practice, and the good. But at this point there is arguably an inevitable relativizing of religion as a species of a more general category of private concern. On such an understanding, it becomes difficult to see why churches and organised religions should be 'singled out' from other choices as able, for example, to discriminate in their employment practices. This is a problem arguably exacerbated by the focus on personal autonomy in religious liberty discourse, a rationale to which I now turn.

III Personal Autonomy

For many writers, promoting personal autonomy is the central rationale of religious liberty. Vickers argues that freedom of religion flows from the dignity and autonomy of each person, their 'capacity for high level consciousness or conscience, independent thought and the potential to develop an individual concept of the good.'[95] Timothy Macklem understands religious freedom to be a component in 'securing our general freedom to be ourselves, that is, our freedom to act in accordance with our personal convictions'.[96] Carolyn Evans argues that 'religion or belief may be part of the deepest self-definition of its adherents and their fullest expression of their commitment to living in compliance with their conception of the good.'[97] On these views, religious freedom is based on a right to autonomous development of one's life.

---

[94] ibid 331.

[95] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 38.

[96] Timothy Macklem, *Independence of Mind* (Oxford University Press 2006) vii.

[97] Carolyn Evans, *Freedom of Religion Under the European Convention of Human Rights* (OUP 2001) 32.

A distinction needs to be made from the outset. In the next chapter, I will raise (and endorse) the argument expressed in *Dignitatis Humanae*, namely that worship and religious belief requires free consent be given to the object of worship as true in order to be true worship. This is a form of subjectivity that points to the illegitimacy of coercion.[98] 'Subjectivity' here means that each unique individual must be drawn towards accepting truth as one's own love, understanding it perhaps partially, and must then respond to truth by exercising his or her own unique talents or gifts in relationship with others. This subjectivity contrasts 'personal autonomy' in religious liberty discourse, which is typically understood as entailing moral or value pluralism, respecting the unique set of ends that an individual may choose to pursue. Personal autonomy is, in this respect, complementary to equal concern and respect and neutrality.[99]

In this section, I will raise this understanding of autonomy with particular reference to Joseph Raz. I will then discussion how autonomy is often viewed as central to the value of 'dignity', invoked increasingly in legal discourse. Finally, I will discuss the contention that religious freedom is part of a vision of multiculturalism. Often autonomy and multiculturalism are paired, the latter forming an argument attempting to ameliorate any perceived individualistic bias in the personal autonomy rationale.[100]

In his influential work, *The Morality of Freedom,* the legal philosopher Raz argues that an essential ingredient of individual well-being is 'that people should make their own

[98] See Chapter Two, Part II (b).

[99] See, e.g., Vickers (n 95) 36-40.

[100] See further Chapter Five, Part II (a).

lives'.[101] The autonomous person, Raz argues, is a '(part) author of his own life … controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'[102] More general in orientation, this particular work of Raz's makes less explicit references to questions of religious liberty than the works of Rawls or Dworkin discussed above. Nevertheless, in much the same way as with Rawls and Dworkin, Raz's arguments on the shape of political morality, principally the requirements of personal autonomy, have been adopted by authors writing explicitly on religious freedom. Jane Norton, for example, draws from Raz's 'influential' account to argue 'autonomy is … the best liberal normative justification for religious freedom. If we value personal autonomy then we must value autonomy in relation to religious matters too.'[103] Others have similarly relied on or drawn support from Raz's account when articulating autonomy as a leading value.[104]

As Raz's description of the autonomous person makes clear, value is created through successive decisions. He adds, however, that this does not mean that value is self-created through choice; rather, he contends that value is independent but augmented, transformed, or solidified through choice.[105] This allows him to argue that there are boundaries to what can be considered a good life, what he calls 'morally acceptable options'.[106] Still, most notably, a good life is one characterised by choices and exercising the capacity to choose.[107] The autonomous exercising of choices, Raz argues, requires that a person have a variety of

[101] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 369.

[102] ibid

[103] Jane Elizabeth Norton, 'Law and Religious Organizations: Exceptions, Non-Interference and Justification' (DPhil, University of Oxford 2011) 19, 21.

[104] See, e.g., Carolyn Evans (n 97) 29-30; Vickers (n 95) 38-39; and Ronan McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 110.

[105] Raz (n 101) 389.

[106] ibid 378.

[107] ibid 371, 189-91.

options available to choose from.[108] Making successive decisions within this variety, the person can, and arguably should, be heterogeneous in his or her pursuits, an ideal developed in 'the industrial age and its aftermath with their fast changing technologies and free movement of labour'.[109]

Raz, in explicit contrast to Rawls, argues that political morality is 'perfectionist', that is, it promotes a conception of the good of the person.[110] On this basis, he argues that the state has an obligation to create an environment with an adequate range of options, one in which options facilitative of personal autonomy are encouraged and illiberal options diminishing a person's autonomy potentially discouraged.[111]

Fundamentally underlining Raz's account of the centrality of personal autonomy is moral or value pluralism. This is the view that there exists 'a multitude of incompatible but morally valuable forms of life'.[112] Value pluralism, Raz argues, 'naturally combines with the view that individuals should develop freely to find for themselves the form of the good which they wish to pursue in their life.'[113] Different forms of life, Raz contends, exemplify different 'virtues' which cannot be combined in the one life. For example, a woman can either commit herself to being a nun or a mother; she will obtain the virtues of her chosen life, but not of the other.[114] Clearly, 'virtue' is being used in a different sense to its classical understanding,

[108] ibid 204.

[109] ibid 369.

[110] ibid 133.

[111] ibid 407-10, 416-18, 424.

[112] ibid 133, 373-74.

[113] ibid

[114] ibid 395.

which considered a virtue to be a possession, like temperance, that provides a disposition to act in a certain manner, for example, commitment to the tedium of a nun's study or restraint in the face of unruly children.[115] Different roles, in this understanding of virtue, may nevertheless be conducive towards a virtuous life and, indeed, towards a single end. But 'virtue' used within the framework of moral pluralism appears to be a byword for 'end', meaning that there is a multiplicity of potential ends exemplified in a multiplicity of lives. This interpretation is supported by Raz's understanding of well-being as success from the individual's point of view. The adoption of particular goals indicates that the value of the goals is in part independent of choice.[116] But in choosing and implementing a course of action, a form of the good, the individual, Raz argues, sets goals that matter to him; a successful life is the achievement of one's goals.[117]

As noted, Raz is not explicitly concerned with religious liberty as such. Nevertheless, notable religious freedom scholars have adopted his arguments. But the prioritising of personal autonomy has raised a number of difficulties: Does religion cease to be a category of concern once it becomes a species of personal autonomy? Is the autonomy argument individualistic and undermining of religious groups? Before engaging with these questions, however, I will explore one direction the argument for autonomy and value pluralism has taken. For some, the public duty to promote autonomy – the capacity of individuals to develop their own conception of the good – is contrasted with the dangerous monolithic value proposed by religion. This is further magnified by an understanding of what autonomy consists in: following reasoned evidence, distinct from belief, to form one's view of the good. Combined, this raises a question: why protect religion if it is contrary to autonomy and a

[115] See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (3rd edn, Duckworth 2007) 191.

[116] Raz (n 101) 308.

[117] ibid 289, 292.

threat to the public domain? This is not a framing of autonomy necessarily endorsed by Raz, nor is it the necessary conclusion from his arguments, but it is one, arguably implicitly influential, version of the autonomy-value pluralism account. Macklem gives the clearest articulation.

(a) Cultivating Reason Against Religion

As noted, Macklem considers that religious liberty must be justified as part of acting 'in accordance with our personal convictions … [and also] more fundamentally, in securing the conditions under which we can become ourselves.'[118] For Macklem, however, living a life characterised by reason is the *sine qua non* of human wellbeing or becoming ourselves.[119] Religious liberty, Macklem argues, must accordingly be justified within this central norm of personal autonomy, a person seeking to live an autonomous life of reason. This has two consequences in his writing: first, a stark contrast between faith or religion and reason; and second, the characterisation of religion as a threat to the secular order.

For Macklem, human well-being is not dependent upon religious faith. Indeed, 'the exercise of rational thought in relation to the selection and pursuit of goals in life' is contrasted with religious faith.[120] Macklem characterises faith as the belief in something despite the absence of any possible reason 'or more troubling perhaps, despite the presence of good reasons not to believe.'[121] He asserts that most people have given up believing in a

[118] Macklem (n 96) vii, 121.

[119] ibid 143.

[120] ibid

[121] ibid 136.

religion as fundamental to the purpose of life.[122] However, he contends that for some people such progression 'is essentially intellectually inaccessible or psychologically unendurable.'[123] These people are, accordingly, allowed to have faith to 'step in'.[124] But this supplementary role must be limited. Macklem argues faith can step-in where this would enhance an individual's well-being and only 'where reason is inaccessible'.[125] For example, death remains genuinely mysterious and psychologically difficult for some.[126] Accordingly, Macklem argues Christian belief in the Resurrection is permitted, but as a form of psychological crutch.

Because faith is belief without reason, Macklem characterises it as monolithic and command-orientated. This means it must be differentiated from the secular sphere of politics, which, Macklem argues, is characterised by value pluralism. Faith, a leap into the unknown, is characterised as 'singular, stable and partial' (where 'partial' means monolithic and jaundiced).[127] In contrast, secular reason is 'plural, comprehensive and evolving'.[128] Different lives generate different kinds of value.[129] Macklem continues by arguing that secular government must recognise this by not allowing religion to exercise a 'straightening effect'.[130] Indeed, Brian Leiter, building off of Macklem's arguments, contends that religious

[122] ibid

[123] ibid 136, 144.

[124] ibid

[125] ibid

[126] ibid 145.

[127] ibid 148.

[128] ibid

[129] ibid 124.

[130] ibid 133 and 149.

liberty should not be accorded *any* special treatment.[131] Religion, he argues, is categorical (monolithic and command-orientated) and does not answer to 'ordinary standards of evidence and rational justification, the ones we employ in both common-sense and in science'.[132] Consequently, he concludes, giving religion any accommodation would encourage lives lacking in reason and full of menacing fervour.[133]

Religious liberty on this account appears as a way-station along the perpetual march of secularisation – 'a ladder up which our ancestors climbed, but one that now should be thrown away', to quote Rorty.[134] Religion is differentiated from a secular order of politics, and then further retreats from the lives of individuals as more and more people adopt a life of reason, which allows developing one's own conception of the good life. Macklem describes his argument as a *reflection* of the 'story of the ascending of reason', which, he argues, '[t]here is no reason to assume … has now come to an end.'[135] This is a problematic self-characterisation. In the face of some 82% of humankind espousing a religious conviction,[136] as well as arguments concerning religion's 'resurgence', Macklem's work can only be read as advocacy.

There are fundamental difficulties with this account of religion and accordingly religious liberty. Macklem's characterisation of faith is impoverished and his appeal to an apparently uncontroversial account of reason is problematic. He conceives of faith as a 'leap

---

[131] Brian Leiter, 'Why Tolerate Religion?' (2008) 25 Const Comment 1, 15.

[132] ibid

[133] ibid 25-26.

[134] Richard Rorty, 'Religion in the Public Square: A Reconsideration' (2003) 31 JRE 141.

[135] Macklem (n 96) 153-54.

[136] Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009) 121.

in the dark', concerned with obedience to particular propositions or assurances for the psychologically weak.[137] This is a voluntaristic understanding of religion, and one 'shared by modern atheists, who understand religion to consist essentially of dubious factual claims.'[138] Macklem and Leiter's arguments in this sense are an explicit rejection of metaphysical accounts of religion. On these accounts, God is not simply the power of raw command. Rather, religion might entail a conversation concerning God as the transcendent cause of and continual donor of creation, exercising a pull on humans towards a teleological reality of objectively good human ends. Exploring this is mediated through thought, actions, and relationships, a tradition seeking what it means to live in right relationship. But Leiter and Macklem opt for some kind of naturalism or materialism.[139] They appeal to 'common sense' and 'science' as the basis for these claims, as though these are unproblematic categories capable of answering all metaphysical questions.

Further, value pluralism itself is contestable. It conceives of individuals as creating different, plural values. But pluralism could be conceived differently. It could, for example, be understood as difference within limits contributing to a common good. Such an understanding may point to a transcendental horizon in which our very differences cohere and participate.[140] Macklem rejects this, but his rejection, as Andrew Koppelman argues, is its own 'kind of faith'[141]

---

[137] Macklem (n 96) 137.

[138] See Andrew Koppelman, 'How Shall I Praise Thee? Brian Leiter on Respect for Religion' (2010) 47 San Diego L Rev 961, 975.

[139] See Leiter (n 131) 19.

[140] See Chapter Five, Part IV (b)(ii).

[141] Koppelman (n 138) 979.

But it is not only that Macklem's argument is a kind of 'faith'. More than this, his account of religious liberty is arguably strongly permissive of state power. He focuses on religious liberty operating only where compatible with the well-being of the individual. And this well-being is governed by 'reason'. In practical terms, this poses a contest between a government practice or law based on rational arguments – from non-discrimination through to land use requirements – and a religious practice understood as non-rational faith. But here rationality is also the judge. The weight of this contest is sufficiently angled towards state reason so as to ensure, on Macklem's account, the continuation of secularisation as declining religious practice.

(b) Religion's Diffusion into 'Choice'

Macklem's attempt to identify boundaries for the protection of 'faith' is based on a real concern. If religious liberty is a species of the individual's pursuit of personal autonomy, why single out religion, or any other subjective account of value, for specific protection? Raz argues that very few people believe in a right to liberty as such. Such a right would be too indiscriminate; it would equally protect 'the liberty to eat green ice-creams and to religious worship.'[142] But the concern is this: that in framing religion as a species of autonomy an inevitable relativizing process is precipitated, in which religion becomes increasingly diffuse as a category or it is viewed as simply another equal form of choice ('individualized preferences, as mysterious and unregulatable as a preference for a certain hair style or flavor of ice cream').[143] Eventually, the contention is, we reach the new Absolute – that all choices, as preferences, are simply instances of an individual's experience or search for authenticity.

[142] Raz (n 101) 245-56.

For a number of theorists, religious liberty is only a species of a more general concern for, to take Dworkin's term, 'ethical freedom'.[144] By 'ethical freedom' he means the freedom to develop 'convictions' which identify 'the value and point of human life and the relationships, achievements, and experiences that would realize that value in his own life.'[145] Dworkin argues this typically concerns family, sex, and religion.[146] Determining one's sexuality and realising it in action, for example, is equally a matter of the individual's 'ethical freedom'.[147] Maclure and Taylor similarly argue that freedom of religion must be understood as a subcategory of 'convictions of conscience', 'core beliefs and commitments', or exercises of judgement as to 'moral identity'.[148] They note that this can play into an argument that religion is simply an 'expensive taste', one which, like any other taste, must bend to the needs or commitments of state law.[149] Aware that the boundary of their 'core beliefs' conception is hazy, they nevertheless hope that a distinction can be maintained. I think this is doubtful. In Chapters Three and Four, I discuss the increasing pressure placed on the category religion, its diffusion into spirituality, personal belief narratives, or authenticity (the discovery of our own way of living).[150] I argue this diffuse understanding of religion, generated by an increasing focus on personal autonomy, raises questions as to why we should be concerned with *religious* liberty and the weight it should be given. But Dworkin's argument for ethical

---

[143] Fish (n 32) 2268.

[144] Dworkin, *Is Democracy Possible* (n 63) 61.

[145] ibid 72.

[146] ibid 73.

[147] ibid

[148] Maclure and Taylor (n 50) 13, 76, 90.

[149] ibid ch 8.

[150] See Chapter Three, Part III and Chapter Four, Part III.

freedom, framed more recently by an appeal to human dignity, illustrates the potential problems.

In his recent *Justice for Hedgehogs*, Dworkin argues that human dignity consists in two ethical principles: self-respect and authenticity.[151] Each person, he writes, must strive for his or her life to be a 'successful performance' (self-respect), identifying 'what counts as success in his own life' through the cultivation of a 'style' or 'way to live that grips you as right for you' (authenticity).[152] Respecting human dignity, so understood, is the fundamental characteristic of political morality.[153] As discussed above, Dworkin argues that justice requires as its 'constitutive morality' that the government treat individuals' decisions or convictions, cultivating a way of life, with equal concern and respect.[154] In developing these arguments, Dworkin rejects a religious understanding of dignity, often narrowly construing religion in a voluntaristic manner as entailing following the commands of God to act well, like a 'detailed moral rule book'.[155] In the absence of this command-based God, which cannot alone give rise to a moral obligation in any event, he asks what morality *really* requires. '*We* are the planners', Dworkin writes.[156] And 'we' consists of a collection of individuals who are each an 'ephemeral singularity'.[157]

[151] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 203-04.

[152] ibid 203-04, 209.

[153] ibid 2.

[154] See above n 62 and accompanying text.

[155] Dworkin, *Justice for Hedgehogs* (n 151) 194–5.

[156] ibid (emphasis in original).

[157] ibid 198.

This account of human dignity poses a number of questions for religious liberty discourse, in particular, for present purposes: Does this account develop a relativistic understanding of self-determination, subsuming religion within a focus on the individual's own understanding of successful living or worth? And, if so, what weight should be given to such individual convictions or choices (including religious) when faced, for example, with a conflicting state law of general applicability?

Dworkin does develop a series of arguments contending value is objective, that there *is* a way for a person to live a successful life. He rejects a realist view – that morality or value depends on the existence of or cohering to an external reality or referent of moral force or truth.[158] Rather, he argues that the truth of our sense of value is entirely dependent on moral argument, the substantive case that can be made for a position.[159] The substantive case is developed, he contends, through seeking coherence in our values, as determined through our convictions. 'We must', Dworkin argues, 'find convictions that grip us strongly enough to play the role of filters'.[160] When faced by values that seemingly compete – for example, whether to tell a colleague truthfully that his or her draft paper is abysmal or lie and compassionately spare his or her feelings – we are tasked with finding coherence (a right position), rather than assuming a competition of values.[161] And such coherence of values is shaped by our 'dense', that is, reflective, convictions.[162] Dworkin imagines a quest: that a person must engage in a search for, reason out of, and integrate convictions that he or she

[158] ibid ch 4. For example, Dworkin argues that the existence of such a force would not add to our moral vocabulary. Its existence (an 'is') could not explain why we adopt as moral a particular action (an 'ought').

[159] ibid 37.

[160] ibid 108.

[161] ibid 121.

[162] ibid 108.

determines provide a worthy way of living well.[163] This, he argues, points to the reality of truth about values. A person, when faced with a decision, must act based on reasons, such that the live question is 'not whether moral or ethical judgments can be true, but which are true'.[164] Truth, he contends, remains centrally important because it maintains 'the idea that there is unique success to be had in inquiry'.[165]

Much of Dworkin's characterisation of objective value could fit other traditions, other ways, for example, of viewing human dignity. Seeking coherence or unity amongst values and framing the pursuit of successful living in terms of a quest could, for example, fit with an understanding of collective life as seeking true human ends for the person and community.[166] His focus on judgement, that a person must accede to convictions that grip him or her, could also be compared to the claim, found in *Dignitatis Humanae*, that personal, subjective assent is a condition of truth.[167] In this way, these contentions would not necessarily raise the questions noted above, namely whether we find here a relativistic notion of self-determination in which religion is simply one option for personal style amongst others. But Dworkin's argument, and its characterisation of objectivity, also points towards a wider appeal to personal autonomy – a capacity to determine our own way of life – that potentially bears upon religious liberty discourse in problematic ways.[168]

---

[163] ibid 108.

[164] ibid 25.

[165] ibid 121.

[166] See above n 83 and accompanying text (discussing Aquinas's characterisation of justice as a general virtue).

[167] See above n 98 and accompanying text and Chapter Two, Part II (b).

[168] See also Patrick Riordan SJ, 'Which Dignity? Which Religious Freedom?' in Christopher McCrudden (ed) *Understanding Human Dignity* (OUP/Proceedings of the British Academy 2013) (forthcoming).

Dworkin gives primary attention to *the responsibility to inquire* into successful living. He calls this 'moral responsibility'.[169] We must reason in the right way, avoiding irresponsibly acting arbitrarily or oscillating, for example.[170] Only then, and through comprehensive reflection, have we earned the right to live by our convictions.[171] This duty (to oneself, presumably) of personal or moral responsibility, Dworkin argues, gives rise to ethical independence – that we are free to cultivate our own way of living, style, or convictions.[172] A person must seek out, rigorously, what is right for him or her. Dworkin consequently writes that he is principally concerned with a 'method' of inquiry, not necessarily its ends.[173] But I suggest this creates at least an ambiguity as to what objectivity now refers to.

Arguably, objectivity is not in respect of a particular end, a good to which the person is drawn or seeks, but rather, potentially, the objective desirability of cultivating one's own way of living, set by methodological standards as to what one must do (the cognitive effort) in order to exercise this capacity rightly. Against my suggestion, it could be argued that the focus on method does not deny seeking true ends; method is simply how we undertake the pursuit. Consistent with this, Dworkin clearly does believe that some ways of living are more successful than others and he rejects relativism. Simply collecting matchbook covers, he argues, is not a successful performance of one's life.[174] Hedonism, while a permissible way

[169] Dworkin, *Justice for Hedgehogs* (n 151) 12, 104-06.

[170] ibid

[171] ibid 39, 99.

[172] ibid 4.

[173] ibid 121. See also John Finnis, 'Religion and State: Some Main Issues and Sources' (2006) 51 Am J Juris 107, 137 n 37 (arguing Dworkin 'dilutes any implicit reference to truth and responsibility by speaking constantly of "decision" and "choice with respect to ethical issues:" "freedom of choice in all ethical matters"').

[174] Dworkin, *Justice for Hedgehogs* (n 151) 420-21.

of life, is a sad version of answering what it means to live well.[175] Living well – adopting dense, reflective convictions – should lead us, Dworkin argues, to a life 'that is good in a more critical sense'.[176] Authenticity, Dworkin contends, only makes sense if we seek 'the right values for our lives, the right narrative, not just any narrative.'[177] We continue, in other words, to aim at something, some kind of value.[178] However, I suggest that maintaining a sense of a truthful end is made difficult by aspects of Dworkin's account, that consequently a *method* of self-determination remains potentially paramount, and that this has the potential effect of reducing concern for religious liberty. Three factors lead me to this suggestion: first, his linking of religion with self-determination; second, the capaciousness of self-determination; and third, the linking of equal concern and respect (the fundamental requirement of political morality) with reserving judgement.

Dworkin focuses on 'authenticity', that each person has a responsibility 'for identifying what counts as success in his own life'.[179] Religion, for Dworkin, is not a response to something (or someone) that is there, the pursuit of an objective reality external to the person.[180] Rather, as discussed, it is part of deciding for oneself matters of importance or 'freedom of choice'.[181] He rejects singling out religious liberty in favour of what he

[175] ibid 207.

[176] ibid 196.

[177] ibid 213.

[178] ibid 214.

[179] ibid 204.

[180] In contrast, see, e.g., Julian Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecc LJ 371, 398 ('the law [makes] no space for the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers') and John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 448 (emphasising 'harmony' with the 'ultimate source of all reality').

[181] See above n 144 and accompanying text. See Dworkin, *Is Democracy Possible* (n 63) 61.

argues is the more abstract (and therefore 'more fundamental') right.[182] Indeed, within these frames, he hopes to change how people understand what is meant by 'religion' as such.[183] He maintains the label 'religion', but he gives it a functional hue by equating it with authenticity.[184] He appeals in this respect to the plurality decision of the US Supreme Court in *Casey*.[185] There, the judges considered authenticity entails deciding 'matters … involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.'[186] What matters on this argument, whether we speak of religion or authenticity, is the capacity for self-determination in 'intimate' matters.

Religion is consequently still present, but now as a focus on deep, ultimate, or intimate choices. For Dworkin, it is potentially different to matchbook cover collecting, as convictions are different from trivial choices. But how is this distinction maintained? As John Goldberg asks, '[W]hy is [matchbook cover collecting] a life to be condemned as irresponsibly led? As compared to what? A life self-consciously devoted to crafting elegant poetry? What is the salient difference between these life-performances?'[187] Dworkin does not appear to appeal to triviality as a sociological fact or in terms of a hierarchy of goods.[188]

---

[182] Dworkin, *Justice for Hedgehogs* (n 151) 330.

[183] See Ronald Dworkin, 'Religion without God' *The New York Review of Books* (New York, 4 April 2013) <http://www.nybooks.com/articles/archives/2013/apr/04/religion-without-god/?pagination=false> accessed 11 July 2013.

[184] See ibid and Dworkin, *Is Democracy Possible* (n 63) 61 (arguing choices, like whether to have an abortion, 'reflect values of the same ethical character and function as religious values of religious people').

[185] See, e.g, Ronald Dworkin, 'Response' (2010) 90 BU L Rev 1059, 1082. See also Gerard V Bradley, 'Life's Dominion: A Review Essay' (1993) 69 Notre Dame L Rev 329, 371-73 (arguing both Dworkin and the US Supreme Court 'upgraded' decisions like abortion 'to the status of religion by stressing … their deep, self-defining quality').

[186] *Planned Parenthood v Casey* 505 US 833, 851 (1992) (joint opinion of O'Connor, Kennedy, Souter JJ).

[187] John C P Goldberg, 'Liberal Responsibility: A Comment on Justice for Hedgehogs' (2010) 90 BU L Rev 677, 682.

[188] An example of a hierarchy of goods is St Augustine's Neo-Platonic contrast between bodily pleasure and the soul's contemplation of truth or divine wisdom. See Brian Brennan, 'Augustine's *De Musica*' (1988) 42

Rather, his argument focuses on the capacity for self-definition, that the individual should develop his or her set of convictions or what is true and important for him or herself. Within such a frame, it is difficult to see, despite Dworkin's own intentions, where the boundaries of convictions and triviality lie.[189]

This capacious understanding of self-definition or ethical independence, breaking down potential barriers between convictions and triviality, is arguably supported by Dworkin's characterisation of political morality. Authenticity, he argues, requires that the person escape domination by others.[190] This is not simply a concern for coercion. Rather, the person is robbed of authenticity if options for living are deemed unworthy or the subject of communal disapproval.[191] As Finnis has argued, Dworkin tends to characterise arguments, made by individuals or a community, that would limit an individual's self-determination as simply the imposition of an external preference, rather than a contention as to 'goods and evils, rights and wrongs'.[192] Combining the argument for ethical independence with its

---

Vigiliae Christianae 267. See similarly Chapter Two, Part II (a) discussing Aquinas' argument for religion as a commanding virtue directed to our ultimate end in God.

[189] The same problem is raised in respect of appeals to 'ultimate meaning', for example. See below n 232 and accompanying text discussing Martha Nussbaum's writing on religious liberty. Further to this argument, Dworkin's appeal to 'style' holds its own ambiguities. His description of life as an artistic performance (see Dworkin, *Justice for Hedgehogs* (n 151) 197) eloquently attests to human creative potential. It could, in this respect, overlap with Christian humanist (and Romantic) reflections. See, e.g., John Milbank, 'Dignity Rather than Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP/Proceedings of the British Academy) (forthcoming) (discussing Pico della Mirandola's *Oration on the Dignity of Man*). But the latter tradition's sense of 'style' entails affirming creative construction of one's life as 'co-creation with God … as much a matter of discovery as invention' (ibid). Dworkin wants his appeal to style to maintain a sense of seeking after objective value. However, as discussed, his understanding of objectivity arguably tends towards the objective value of authenticity itself, and this would be consistent with his allusions to Nietzsche's *different* sense of 'style' as a 'way of being that you find suited to your situation'. Dworkin, *Justice for Hedgehogs* (n 151) 209-10.

[190] ibid 212.

[191] ibid 212, 335.

[192] John Finnis, 'Secularism's Practical Meaning' in *Collected Essays: Religion & Public Reasons*, vol 5 (OUP 2011) 56, 72-3.

uncertain borders and the argument for political morality, there is at least the potential to read Dworkin or adopt his writing for a contention that the concern really is 'to be "let alone"'.[193]

In Chapters Three and Four, I will argue that this potential thread of argument has led to real concerns in religious liberty discourse. Religion, on this view, has increasingly become associated with a diffuse account of authenticity, tied to personal autonomy. And this has raised questions over the individualisation of religion (bearing the hallmarks of a consumable good rather than the cultivation of a community pursuing virtuous ends and affecting our characterisation of the religious group) and whether religion itself should be especially protected.[194] Rivers, as noted in the thesis introduction, argues there is an increasing trivialisation of religion.[195] Throughout the thesis, I refer to a 'flattening' dynamic.[196] Both of these characterisations point to a similar contention. On some accounts, religious traditions may be a particularly harmful or philosophically dubious activity, a characterisation that Dworkin exhibits on occasion.[197] But the focus on the capacity for self-definition can also lead to characterising religion as, in the words of Eisgruber and Sager, simply part of the 'grand diversity of relationships, affiliations, activities, and passions' present in the community.[198] On this equalising basis, religious claims, as one option amongst others, must be equally subject to 'neutral' state law.[199] Perhaps paradoxically,

---

[193] ibid 71.

[194] See Chapter Three, Part III and Chapter Four, Part III.

[195] Julian Rivers, 'Secularisation' (n 180) 396.

[196] See further, Chapter Three Part I (b). Chapter Four, Part I (c), and Chapter Five, Part III.

[197] See, e.g., Dworkin, *Is Democracy Possible* (n 63) 54-55 (discussing religious objections to same-sex marriage as sourced in 'revulsion') and Dworkin, *Justice for Hedgehogs* (n 151) 194-95 (characterising the desire to please God by accepting his will as treating 'some sacred text as an explicit and detailed moral rule book'). See similarly ibid 339-41.

[198] Christopher L Eisgruber and Lawrence G Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) U Chi L Rev 1245, 1266.

subsuming all claims under a general, abstract right of self-definition can have the effect of flattening difference – all claims are equal, all claims are equally subject to the same law.

(c) Individualism and Multiculturalism

Does an autonomy-based conception of religious liberty then lead to problematic forms of individualism? It can, according to Sandel, because it understands the person as existing prior to any attachment to particular ends shaped by a community; his view is that persons and their ends are shaped in concert with the communities from which they emerge, and in which they are embedded.[200] Ronan McCrea notes that an overly-individualistic conception of the person might be problematic for understanding religious freedom in Europe, where religious and civil institutions interact in complex ways and provide 'sources of identity in several Member States.'[201] Consider England, where the history and traditions of the political community are interwoven with the Church of England, and this finds continued expression in constitutional practices (the anointing of the monarch as head of state and head of the Church; Bishops in the House of Lords, for example), government relations with the Church for the purpose of public welfare,[202] and the exercise of public rites of passage by the Church.[203] These arguments and examples suggest that understanding religious freedom

---

[199] Rivers, 'Secularisation' (n 180) 396

[200] See above n 78 and accompanying text.

[201] McCrea (n 104) 111.

[202] See, e.g., Church Urban Fund, *Near Neighbours Programme* <www.cuf.org.uk/near-neighbours> accessed 25 April 2012 (a £5 million three-year Communities and Local Government funded programme, administered as a new charity set up through the Church Urban Fund and Church of England, which aims to bring neighbours of multi-faith communities together and collaborate on initiatives of shared interest).

[203] At common law, parishioners have the right to present their children for baptism, (arguably) to be married, and to be buried by the Church of England: see Rivers (n 93) 182.

primarily in terms of an individual believer's autonomy is an oversimplification, if not outright misleading.

Defenders of the autonomy conception are aware of this charge and seek to refute it. Raz goes so far as to say that a concern for personal autonomy is *incompatible* with moral individualism.[204] He argues that the expression of personal autonomy depends on social institutions; so, if I choose to marry, I depend on there being a social practice called marriage and if I choose to be a lawyer, I depend on there being a legal profession, with a supporting educational and licensing apparatus, and so on.[205] Dworkin rejects the charge of individualism along similar lines: 'People cannot invent wholly new styles of living'; our culture provides 'the spectacles through which we identify experiences as valuable.'[206]

This misunderstands the force of Sandel's argument. His point is not that a Raz- or Dworkin-style autonomy denies social practices entirely, as if they imagine persons to be free-floating atoms or stranded on a desert island without any civil society. *Of course* even defenders of the personal autonomy view recognise that autonomy is sometimes expressed socially. Rather, the real objection to the autonomy view is grounded in two claims.

First, choosing life-plans from a menu – which seems to be especially Dworkin's guiding metaphor, as he construes the 'ethical environment' in free market terms as 'fixed by individual decisions'[207] – frequently violates our self-understanding of those choices. To say,

[204] Raz (n 101) 206-07.

[205] ibid 309-11.

[206] Dworkin, *Justice for Hedgehogs* (n 151) 211 and Dworkin, *A Matter of Principle* (n 61) 228.

[207] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 214.

'Some of the options on the menu are socially-expressed' misses the deeper point that we often do not experience our choices as free in that way. Sandel argues that we often find ourselves claimed by commitments that we have not chosen.[208] He consequently focuses on 'conscience' rather than 'choice', arguing that this captures the understanding that persons can be 'bound by duties derived from sources other than themselves'.[209] Most importantly, on the understanding of a particular community, God might be calling the person to live a certain life.

Second, while personal autonomy might be important, making it a paramount value leads to problematic characterisations of the group, with attendant consequences for group autonomy. For Dworkin and Raz, the group (religious or otherwise) is an aggregate of the individual interests which it serves. To be sure, both understand that groups are important; they provide the context for the exercise of individual choice. Raz notes that the exercise of religious liberty by individuals depends on the existence of religious communities. Such communities provide the context for exploring possible options within a culture.[210] Recognising precisely this argument has been part of multiculturalism discourse.[211] Gidon Sapir, for example, building on Will Kymlicka, argues that religious accommodations could be understood as protecting a context for individual choice in an environment where there is 'at least partial establishment' of a majority culture.[212] In other words, accommodations act to re-balance the available range of options threatened by homogeneity. Certainly,

---

[208] See Michael J Sandel, 'Freedom of Conscience or Freedom of Choice?' in James Davis Hunter and Os Guinness (eds), *Articles of Faith, Articles of Peace* (Brookings Institution 1990) 74, 77.

[209] ibid 89.

[210] Raz (n 101) 251-54.

[211] See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995) 126 and Dorfman (n 72) 287-88.

[212] Sapir (n 60) 631 quoting Kymlicka (n 211) 111.

recognising institutions and communities recognises a relationship between individuals and groups. However, the arguments here remain within a methodological individualism. The group is understood as a vehicle for individual interests. As I discuss further in Chapter Five, this raises the possibility that the individual's claims to self-determination, whether in the form of non-discrimination or simply a liberty interest, can defeat the group's claim to be representing a distinct and 'liberty-constraining' ethic.[213] Raz argues that respect for a group is determined by its consistency with the ideal of personal autonomy.[214] Does the Catholic Church serve the personal autonomy interests of priests, parishioners, and potential parishioners when it limits the priesthood to men? What is missing, I will argue, is an understanding that the group exercises a form of authority not simply derived from individuals opting-in to the group.

IV Truth and Conscience

Sandel, as noted, contrasts choice with conscience. An example clarifies the distinction. If a Jewish person maintains the Sabbath as a day without labour has he or she simply chosen this or is this better characterised as a response or obedience to God's own decision or command?[215] 'Conscience' attempts to capture the latter characterisation. It reflects the view that autonomy or choice by itself fails to describe correctly how the action is understood (as above), *and* that it is too open-ended. Religious liberty, on this view, is directed towards something outside of the person that makes claims on the person's actions. In this section, I consider the argument that religious liberty supports the individual's quest, duty-orientated as

[213] See Chapter Five, Part III.

[214] See above n 111 and accompanying text.

[215] See Michael McConnell, 'Religious Freedom at a Crossroads' (1992) 59 U Chi L Rev 115, 125 (criticising the language of choice in *Estate of Thornton v Caldor* 472 US 703, 711 (1984) (O'Connor J, concurring)).

a matter of conscience, to seek out and act in obedience to truth. I argue that while one still sees echoes of this, implicitly drawing from religious tradition, conscience has largely been deconstructed as synonymous with self-determination.

The claim that religious expression and practice should be protected because it is (or might be) true is not popular, at least if this is understood outside of a 'true for me' subjectivity. The reasons for this will be clear from the discussion of neutrality and personal autonomy. Faced with value pluralism what is needed, it is argued, is a neutral, public reason-based rationale for religious liberty.[216] As discussed, these claims are not without their own truth content or metaphysical claims.[217] Occasionally, reference is made to John Stuart Mill's argument for freedom of speech, namely that religious practice and opinion should not be suppressed on the basis that it might be true.[218] This is, however, alluded to as an open-ended argument, cultivating an open mind which parallels arguments for personal autonomy, rather than settling on any particular destination. However, truth arguments *are* articulated in terms of conscience and duty to a higher authority.

Courts and commentators did not always see something wrong in identifying an objective truth as at stake in religious freedom claims. In the American experience of religious liberty, James Madison's *Memorial and Remonstrance Against Religious Assessments* has often been appealed to.[219] Penned in 1785, Madison was writing against an Assessment Bill in Virginia that would have enforced, with qualifications, a tithing tax.

[216] See, e.g., Vickers (n 95) 27, 32 (rejecting religious truth as a reason for protection).

[217] See above n 77 and accompanying text.

[218] See, e.g., Carolyn Evans (n 97) 28 discussing John Stuart Mill, *On Liberty* (Wordsworth Classic 1996) 20.

[219] See *Everson v Board of Education* 330 US 1 (1947) (Madison's *Memorial and Remonstrance* is attached as an appendix to Rutledge J's dissent).

Madison argued that the right to freedom of religion was premised upon the character of religion. Religion entailed

> … a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. … If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered.[220]

As Judge Noonan has written extra-judicially, the argument reasons from the existence of a God who takes satisfaction from 'the homage humans render him' and who 'will condignly punish humans who neglect to observe the commands that he communicates through conscience.'[221] Unsurprisingly, this idea that there is a God who can communicate to human persons is reflected in early US judicial statements. In 1890, for example, Field J wrote, 'The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.'[222] Dillon J, in an often quoted statement of similar import from UK charity law, considered 'religion' to be '[r]ecognition on the part of man of some higher unseen power as having control of his destiny, and as being entitled to obedience, reverence, and worship'.[223]

Madison and these judges located the search for the truth of what God requires in the dutiful response of individual conscience, premised, of course, on the existence of God. On this understanding, state coercion of conscience can result in a particular kind of pain – acute spiritual suffering – either for the individual who coerces belief (and must therefore render an

---

[220] ibid (appendix) 64, 66.

[221] John Noonan, 'Religious Liberty at the Stake' (1998) 84 Va L Rev 459, 462.

[222] *Davis v Beason* 133 US 333 (1890) 342.

[223] *Re South Place Ethical Society* [1980] 1 WLR 1565 (Ch) 1572.

account to God) or for the individual who is forced, against religious conscience, to adopt religious precepts advanced by the coercing individual or state.

There are, however, tensions in this Madisonian account. God is understood as eliciting and commanding obedience, but what this requires is in turn determined by the individual's conscience. Conscience may refer to the necessity of consent in any act of worship.[224] It may, however, also represent an understanding of the individual as a discrete will or monad – following the commands of a voluntarist God or, in its modern form, the choices of the self. This is precisely the genealogy traced by Taylor, in which a covenanting God establishing human order by divine command gives way to the internal development of ethical rules and then, finally, the individual's own sense of authenticity.[225] Steven Smith similarly notes a shift away from conceptions of mediation – understanding the reality of creation, natural reason, humanly creative acts, and importantly the work of the church as disclosing God's nature – to the individual and his or her conscience as 'the spiritual center of gravity'.[226] Garvey takes this a step further, calling this the development of a 'right of private judgment'.[227]

This history is not unfamiliar to religious freedom jurisprudence; indeed it is likely to be seen as a natural development. Dickson J of the Supreme Court of Canada explicitly traced the purpose of the guarantee of freedom of conscience and religion in s 2(a) of the Canadian

[224] See Chapter Two, Part II (b).

[225] See Charles Taylor, *A Secular Age* (Belknap Press 2007) Part II 'The Turning Point'.

[226] See Steven Smith, 'Discourse in the Dusk: The Twilight of Religious Freedom?' (2009) 122 Harv L Rev 1869, 1878.

[227] John Garvey, 'An Anti-Liberal Argument for Religious Freedom' (1996) 7 J Contemp Legal Issues 275, 284.

Charter of Rights and Freedoms in these terms.[228] He characterised the right as historically arising from a concern for those in post-Reformation Europe subject to a ruler who held, and tried to enforce, a different faith.[229] He then noted that this (again, historically) shifted to 'the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God who had planted it in His creatures.'[230] This precipitated, he concluded, the contemporary position, in which the right rests on the centrality of individual judgement to both democratic political tradition and concerns for human worth and dignity – a conception of personal autonomy.[231] God drops out of the conscience relationship, revealing that we were, all along, really concerned with the self-determining individual. At this point we reach the problems noted in relation to personal autonomy. Is conscience essentially individualistic? Can it be contained as a category? Is it an inevitably relativizing category? If so, can it be a category for protection?

The recent use of 'conscience' in religious liberty discourse struggles with these questions. Martha Nussbaum has tried to frame religious liberty as protecting a form of conscience, central, she argues, to human dignity. She identifies the 'faculty with which each person searches for the ultimate meaning of life' as the category of concern and protection.[232] Like Maclure and Taylor, Nussbaum hopes to avoid reducing religious liberty claims to the individualistically trivial or 'frivolous'.[233] But this kind of conscience argument faces a

[228] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 [118]. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[229] ibid [119].

[230] ibid [121].

[231] ibid [123]-[125].

[232] Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008) 168-69.

[233] ibid

central problem. From where does Nussbaum obtain the contrast between 'ultimate meaning' and 'frivolous' meaning? On her account, the sincerity of the individual pursuing their own life plan is of central importance. She writes of respecting the *faculty* of conscience, without judging 'the question whether there is a meaning to be found'.[234] True religion on this account accordingly becomes, as Perry notes, 'all of us conscientiously seeking truth *in our own way*.'[235] And yet Nussbaum still wants to appeal to a standard of the 'frivolous'. We begin then with recognition of deep moral pluralism – each person as a potential definer of self-meaning. Then, despite this foundational and valorised pluralism, which operates potentially at the level of each individual, an assertion is made that we can nevertheless share an understanding of the difference between the trivial and the ultimate. For some reason, not evident on the account itself, foundational pluralism does not go 'all the way down'.

In this respect, Cécile Laborde's intuition seems correct: liberal neutrality, at least in this guise, appears as a form of borrowed capital. Christian ethics previously 'provided the moral framework within which "strong evaluations" – between good and evil, significant and trivial, etc – were taken for granted.'[236] Conscience, in other words, makes sense within a particular tradition. This is evident from Nussbaum's account. Despite her commitments to neutrality and supporting the faculty for conscience, she arguably still cannot escape an assessment of truth. She points to the case of a Tennessee man claiming a non-optional commitment to wearing a chicken suit while before the court.[237] Nussbaum deems this

---

[234] ibid

[235] John Perry, *The Pretenses of Loyalty: Locke, Liberal Theory & American Political Theology* (OUP 2011) 195 (emphasis added).

[236] Cécile Laborde, 'Protecting Freedom of Religion in the Secular Age' (*The Immanent Frame*, 23 April 2012) <http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/> accessed 4 June 2012.

[237] Nussbaum (n 232) 168, referring to *State v Hodges* 695 S W 2d 171 (Tenn 1985). Mr Hodges in fact won his case, at least in the preliminary stages; the Supreme Court of Tennessee ruled the trial court must investigate his religious belief.

'frivolous'. But, as Perry notes, there is at least an implicit theological assertion in this judgement – 'God has not actually spoken' – that reaches beyond the faculty of individual conscience.[238]

The difficulties with conscience, following this genealogy and trajectory, are at least twofold. First, the act of conscience is removed from the object of worship – there is no necessary response to an unfolding transcendent. Second, it is removed from a body that seeks to establish what following a relationship with that object entails or looks like. Uncoupled in this way – and if removed from the borrowed capital of a tradition – conscience is synonymous with an individualised understanding of religion or simply choice.

V The Necessity of Intermediary Groups

Courts and commentators have suggested supporting religious groups may be important for a vital civil society.[239] Such groups can produce outcomes beneficial to the general public (for example, charitable care or social cohesion); they may offer the potential for critiquing the exercise of state power where necessary, grounded in alternative institutions and ideas; and they may provide the institutional structures and traditions needed for the cultivation of virtue. These arguments are generally permeated by and developed against the backdrop of an important question facing Western societies, namely whether 'solidarity and political participation in the West is declining or just adapting.'[240] In this section, I argue that while

[238] Perry (n 235) 197.

[239] See Chapter Five, Part I on ECtHR references to civil society's vitality.

[240] See Bretherton (n 82) 6.

these ideas are important, they are not self-defining and need therefore to be supplemented with a discourse of desirable ends.

(a) Social Capital and Public Benefit

In its report, *Faithful Citizens*, the think-tank *Demos* concludes that religious people are more likely than the non-religious in the UK to volunteer in their local community, take an active role in decision-making bodies, show higher levels of trust in social institutions, and a greater sense of belonging to their local community.[241] More recently, they have argued that faith-based providers of social care 'often serve as the permanent and persistent pillars of community action within local communities.'[242] Faith-based providers, they note, almost always grow out of a local church, mosque, or religious body, acquiring volunteers who are more willing to work for less money or for free.[243] This is seen as vital. The report concludes by emphasising the importance of the group's religious ethos to sustaining action, as well as, sometimes, meeting spiritual needs.[244]

To this we can add other case studies. Sponsorship and nurturing of education has historically been the province of churches; today, there is a mix of maintained, independent, and academy schools that maintain a religious ethos.[245] Elizabeth Green, in her initial

---

[241] Jonathan Birdwell and Mark Littler, *Faithful Citizens* (*Demos*, 2012) <www.demos.co.uk/files/Faithful_citizens_-_web.pdf?1333839181> accessed 11 February 2013.

[242] Jonathan Birdwell, *Faithful Providers* (*Demos*, 2013) <www.demos.co.uk/files/Faithful_Providers_-_web.pdf?1358533399> accessed 11 February 2013, 13.

[243] ibid 35, 41.

[244] ibid 13.

mapping of the Christian ethos education field, suggests that there is some evidence that pupils at maintained church schools 'achieve more highly and make better progress than pupils at non-denominational schools' and that this is in part due to the ethos and educational approach of such schools.[246]

Collectively, we could call this emphasis on care and participation 'social capital'. The term, according to its leading exponent Robert Putnam, denotes 'social networks and the associated norms of reciprocity and trustworthiness … like tools (physical capital) and training (human capital), social networks have value.'[247] Through social networks and associations, poverty is confronted, disputes are resolved, and political action is undertaken. Translated into a rationale for religious liberty, we could argue that providing robust freedom to religious communities – to pursue care compatible with their ethos, to engage in religious-based education, to enjoy accommodation of practices within public schools, employment, or local bodies – serves the public good. How we understand 'public good' is, however, critical.

'Social capital' has an ambiguous import. Arguably, it conjures a sense of instrumentalisation.[248] Religious communities are, on this view, permitted to flourish, indeed supported in doing so, so long as they comply with government aims. The distinct ethos of the group is not recognised as itself good, rather the goal might be to have associations to throw at a particular problem (from fundamentalism through to poverty support).

---

[245] Ahdar and Leigh (n 71) 234 and Elizabeth Green, *Mapping the Field: A Review of the Current Research Evidence on the Impact of Schools with a Christian Ethos* (*Theos*, 2009) <www.theosthinktank.co.uk/publications/2009/05/15/mapping-the-field> accessed 20 March 2013.

[246] See ibid 76.

[247] Robert Putnam, '*E Pluribus Unum*: Diversity and Community in the Twenty-first Century (The 2006 Johann Skytte Prize Lecture)' (2007) 30.2 Scandinavian Political Studies 137 quoted in Bretherton (n 82) 39.

[248] ibid. See also Rivers (n 93) 165 (discussing the changing use of 'public benefit' as a criteria for charitable religions).

Further than this, the instrumental quality – religious bodies as functional proxies for the government's goals – means that religious bodies may have to undergo a process of transformation before being admitted to the world of public care or service provision. Take the case of Catholic adoption agencies, which closed down once it was clear they could no longer limit their services to married couples. In terms of public benefit, we might lament their closure. Some 4,000 children remain in state-run orphanages while Catholic service agencies have been effectively precluded from engaging in a worthwhile act of public welfare.[249] But this might also be seen as the natural conclusion of a focus on 'social capital'. Vickers, for example, argues that this is a problem with 'social cohesion' (similar to 'social capital') as a rationale for religious liberty. She writes that if social cohesion is a fundamental basis for protecting religious liberty, 'there is no reason … to allow protection for those whose beliefs conflict with the fundamental beliefs of the society.'[250]

The reach of this conclusion, however, might depend on what idea of 'benefit' is adopted and the relationship between state, associations, and individuals in which it is considered. The model of social cohesion and public benefit at work in the case of Catholic adoption agencies and in Vickers' conclusion appears to be undifferentiated: everyone must cohere to a single standard promulgated by the state in its representation of the interests of individuals.[251] A consequent question is whether social cohesion and public benefit can be understood in a way that is capable of recognising differences contributing to a whole. This is an argument I discuss in Chapters Five and Six.

---

[249] See *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007 26 April 2011 (Charity Tribunal) [32].

[250] Vickers (n 95) 35.

[251] See Chapter Five, Part III.

(b) Political Challenge and Civic Virtue

Against the view that religious communities must conform to state norms, religious liberty is at times said to promote the continued vitality of religious groups to operate as a critical watchdog on state power or public norms. Sachs J, for example, wrote of religious groups bearing witness to the exercise of political power by the state.[252]

This builds on a 'prophetic' conception of religious bodies. Amos, a Hebrew prophet of social protest, declares against ancient Israel, 'let justice roll on like a river, righteousness like a never-failing stream'.[253] Dietrich Bonhoeffer argued the church claims this office of prophetic judgment, addressing the government 'in order to draw [the government's] attention to shortcomings and errors which might otherwise imperil its governmental office'.[254] Examples that are appealed to include William Wilberforce and the Clapham Sect advancing the abolition of slavery, Martin Luther King Jr and the role of the Southern Christian Leadership Conference in the American civil rights movement, and the influence of 'social Catholicism' in resisting communism in Poland.[255]

Maintaining critical political awareness is often coupled with the contention that religious associations, as one form of community network, are fundamental to the cultivation of civic virtues. Mary Ann Glendon has been a notable proponent of this view, arguing 'we

---

[252] *Christian Education of South Africa v Minister of Education* (2000) (4) SA 757 (CC) [24] n 24.

[253] Amos 5:24.

[254] Dietrich Bonhoeffer, *Ethics* (Touchstone 1995) 345.

[255] See, e.g., Rowan Williams, 'Freedom and Slavery – Wilberforce Lecture 2007' (*Archbishop of Canterbury*, 24 April 2007) <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1167/freedom-and-slavery-wilberforce-lecture-2007> accessed 11 February 2013; Paul Horwitz, 'The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond' (1996) 54 U Toronto Fac L Rev 1, 51; and José Casanova, *Public Religions in the Modern World* (University of Chicago Press 1994) 103.

need to attend to the "seedbeds" of civic virtue where succeeding generations learn anew to appreciate the benefits and sacrifices necessary for a constitutional order'.[256] She points to associations – religious groups, family, community, and workplace – as sites to overcome an 'excessive homage to individual independence and self-sufficiency'.[257] While Glendon's work focuses on the US, her sense of what we might call citizen disaffection, *anomie*, or *ennui* facing the polity is not limited to the US. Phillip Blond raises a comparable outlook, dramatically claiming a 'gap' in the UK 'between the politics of the elites and general mass disaffection', reflecting and caused by 'a wholesale collapse of British culture, virtue and belief.'[258] Trade union membership, church attendance, and political party membership have all declined significantly over the past fifty years.[259] Blond couples this with a series of social statistics, largely centring on family breakdown and the loss of trust within society, painting a bleak picture.[260]

Glendon's questions of the American polity are not, consequently, limited to America. She asks where the virtues of 'fellow-feeling', sense of 'personal responsibility' over one's own life, skills of governing, and willingness to serve will come from if intermediary associations, tasked with cultivating such skills and virtues, increasingly face destabilising pressures.[261] What are these pressures? Several have been mooted: *laissez faire* capitalism,

---

[256] Mary Ann Glendon, 'Comments on Part 4' in Paul Kirchof and Donald Kommers (eds), *Germany and Its Basic Law: Past, Present and Future - A German-American Symposium* (Nomos Verlagsgesellschaft 1993) 286-87.

[257] Mary Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991) 14.

[258] Phillip Blond, *Red Tory: How Left and Right Have Broken Britain and How We Can Fix It* (Faber and Faber 2010) 2.

[259] In 1979, trade union membership peaked at over 13 million. By 2006/7 it was under 8 million. Regular attendance at a religious service has fallen from 71% in 1970 to less than half of that in 2005. Political party membership stood at around 1.3% of the electorate in 2005, and voting at elections is declining. See ibid 72.

[260] ibid 73.

[261] Glendon, *Rights Talk* (n 257) 120.

prioritising individual satisfaction (or its continual deferment) through the consumption of goods and the pursuit of leisure;[262] an increasing focus on aesthetics in politics and a dominance of special interests;[263] the subjection of groups to liberal (or bureaucratic) norms, including treating the individual as separate from particular communities;[264] the rise of interest group politics, understood as a collection of individuals;[265] the loss of substantive visions of the good in favour of proceduralism;[266] the centralisation of power through big business and strong states, at the expense of local communities;[267] the development of customised spiritualities;[268] and an emphasis on the rights and freedoms of the individual. Glendon is particularly concerned by the last of these. She considers, 'Saturated with rights, political language can no longer perform the important function of facilitating public discussion of the right ordering of our lives together.'[269]

This concern is not limited to communitarian writers like Glendon. Galston and Peter Berkowitz, for example, have also considered virtue cultivation from a different angle, examining its compatibility with the promotion of 'self-mastery, self-expression, active pursuit of knowledge, unhesitating acceptance of moral responsibility'.[270] They identify a number of virtues as necessary to uphold a liberal polity: independence (taking responsibility

[262] See Ward (n 136) 70.

[263] See ibid.

[264] See Wendy Brown, *Regulatory Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press 2006) 92.

[265] See Glendon, *Rights Talk* (n 257) 115.

[266] See Alasdair MacIntyre, 'The Claims of *After Virtue*' in Kelvin Knight (ed), *The MacIntyre Reader* (Polity Press 1998) 69, 70.

[267] See Blond (n 258) 6, 131.

[268] See Chapter Three, Part III.

[269] Glendon, *Rights Talk* (n 257) xi.

[270] Galston (n 42) 80 and Berkowitz (n 43).

for oneself); tolerance and restraint (favouring education and persuasion); courage to defend the community; law-abidingness; a suitable work ethic; the achievement of a means between self-denial and self-indulgence; and self-discipline to accept difficult decisions when required.[271] Galston argues that the cultivation of these virtues may depend on tacit socialization in various institutions like, for example, the family.[272] He further notes the possibility that self-indulgence and self-expression become the key imperatives in liberal thought, undermining the cultivation of the listed virtues.[273]

But Galston and Berkowitz's list of virtues raises a concern, applicable to the political challenge and the civic virtue rationales. 'Political challenge' and 'civic virtue' are not self-defining and cannot, therefore, be respected *per se*. Respect must depend on what the political challenge is and what the asserted content of civic virtue is.[274] Galston and Berkowitz's virtues are suited to self-making. Arguably, this is a list very different from the list and understanding one would read in traditional Christian thought.[275] Virtues in the Christian tradition are dispositions or habits of living necessary for the perfection of a nature.[276] For example temperance, chastity, or fidelity is exercised for the end of a marriage. This latter view, pointing to the perfection of a nature, is arguably on the self-making and personal autonomy account an unwanted limitation. Berkowitz considers that one of the key criteria for determining when a government should intervene in civil society is 'the manner and extent to which the practice or association in question supports the virtues necessary to

[271] ibid xi and Galston (n 42) 221-25.

[272] ibid 233.

[273] ibid

[274] See Horwitz (n 255) 51.

[275] See Berkowitz (n 43) 16-17.

[276] See Martin Augustine Waldron, 'Virtue' in Kevin Knight (ed), *The Catholic Encyclopedia* (Robert Appleton Company 1912) <www.newadvent.org/cathen/15472a.htm> accessed 11 February 2013.

the preservation of liberal political society.'[277] The scope of this intervention is an interesting question; it appears to be consistent with Raz's concern for the promotion of personal autonomy. Religious communities may accordingly cultivate virtue, but the question is whose virtue? Is it the virtue we want?

I am not suggesting that the government taking an interest in promoting some understanding of (broadly) right living is, in itself, a problem. It is difficult to conceive of it doing otherwise.[278] Rather, the question is what constitutes civic virtue and what should be the relationship between the state, institutions, and individuals. Currently, there is a strong tendency towards structuring religious liberty around a state-individual paradigm. In this thesis, I argue that this points towards increased state power at the expense of 'intermediate' or 'mediating' institutions. But this also alludes to an alternative. Several writers have begun to explore a more institutional focus for religious liberty, with an interest in the right positioning between individuals, groups, and the whole polity. I discuss and develop these ideas in light of the Radical Orthodoxy position in Chapters Five and Six. But Rivers intimates the broad project.

In curative fashion, Rivers argues, 'It needs to be accepted that organized religions represent locations of authority in civil society which in some way stand over against Government and must be reconciled with Government.'[279] This points to, I argue, an alignment between an institutional account and one based on truth. To accept a religious group exercises authority 'against' (but also potentially deeply *for*) government has two

[277] Berkowitz (n 43) 33.

[278] See Richard Garnett, 'Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine' (2004) 51 UCLA L Rev 1645, 1650.

[279] Rivers (n 93) 295.

implications. First, that some form of institutional autonomy for that religious group is necessary. The institution or group could not call government to account if the group's authority was capable of being undermined by complete subjection to the state. Second, that there is indeed a higher good and a higher judgement beyond government that can be appealed to, trusted, and constituted in that body. Such a higher good and judgement would form the basis for a perpetual critique and a perpetual offering of a different vision. If there is no transcending truth to which we aim, perhaps fumble towards, then it is difficult to see what 'authority' amounts to. However, as this thesis contends, this is arguably a religious conception or, at the very least, finds its fulfilment in a religious conception.

VI Conclusion

In this chapter, I have critically discussed several possible bases or central reasons why religious liberty matters. The discussion has proceeded by noting connections, but examining each in turn. This raises a question: while one particular theory might not be sufficient alone, could we opt for a combination of these as possible values to be taken from as and when needed? This is Kent Greenawalt's contention.[280] Greenawalt argues that there is a range of considerations or values, and that the weight accorded to these will vary depending on the circumstances.[281] He calls this an 'eclectic' approach, in which different people, appealing to the same set of considerations or values, may disagree on how these should apply to a given

[280] Kent Greenawalt, 'Fundamental Questions about the Religion Clauses: Reflections on Some Critiques' (2010) 47 San Diego L Rev 1131.

[281] ibid 1142.

case.[282] And he argues that this is, for the most part, sufficient; most citizens, he contends, intuitively recognise the importance of religious liberty and its values.[283]

There is certainly something right in this. While my discussion in this chapter of the religious liberty literature has been a critical review, many of the ideas and values implicated remain important. The concern for persecution is, as discussed, real. Accommodating religious practices can, as Taylor and Maclure discuss, point to the desirability of inclusion in public life. Because a general norm may be developed by a majority culture, it may be blind to the perfectly reasonable accommodation of a minority group's practices.[284] Social cohesion and social capital arguments similarly point towards desirable inclusion in civil society. And arguments for personal autonomy also point towards the illegitimacy of coercion and, arguably, the value of creativity (although such arguments tend to treat autonomy as an end in itself). Greenawalt's argument is consequently right insomuch as it cautions us against pointing to one particular thing – a concern for persecution, for example, or civic virtue.

But there is a fundamental problem with simply relying on the 'eclectic' approach. We do not agree on how these values are understood or should interact, nor do we even agree on the value of religion. Greenawalt hopes that a tradition of respecting religious liberty will sustain us. However, we see in the push towards understanding religion as another species of personal autonomy a challenge to the idea that we should especially care about religious liberty; indeed, on some accounts, this leads to a framing of religion as a problem (perhaps *the* problem) for autonomy, self-determination, or 'self-mastery'. This is challenged by

[282] ibid 1144.

[283] ibid 1146.

[284] See above n 54 and accompanying text.

others, appealing to a more institutional account of religious liberty. And the reason for this arguably increasing divide is not simply because of the equally reasonable application of a shared set of values. Rather, we 'plot' these values in terms of different narratives or political imaginaries, reflecting different understandings of the relative place of individuals, groups, and the state. This gives rise to differently conceptualising the ends of 'religion' and, accordingly, its appropriate place in a polity. Appeals can be made to 'civic virtue' or 'civic peace', but what these mean will be given content within these different narratives.[285]

In this chapter, I have noted how several of the rationales offered for religious liberty are framed by a containment thesis. This is the argument that religion must be (and is) a private matter separable from 'politics'. Religion is either a problem to be contained, lest it disrupts civic peace, or it is a species of personal autonomy reflecting the development of a conception of the good that the state must negotiate by neutral means. By looking at Radical Orthodoxy writers, we see a challenge to this containment that points towards a political imaginary, religious in design, concerned more with groups exercising authority and seeking to pursue the common good. The difference between these two visions reflects a fundamental division of opinion over a prominent and shaping narrative in political, sociological, and theological thought: secularisation. This narrative, and its acceptance or rejection, is the subject of Chapter Two.

[285] Greenawalt himself intimates as much as this when he acknowledges the influence of his own Protestant background. Greenawalt (n 280) 1144-45.

2

Secularisation

What is the secularisation narrative? Put broadly, the following story of secularisation, or aspects of it, has held a popular purchase in the fields of political theory, sociology, law, and, at times, theology: At one point in human history, a time we could call pre-scientific, religion was central to social cohesion and political authority. There was either an original unity between church and state in classical societies, or a loose symbiosis in the Middle Ages.[1] This centrality, however, declined as the realms of the political, the social, and the economic, were stripped of religious trappings, a form of emancipation that revealed society as its own examinable, autonomous artefact outside of religious authority. The reasons for this are varied and overlapping, but we may call them 'pragmatic' and 'scientific'.

On the pragmatic side, the removal of religion from political authority was necessary for society's survival, ravaged as it was by warring religious sects in the sixteenth and seventeenth centuries. Society, in order to survive, needed to do so without religion at its centre, and religion, to be permissible, had to be private.[2] This pragmatic need was supported by various scientific arguments. The political authority of the newly formed nation state could be understood in purely scientific terms. It arose as either an artificial creation of

[1] See, e.g., Philip S Gorski, 'Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, CA. 1300-1700 (2000)' in Bryan S Turner (ed), *Secularization: Defining Secularization, The Secular in Historical and Comparative Perspective*, vol 1 (Sage 2010) 117, 119 (describing the traditional secularisation paradigm).

[2] See Judith Shklar, *Ordinary Vices* (Harvard University Press 1984) 5 discussed in William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP 2009) 132.

human wills, the result of individuals ordered under a sovereign for the purposes of mutual protection of rights, or the protection of the co-ordination of individual desires, manifest in the market economy.[3] Such political authority is not dependent on religious authority, but rather 'natural' reason. Indeed, religion would arguably thus lose its *raison d'être*. As a pre-political category, religion was functional to social cohesion, but by revealing this merely functional role, legal codes and constitutions could be substituted as the basis of cohesion.[4] Religion must, accordingly, decline or at least be privatised.[5]

The discovery of grounds for political authority independent of religion reflected a wider emancipation of, for example, scientific inquiry and knowledge. The cry of '*Sapere aude!*' had been uttered.[6] Individuals were now to have the courage to use their own understanding, their independent reason, in order to see humanity 'gradually work their way out of barbarism.'[7] Religious knowledge (superstition) had given way increasingly to reason, first through metaphysical speculation and then through the development of science as such, understood as the positivist focusing of our attention on finite things, how they work, and our ability to comprehend them fully.[8] Indeed, science was simply fulfilling a process initiated by, most importantly, the more rational religions of Judaism and Christianity. Genesis declared the sun to be created, not itself a cosmic force or god in an enchanted world.[9]

---

[3] See John Milbank, *Theology and Social Theory: Beyond Secular Reason* (2nd edn, Blackwell 2006) Part I (*TST*).

[4] See Bryan R Wilson, 'Aspects of Secularization in the West (1976)' in Bryan S Turner (ed), *Secularization: The Sociology of Secularization*, vol 2 (Sage 2010) 88 (developing a modern version).

[5] ibid

[6] Immanuel Kant, 'An Answer to the Question: What is Enlightenment? (1784)' in Jostein Gripsrud and others (eds), *The Public Sphere: Discovering the Public Sphere*, vol 1 (Sage 2011) 5.

[7] ibid 9.

[8] See Jürgen Habermas, *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (Polity Press 2010) 15, 16-17 and Rob Warner, *Secularization and its Discontents* (Continuum 2010) 20.

Biblical criticism would (much later) come to show the 'real' historical basis for biblical narratives stripped of the superstitions of miracles or mysteriously superfluous doctrines like the Trinity.[10] God could now simply be understood as the first cause creator of the Deists, concluding a process of disenchantment whereby we are progressively freed from magic.[11] Religion, against this breakthrough, is either: proven to be false (miracles do not happen; everything has a natural explanation); irrelevant in the face of the power of reason and science ('now that we can cure ringworm by drenches');[12] a moral code that simply reflects the best natural impulses of the autonomous person;[13] or a psychological neurosis consistent with humanity's infancy or else a projection of our own desires.[14] In the words of Shelley, 'The painted veil … is torn aside; / The loathsome mask has fallen, the man remains'.[15]

The shift to a scientific mode of thinking gave rise to a modern cadre of specialists. Scientists now possessed pre-eminence because first, religious groups were unable to maintain specialist knowledge as compared to the growing scientific community and second, government endorsement shifted from religion to science as a focus of economic growth.[16]

---

[9] Genesis 1:14.

[10] See Warner (n 8) 18. See also John Finnis, 'Catholic Positions in Liberal Debates (1999)' in *Collected Essays: Religion & Public Reasons*, vol 5 (OUP 2011) 113 (arguing disbelief in the teachings of the Catholic Church has been caused in large part by the undermining of revelation's historical character in biblical scholarship).

[11] José Casanova, *Public Religions in the Modern World* (University of Chicago Press 1994) 31.

[12] Charles Taylor, *A Secular Age* (Belknap Press 2007) 429.

[13] See Bryan S Turner, 'Religion (2006)' in Bryan S Turner (ed), *Secularization: Defining Secularization, The Secular in Historical and Comparative Perspective*, vol 1 (London 2010) 313.

[14] See Daniel Bell, 'The Return of the Sacred? The Argument on the Future of Religion' (1977) 28 British Journal of Sociology 419, 420-23 reproduced in Linda Woodhead and Paul Heelas, *Religion in Modernity: An Interpretive Anthology* (Blackwell 2000) 309 (discussing Freud). See also Casanova (n 11) 34 (discussing Feuerbach on religion as a projection).

[15] Percy Bysshe Shelley, *Prometheus Unbound* (JM Dent & Sons 1961) 99 (Act III, Sc iv).

[16] See Bryan Wilson, *Religion in Secular Society: A Sociological Comment* (CA Watts 1996) 47-48 reproduced in Woodhead and Heelas (n 14) 232-24.

But secularisation also unveiled specialist knowledge as the natural norm in all spheres of endeavour. Reason uncovered the existence of different spheres of societal order: politics, economics, science, aesthetics, for example. But this discovery precipitated a regime of rationalisation – mastery of each order to maximise its uncovered natural laws.[17] Society is, accordingly, further 'disenchanted'.[18] There is no ultimate meaning to be found and no 'sacred canopy' of integrated religious authority.[19] Religion, if it survives at all, is like a salve to those 'who cannot bear the fate of the times'.[20] What remains is the mastery of technical order.[21]

So ends the narrative. In this chapter, I begin in Part I by unpacking the different claims this narrative makes. Broadly, there are two versions of secularisation. First, that as reason and science progress, religious belief will or should decline either because more people come to see the error of their ways or because now they lack religious institutional structures of support. Second, that as reason and science unlock the inherent logics of different spheres of life – politics and economics, for example – religion experiences differentiation; that is, it comes to occupy a distinct sphere, distinguished from politics and economics and largely private. Religious liberty discourse exhibits both versions of the secularisation narrative. The Chapter then turns to challenges raised against the secularisation narrative, using sociologists Peter Berger and José Casanova as examples. I

[17] See Bell, 'The Return of the Sacred?' (n 14).

[18] Max Weber, 'Science as Vocation' in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1948) 129, 155-56.

[19] Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (NY Doubleday 1967).

[20] Weber, 'Science as Vocation' (n 18) 155-56.

[21] See Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Unwin 1985) 181-82 and Bryan Wilson, 'Secularization: The Inherited Model' in Philip Hammond (ed), *The Sacred in a Secular Age: Toward Revision in the Scientific Study of Religion* (University of California Press 1985) 9 reproduced in Woodhead and Heelas, (n 14) 327.

argue that while these theorists generally challenge the decline thesis, they maintain and support the differentiation thesis. Part II looks at branches of post-World War II Catholic thought – Jacques Maritain, Vatican II, and the New Natural Law (NNL) tradition. Here, I discuss how significant influences on Christian thought concerning religious liberty have arguably adopted the differentiation thesis as natural. This is in contrast to Radical Orthodoxy (RO) writing. In Part III, I begin exploring RO's challenge to secularisation as differentiation by first discussing RO's antecedents: the philosopher Alasdair MacIntyre and the theologian Stanley Hauerwas. In providing this map through the lens of secularisation, I introduce RO's radical claim: against the autonomy of the secular, ecclesiology should provide the shape of social and political theory.

I Secularisation Narratives

(a) Decline and Differentiation

'Secularisation' stands for a set of multiple claims that may be held together or separately. In particular, it may refer to a decline in religious belief or the differentiation of politics and religion.

The decline thesis can take several forms. As various domains of life come under the universal sway of reason and science, there is less need to believe. Or, as religion is stripped from public life, it undergoes a loss of what Berger referred to as 'plausibility structures', public and institutional manifestations of religion that shore up or legitimate the faith or

worldview of the believer.[22] Private religious pluralism, Berger continued, was the alternative, but this 'plunges religion into a crisis of credibility' because it construes religion as individually relativistic. All choices are equally meaningful; all choices are equally meaningless.[23] Simply put then, less people believe in the claims of religion either because of advancing knowledge or because of a loss of credibility. In contemporary terms, one might support this secularisation thesis by pointing to a continuing decline in attendance at traditional houses of worship, at least in Europe.[24]

Secularisation may alternatively refer to a differentiation of spheres and functions in society. At its most basic, the differentiation thesis describes a societal shift, from a complete and governing 'religious' authority – a 'common world within which all of social life receives ultimate meaning binding on everybody' – to an expectation that different spheres of life are governed without reference to religious authority.[25] There are two dynamics on display in such a shift. First, we can note a historical movement, consistent with the original usage of the term secularisation in the sixteenth century. This is the expropriation by the state of monasteries, landholdings, and wealth of different churches after the Protestant Reformation. As Casanova writes, 'Since then, secularization has come to designate the "passage," transfer, or relocation of persons, things, functions, meanings, and so forth, from their traditional location in the religious sphere to the secular spheres.'[26] Second, we can further understand the shift of differentiation as precipitated and deepened by the rise of specialists applying knowledge internal to particular spheres.

---

[22] Berger, *The Sacred Canopy* (n 19) 45.

[23] ibid 151.

[24] See, e.g., Steve Bruce, 'Secularization and the Impotence of Individualized Religion (2006)' in Bryan S Turner (ed), *Secularization: The Sociology of Secularization*, vol 2 (Sage 2010) 295.

[25] See Berger, *The Sacred Canopy* (n 19) 134, 107. See generally, Warner (n 8) 42.

[26] Casanova (n 11) 13.

Max Weber provided what is perhaps the leading account of sphere differentiation. 'We are placed', Weber considered, 'into various life-spheres, each of which is governed by different laws.'[27] He identified seven such spheres: the religious; social; economic; political; aesthetic; erotic; and intellectual/scientific.[28] Politics, for example, concerns, Weber argued, the cultivation and distribution of power or 'men dominating men'.[29] The state, holding a monopoly on the legitimate use of violence is, accordingly, the principal site of politics.[30] This is the 'law' or 'logic' of politics, determining its autonomous existence. Such autonomy is furthered, Weber argued, by the growth of an administrative class, an 'expert officialdom' whose specialty consists in the management of interest groups.[31]

For some, this differentiation holds the character of emancipation.[32] (Weber himself seemed to be altogether less optimistic about the development of an 'iron cage'.)[33] Religion was to occupy its own distinct sphere, allowing the natural and technical orders of politics and economics their autonomy. One consequence of this is the on-going attempt to identify religion's 'essence'. Differentiation does not necessarily mean the absence of religion. Rather, it too could be construed as emancipated to be *true* religion, shorn of extraneous spheres. Thomas Luckmann, for example, argues that differentiation comes to reproduce

[27] Max Weber, 'Politics as Vocation' in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1948) 77, 123.

[28] See Max Weber, 'Religious Rejections of the World and their Directions' in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1948) 323.

[29] Weber, 'Politics as Vocation' (n 27) 78.

[30] ibid

[31] ibid 82, 88, 94.

[32] See Casanova (n 11) 40.

[33] See Richard K Fenn, *Key Thinkers in the Sociology of Religion* (Continuum 2009) 56 (discussing Weber's concern for the 'unprecedented inner loneliness' of the modern individual).

itself as segmentation of categories or spheres in the individual's consciousness.[34] Religion can be maintained as a private form of belief, consistent with its own sphere, but in any other sphere the demands of a role performance, consistent with that sphere's 'laws', are paramount. Secularisation may even, on this account, be compatible with a majority of people continuing to *believe* in God. The United States, with its 'religious economies' and high levels of personal belief, is a commonly given example.[35]

These two secularisation theories present an ambiguity: are they descriptive or normative? Does the narrative refer to historical events or contemporary advocacy? Although there are historical claims – for example, concerning conflicts in the sixteenth and seventeenth century – there is also a prescriptive *telos* at work.[36] The above narrative attempts to reflect this, in keeping with what David Martin refers to as a common story of 'the triumph of the secular', which 'combines description of the process with overt or covert prescription of the outcome.'[37] Indeed, consistent with this mixture of description and advocacy, it has been suggested that secularisation exists most notably amongst a particular 'knowledge class' or university elites.[38] Thus, the narrative I have presented above is arguably one told and advocated by particular people; it has, in other words, an implicit or explicit agenda.

---

[34] Thomas Luckmann, *Invisible Religion* (Macmillan 1967), discussed in Casanova (n 11) 36.

[35] See, e.g., Rodney Stark and Laurence R Iannaccone, 'A Supply-Side Reinterpretation of the "Secularization" of Europe (1994)' in Bryan S Turner (ed), *Secularization: The Sociology of Secularization*, vol 2 (Sage 2010) 229, 232.

[36] See Julian Rivers, *The Law of Organized Religions* (OUP 2010) 317.

[37] See David Martin, *On Secularization: Towards a Revised General Theory* (Ashgate 2005) 8.

[38] See Philip S Gorski and others, 'The Post-Secular in Question' in Philip S Gorski and others (eds), *The Post-Secular In Question: Religion in Contemporary Society* (SSRN and New York University Press 2012) 1, 2-4.

(b) Secularisation and Religious Liberty Discourse

Religious freedom literature can be viewed through the lens of the secularisation narrative. The civil peace argument is a clear example.[39] Judith Shklar, for example, wrote that following 'religious civil wars', religion, if it were to survive, must 'do so privately'.[40] This is then developed further in the work of Rawls. Rawls, it will be recalled, considered that the development of a 'political' solution was necessary in light of conflicting salvation creeds.[41] Differentiation, on this account, is the necessary solution to the problem of theological conflict. But it is also a 'natural' arrangement. Politics or justice, as discussed by Rawls and Dworkin, concerns its own identifiable sphere characterised by equal respect for individual conceptions of the good. This places politics above religion, as that which regulates private sectarian concerns.

This may or may not mean that religious liberty scholars contend that religion is on the decline or should be. Rawls himself considered that America had a flourishing religious economy on the basis of its differentiation between religion and politics or church and state.[42] However, it is also the case that Rawls advocated the decline of certain kinds of religion, namely religion which is 'unreasonable' on his account of politics.[43] In essence, any religion which seeks to shape political life around a thick vision of human flourishing must be resisted; only those that accept the account of 'self-respect' dictated by 'reason' can be accepted.

---

[39] See Chapter One, Part I.

[40] See above n 2.

[41] John Rawls, *Political Liberalism* (Expanded edn, Columbia University Press 2005) xxvi.

[42] John Rawls, 'The Idea of Public Reason Revisited' in *The Law of Peoples* (Harvard University Press 1999) 166.

[43] See ibid 132 (political liberalism does not engage those who 'struggle to win the world for the whole truth').

In this sense, Rawls' secularisation is at least in continuity with the more explicit secularisation argument developed by Macklem.[44] Macklem argues the secular sphere of politics is separate from religion. Politics concerns reason, which is characterised by evidence, common sense, rationality, and science, and which ultimately points towards value or moral pluralism.[45] Religion in political life, he argues, would exercise a straitening affect, limiting the valuable options available to persons. But religion must also be limited, Macklem argues, because the development of the autonomous life is governed by reason. Religion *should* decline, as more and more people realise it functions as a psychological crutch. This reflects a common view in secularisation theory: religion is a response to 'existential insecurity'.[46]

More generally, the popularity of the personal autonomy rationale for religious liberty could be read in terms of a secularisation narrative. This would reflect an argument of historical progress: from religious authority to personal authority; from establishment to neutrality; from a concern for religious freedom to a concern for freedom as such.[47] As religion is differentiated from politics or economics, its essence is distilled – a private category of belief.[48] This is an anthropocentric turn, towards the individual deciding for

[44] See Timothy Macklem, *Independence of Mind* (Oxford University Press 2006) ch 4, discussed in Chapter One, Part III (a).

[45] Rawls similarly defined reason in terms of principles of logical inference; rules of (admissible) evidence; the criteria and procedures of 'common sense'; and the 'methods and conclusions of science when not in dispute'. See William A Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Princeton University Press 1999) 111.

[46] See Gorski and others (n 38) 8.

[47] See similarly (and critically) Rivers (n 36) 316.

[48] See, e.g., Douglas Laycock, 'Formal, Substantive, and Disaggregated Neutrality Toward Religion' (1990) 39 DePaul L Rev 993, 1002.

himself or herself the requirements of conscience or (in Dworkin's turn) 'style'.[49] Dickson J of the Supreme Court of Canada put this succinctly as a 'right … to work out for himself or herself what his or her religious obligations, if any, should be'.[50] Religious authority can continue to exist, but separated from political authority; it is re-constituted as the collective coming together of private interests in association.

Emancipation is a common theme. The individual is released to a life of 'self-mastery' or authenticity, reflecting a more stylised and arguably aesthetic version of Kant's 'dare to know'.[51] And political authority is released from the monolithic value of religion. Indeed, this turn to the individual provides the logic of 'the political' as such: a commitment to the equality of individuals results in the state as the manager of individual interests. Religious liberty thus would entail the securing of an autonomous space for politics, defined as the necessary facilitator of individual conscience or individual style.

(c) Challenging the Secularisation Narrative

The secularisation narrative lives on in contemporary writing, including religious liberty discourse, but some of its basic conclusions have been challenged. Of particular note is the following: calling into question the contention that modernisation results in religious decline; disputing the claim that religion undergoes privatisation, pointing to, notably, the place of religion in civil society; and highlighting what can be described as a 'new visibility of religion' in different forms.[52] The first two forms of the challenge to the secularisation

[49] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 203. See Chapter One, Part III (b).

[50] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 [136].

[51] See above n 6 and accompanying text.

narrative, which are the focus of this section, are, I contend, limited. They do not question central tenets of secularisation – namely, sphere differentiation and, in some instances, the identification of religion as, largely, a category of individual belief – but rather point to changes in the dynamics of belief. The third challenge, the new visibility of religion, could be construed similarly, but it also poses a more difficult question, asking whether 'secular' practices bear the hallmarks of religion. In Chapter Three I discuss what Ward calls the 'commodification of religion' and the argument that this component of the new visibility of religion is, paradoxically, shaped by secularisation developments.[53]

Peter Berger is an often cited example of the secularisation narrative's reversal in scholarly fortune, at least as it relates to decline.[54] Berger, a leading sociologist of religion, was formerly an exponent of the secularisation thesis: that deepening modernisation would continue to precipitate an inexorable decline in religion, both for society and individuals, as rationality overtook purported irrationality. However, he has come to revise his views. '[T]he assumption that we live in a secularized world is false', he argues.[55] 'The world today, with some exceptions … is as furiously religious as it ever was, and in some places more so than ever'.[56] The bases for this claim are not heavily disputed. New Religious Movements and diverse forms of spirituality continue to arise in Western societies; Pentecostal Christianity (or what Berger describes as 'dynamic evangelical Protestantism') continues to expand globally; the Catholic Church has been growing in the Global South; the Orthodox Church is experiencing a revival in Russia; Islamic movements are on the rise in

---

[52] See Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009) ch 3.

[53] See Chapter Three, Part III.

[54] See, e.g., Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 1.

[55] Peter Berger, 'Secularism in Retreat' (1996-1997) Winter The National Interest 3.

[56] ibid

both the Muslim world (a revitalisation) and 'the Muslim diaspora in the West'; and fundamentalism of various hues is a feature of international life.[57]

Berger's underlying characterisation of this 'furiously religious' revival is one of reaction, which he sees as holding potential dangers. He notes that it is the more 'conservative' and 'reactionary' faiths, those that refuse to adapt to the requirements of a scientific and secularised worldview, which have flourished.[58] He is critical of both secularist fundamentalism, which would attempt to strip public life of all religious symbolism, and religious fundamentalism, which seeks 'the dominance of religion over every sphere of human life'.[59]

In contrast, he points to institutional differentiation. Religion, he contends, experiences necessary 'specialization'. The paradigm case is denominationalism in America.[60] The political sphere concerns regulating pluralism; in contrast, the religious sphere concerns vying for believers on a 'free market'.[61] Thus, while Berger challenges the decline component of the secularisation narrative, he does not challenge differentiation. Rather, he poses two forms of religion: 'furious reactionaries' who, he laments, would disrupt differentiation, and individual believers who act as consumers on a private market of belief.

---

[57] See Peter Berger, 'Secularization Falsified' (*First Things*, February 2008) <www.firstthings.com/article/2008/01/002-secularization-falsified-1> accessed 23 September 2012. See also Phillip Jenkins, *The Next Christendom: The Coming of Global Christianity* (OUP 2002); and John Micklethwait and Adrian Wooldridge, *God is Back: How the Global Revival of Faith is Changing the World* (Penguin 2009).

[58] See Berger, 'Secularism in Retreat' (n 55) 5.

[59] Berger, 'Secularization Falsified' (n 57).

[60] ibid

[61] ibid

A second challenge to the secularisation thesis claims that religion has experienced 'deprivatisation'. José Casanova refers to a 'process whereby religion abandons its assigned place in the private sphere and enters the undifferentiated public sphere of civil society to take part in the ongoing process of contestation, discursive legitimating, and redrawing of boundaries.'[62] He provides five case studies: the disestablished church in Spain; the role of the church in Polish civil society; the shift of the Brazilian church from being for the oligarchs to being for the people; Catholicism in the United States becoming a public denomination; and evangelical Protestantism in the United States, eventually taking the form of the New Christian Right. These illustrate, he argues, religious traditions refusing to accept the privatised role assigned to them by theories of modernity and secularisation.[63]

Casanova concludes that the secularisation-as-decline thesis is 'a myth that sees history as the progressive evolution of humanity from superstition to reason, from belief to unbelief, from religion to science.'[64] And his examples of public religion point beyond a purely individualised faith. Nevertheless, he argues that the core of the secularisation thesis, differentiation, can be maintained and, one suspects, should be. Although he identifies religious activity in a sphere of civil society, he points to freedom of conscience as the 'first freedom' of modern Western societies.[65] This is understood as intrinsically related to a 'right to privacy', free from governmental and ecclesiastical control. Differentiation is labelled 'constitutive of modernity' and, at its heart, this includes the identification of religious freedom fundamentally with a private, internal realm.[66] Casanova describes this as a form of

[62] Casanova (n 11) 65-66.

[63] ibid 5.

[64] ibid 17.

[65] ibid 40.

[66] ibid

emancipation or liberation, one which, he argues, was internally preferred from within religion as evidenced by general pietistic trends.[67] In a contemporary turn, he notes the consummation of this process in the Catholic Church, which has 'largely renounced its own self-identity as a "church," that is, as a territorially organized, compulsory religious community coextensive with the political community or state' and adopted the identity of one denomination amongst others.[68]

(d) Conclusion

What kind of health is the standard secularisation narrative in? Berger and Casanova, as two prominent figures challenging the standard secularisation narrative, reject the decline thesis and they both contend that the relationship between public authority and public religion is more complicated than simply privatisation. Nevertheless, they also fundamentally accept differentiation as between religion – typified by the liberation of personal belief and conscience – and spheres of reason and secular governance. Their acceptance, I would add, is both descriptive and normative – such differentiation is a good thing.

Can differentiation itself be challenged? Doing so, I argue, is fundamental to a vision of religious liberty that would step outside of understanding religion quintessentially or primarily as personal belief that must be separated from our understanding of politics, where politics concerns the instrumental and neutral regulation of competing interests or identities. This is a central plank of Radical Orthodoxy. For RO writers, the autonomy of secular reason and secular politics is construed as a competing ontology that Christianity has traditionally challenged (although also fallen prey to): viewing competing individual wills as fundamental

[67] ibid 39, 48-51.

[68] ibid 62.

reality. RO is, in this sense, post-secular, espousing a vision in which the shape of the Church, and its discursive quest for agreement on human flourishing, shapes all public and social life. Other theological voices, however, contest this vision or reach different conclusions supportive of differentiation. Examining these voices, albeit briefly, is important. The aim is twofold: first, to illustrate how acceptance of a differentiation thesis, or secularisation, impacts construal of religion and consequently the shape of religious liberty; and second, to introduce by contrast the RO claim against differentiation.

II Post-War Catholic Thought and Differentiation

Recent political theology has, at least in part, been characterised by a debate as to whether and how to accept, endorse, or act within the liberal modern state. The differentiation thesis, a separation of value spheres between the religious and the secular, is the broad structural point of contention for this debate, but, fundamentally, how this is addressed also turns on what it means to be and talk about 'the church'.[69] Following Bretherton's characterisation, for some 'the church' is either one constituent within civil society or it is a supra-temporal body which, in either case, offers values in support of 'democratization and a commitment to a liberal state.'[70]

My illustrations for this position will draw from the 'New Natural Law' (NNL), an explicitly jurisprudential school of thought, and post-World War II Catholic thought (Jacques Maritain and Vatican II, especially *Dignitatis Humanae*). Here, I explicitly choose writers

[69] See also Daniel M Bell, 'State and Civil Society' in Peter Scott and William T Cavanaugh (eds), *The Blackwell Companion to Political Theology* (Blackwell Publishing 2007) 424. For the different meanings of 'church' in this thesis, see Introduction, Part II (e).

[70] Luke Bretherton, *Christianity and Contemporary Politics* (Wiley-Blackwell 2010) 16.

within a more developed Catholic tradition that are comparable interlocutors for RO. I leave to one side, for example, writers who adopt a broadly Rawlsian or Dworkinian approach to develop arguments for religious liberty based on the 'fact of pluralism' or scepticism as to whether one tradition can claim truth at the expense of others.[71] Each of my illustrations holds its own ambiguities and, indeed, is not always at odds with the competing position. The competing position, post-secular in outlook, is associated with RO and related writers. It understands 'the church' in its universal and catholic sense as 'a distinctive politics and [as] a particular polity'.[72] 'Civil society', on this competing position, is placed at the centre of politics and, in essence, it is defined and characterised by the practice or performance of Church – the instantiation of charity in different contexts, given witness by, but not limited to, the central case of the church as institutional and catholic. Fundamentally, in light of the acceptance or rejection of the differentiation thesis and the subsequent characterisation of the church and civil society, these positions, I will argue, present us with different accounts of religious liberty.

(a) New Natural Law

New Natural Law (NNL) is a school of jurisprudence familiar to lawyers through the writing of, most notably, John Finnis. It does not consider itself to be engaged in religious reasoning, but rather analytical legal philosophy that nevertheless points in certain theistic directions.[73]

---

[71] See, e.g., Tore Lindholm, 'Philosophical and Religious Justifications of Freedom of Religion or Belief' in Tore Lindholm, W Cole Durham Jr and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004) 19 (combining Rawls and religious argument) and James E Wood, 'An Apologia for Religious Human Rights' in John Witte Jr and Johan D van der Vyver (eds) *Religious Human Rights in Global Perspective: Religious Perspectives* (Kluwer Law International) 455 (focusing on religious truth in a plurality of traditions).

[72] Bretherton (n 71) 16.

[73] See, however, Germain Grisez, *The Way of the Lord Jesus* (St Paul's 2008) <http://twotlj.org/> accessed 25 September 2012. Grisez is a central NNL figure.

Despite this, I briefly raise some of the relevant thoughts of this school in this section discussing 'religious' voices for two reasons. First, there are notable continuities between the post-War Catholic debates discussed below (part (b)) and some of the NNL contentions. Second, although NNL scholars articulate their project as one of philosophy independent of revelation or faith (at least as concerns the fundamental principles of reasoning), it is nevertheless the case that NNL scholars are generally Christian if not Catholic and that this belonging is apparent in much of their writing. In this section of the chapter, I am not attempting a complete characterisation of the NNL school, nor will I engage in a full comparison between the jurisprudence of NNL and RO thought central to this thesis.[74] Such a project is beyond a focus on religious liberty as such. Rather, I raise at this point only three themes: first, the specification of public order and the common good in terms of subjective rights; second, the characterisation of religion as one 'basic good' amongst others; and third, the acceptance of a differentiation thesis.

NNL scholars contend that a democratic regime of individual rights can be reflective of (or congruent with) a discourse of natural law found most notably in the Christian tradition. Giving a brief elaboration of this view requires something of a description of the 'fundamentals' in NNL writing, from 'basic goods' through to 'rights'.

Underpinning NNL thinking is the contention that there are basic goods which give all actions their directional quality and end, understood as 'some intelligible benefit' instantiated by the action.[75] 'Knowledge', for example, is 'irreducibly basic'.[76] It is simply

[74] I focus, for example, almost solely on John Finnis.

[75] See, e.g., John Finnis, 'Commensuration and Public Reason' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997) 215, 224.

[76] John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 59 (*NLNR*).

good to have, such that its status as basic is grounded on the reality that we could not rationally disagree with the principle that 'ignorance is to be avoided'.[77] There are other goods (the list has changed over time): life; play; aesthetic experience; sociability (friendship); marriage; practical reasonableness; and religion.[78] NNL theorists consequently write of 'human integral fulfilment', meaning the fulfilment of all persons and their communities in the basic human goods.[79]

This is where rights come in. On this theory, a subjective right arises wherever the duty not to intentionally choose to destroy, damage, or impede an instance of a basic good gives to A (and every other member of a class to which A belongs) the benefit of imposing an obligation upon B, for example a duty to undertake or refrain from a specific act.[80] The right to life, for example, reflects the requirement that 'person' B (for example, the state through its actors) not act so as intentionally to destroy A's participation in a basic good, namely life.

How does religion figure within this jurisprudential outlook? As noted, it is one basic good amongst others. This raises two issues. First, how does it relate to other basic goods? Second, how is it characterised?

Can there be a hierarchy between the basic goods on the NNL account? The good of play and the good of religion, for example, are both equally basic and therefore

---

[77] ibid 63.

[78] See, e.g., John Finnis, 'Limited Government (1996)' in *Collected Essays: Human Rights and the Common Good*, vol 3 (OUP 2011) 83, 88.

[79] Finnis, 'Commensuration' (n 75) 224 and Germain Grisez, Joseph Boyle and John Finnis, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 Am J Juris 99, 128.

[80] Finnis, 'Commensuration' (n 75) 226 and Finnis, *NLNR* (n 76) 205-06, 218-19.

incommensurable.[81] One could, therefore, choose to play golf on a Sunday rather than go to church, assuming one remains open to the possibility of the latter such that a failure to attend church is only a 'side-effect' of the decision to play golf.[82] As Hittinger argues, this contrasts with the traditional Thomistic conception that there is a teleological end for human beings prior to choice.[83] For Aquinas, the first principle of practical reason ('good is to be done and pursued') follows after an understanding of 'Man's Last End'. The last end is understood as 'master of his affections, since he takes therefrom his entire rule of life.'[84] Our nature as humans, Aquinas considered, gives rise to a desire for a perfected end in which nothing more is left to be desired.[85] In this he followed Augustine, who considered 'our heart is restless until it rests in [God]'.[86]

That religion may relate to an ultimate end prior to choice gives the sense that it is a superordinate, infrastructural, or architectonic good.[87] Consistent with 'man's last end', Aquinas considered 'religion' in terms of a virtue. Reverence is owed to God as the first principle of creation, the governor of all things, and on account of the human soul being ordered to God as its end.[88] On this basis, the virtue of religion commanded all other virtues. The characterisation of religion within NNL writing is very different.

---

[81] See Finnis, 'Commensuration' (n 75) 215, 220 and Robert P George, *In Defense of Natural Law* (Clarendon Press 1999) 93.

[82] See further Russell Hittinger, *A Critique of the New Natural Law Theory* (University of Notre Dame Press 1987) 75-76.

[83] ibid 20, 78.

[84] Thomas Aquinas, *The Summa Theologiae of Saint Thomas Aquinas* (NovAntiqua 2008) I-II.1.5 ('ST')

[85] ibid

[86] Augustine, *Confessions* (Henry Chadwick tr, OUP 2008) Book I, 4.

[87] See Hittinger, *A Critique* (n 82) 170.

[88] ST II-II.81.8.

Fundamentally, I suggest religion within the NNL tradition is a primarily cognitively orientated concept. Finnis frames religion first in terms of the acquisition of knowledge.[89] A person, on his account, comes to accept the argument for the existence of a transcendent explanation of all that exists, a sheer actuality or uncaused cause, as a philosophically cognisable proposition. Once this is accepted as rational it becomes reasonable, Finnis argues, to hypothesise that the uncaused cause would make a disclosure of itself. At this point, we judge the historical evidence and the moral character of the revelatory figures (and their disciples and witnesses). Religion is consequently described as, first, a 'shorthand for judgments about what explains not only the existence and intelligibility of the entire universe but also the real possibility, worth, and responsibility of seeking answers to one's questions about existence, intelligibility, and worth (and worthlessness)'.[90] Finnis does go on to say that religion includes practices, but it is clear that these are secondary or derivative of cognitive and internal beliefs; they are 'responsive to the transcendent explanatory realities affirmed'.[91] Finnis, mirroring *Dignitatis Humanae* (see below (b)), affirms both a concern against coercion as contrary to the requirements of truth *and* the primacy of internal belief as the site of religion.[92] I suggest that the latter, which is a form of interiorisation, makes it much easier to comprehend playing golf on a Sunday over attending church, consistent with the basic goods. NNL writers themselves do not make the point, but a person is certainly not acting to destroy the basic good of accepting a causal explanation for the universe by playing golf.

[89] See Finnis, *NLNR* (n 76) 387-88 and John Finnis, 'Religion and State: Some Main Issues and Sources' (2006) 51 Am J Juris 107.

[90] John Finnis, 'Introduction' in *Collected Essays: Religion & Public Reasons*, vol 5 (OUP 2011) 1, 2.

[91] ibid

[92] See Finnis, 'Religion and State' (n 89) 119-20.

Finnis furthers an inward movement in this formulation of religion by also giving primacy to the individual. He considers that while it is beneficial that religion operates in a collective manner, faith and worship are fundamentally acts of the individual.[93] This could be understood as an argument against coercion into the body of believers (an argument Finnis makes), but it is also the case that Finnis understands that, fundamentally, the collective component of religion facilitates the individual pursuing the good of religion, that is, the individual's assent to a set of beliefs. This is entirely continuous with Finnis' characterisation of the 'common good'. He does note that the 'common good' can also refer to an all-inclusive and intrinsically desirable flourishing of a community.[94] But generally the 'common' character of sometimes collective goods (religion, friendship, marriage) is framed as all individuals being able to pursue or benefit from the good in question, notably through the maintenance of rights and duties.[95] This contrasts with the understanding of religion developed in this thesis, in which Christianity is the central case entailing, in a more architectonic mode, the formation of a new body, a distinct society as such, rather than a collection of rights-bearing individuals.[96]

When these NNL contentions are placed into the explicit context of religious liberty discourse, critical questions can be raised. Finnis is clear in his objections to religious liberty being treated as merely a species of a right to 'decide for oneself' or 'self-determination'.[97] But, as Steven Smith argues, NNL's conceptual foundation – 'persons pursuing goods' – echoes an individualistic anthropology, making 'the subjectivist orientation in ethics seem

[93] ibid 121.

[94] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 459.

[95] See Finnis, *NLNR* (n 76) 210-214 and John Finnis, 'Human Rights and their Enforcement (1985)' in *Collected Essays: Human Rights & Common Good*, vol 3 (OUP 2011) 19, 34.

[96] See below n 184 and accompanying text.

[97] Finnis, 'Religion and State' (n 89) 112.

natural, plausible – even irresistible.'[98] Friendship, marriage, and, above all for our purposes, religion, are not taken as inherently relational – the cultivation of a new body as such.[99] Rather, religion is a good the person acquires amongst others, like play. And Finnis' definition of the basic good of religion does not assist matters. He describes the good of religion as '*harmony with* the widest reaches and most *ultimate source* of all reality, including meaning and value'.[100] While he understands this in Christian terms (and the very idea of seeking harmony arguably evokes reconciliation or participation), he wishes to remain within a philosophical or anthropological definition, which means the basic good is arguably caught-up in the capaciousness of different versions of 'ultimate source'. Further, this subsequent individualising of religious liberty is deepened by Finnis' cognitive framing of the good. One has to query whether this will inevitably diminish religious freedom. For if the basic good of religion consists fundamentally in a form of cognitive assent, then curtailing attendant, derivative, or secondary practices is of less concern: the mind, strangely, remains free. Finnis in this way echoes a fundamental and problematic dichotomy in religious liberty discourse, discussed in Chapter Four: belief and manifestation.

Both of these characteristics – a subjectivist orientation and the priority of 'belief' – are at one with a secularisation-as-differentiation narrative. Finnis does consider that adherence to the natural law is rationally unstable in the absence of some kind of theistic stance.[101] And he contends against a secularism that turns religion into merely self-determination and considers the question of God's existence (and the miraculous) as

[98] Steven Smith, 'Persons Pursuing Goods' (2007) 13 LT 285, 312.

[99] ibid 308.

[100] Finnis, *NLNR* (2nd edn) (n 94) 448 (emphasis in original).

[101] See John Finnis, 'Philosophy and God's Nature: Second Thoughts (2008)' in *Collected Essays: Religion & Public Reasons*, vol 5 (OUP 2011) 193, 195.

irrational.[102] However, he also considers that the Catholic Church has no 'secular' purpose.[103] Rather, he advocates what he describes as a 'perennial Catholic doctrine' of parallel realms of autonomy as between the religious and the secular: 'within the heart and mind of the believer' and through 'church and state'.[104] We can question just how 'perennial' this doctrine is, however. To be 'perennial' one would have to co-opt, notably, Augustine. But Augustine's two cities account is not one of spatial differentiation of 'church' and 'state'; indeed, for Augustine, the two cities map on to the *same space* and represent competing practices orientated by ultimate loves.[105] Further, one would have to understand Christ's words, 'Render to Caesar the things of Caesar' as, per Finnis, a 'firmly differentiating doctrine'.[106] This is questionable. Christ's words do not represent recognition of permanent realms of autonomous authority, but rather point, as others have argued, to the ultimate irrelevance and subordination of temporal authority to the kingdom of God.[107]

Finnis' interpretation comes across as strikingly Weberian.[108] He does not delve deeply into secularisation theory. He accepts, however, differentiation – understood as the

---

[102] See Finnis, 'Religion and State' (n 89) 112.

[103] ibid 120.

[104] Finnis, 'Introduction' (n 90) 5.

[105] See Chapter Five, Part IV.

[106] John Finnis, 'Secularism's Practical Meaning' in *Collected Essays: Religion & Public Reasons*, vol 5 (OUP 2011) 56 (Matt 22:21).

[107] See Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (CUP 1996) 93.

[108] And also as a neo-scholastic interpretation of the Christian tradition. James K Smith's critique of neo-scholastic readings of Augustine is salutary. James K Smith, 'Reforming Public Theology: Two Kingdoms, or Two Cities' (2012) 47 CTJ 122, 127-28:

> The single most common error in reading Augustine is to confuse the earthly city with finite, temporal, creation. On this misreading, the earthly city becomes identified with the political, or even more narrowly, the state. … Such readings …construe Augustine's distinction between the two cities as if it were a distinction of levels – a neoscholastic distinction between nature and grace, temporal and eternal, reason and faith. This then translates into a picture of

autonomy of different spheres of life according to their own laws or logic – as progress and as a process embedded in Christianity. Secularisation is described as the subjection of various human enterprises to increasing levels of technological and natural-scientific control, contrasted with the misdirected idea of management through prayer.[109] This process, he argues, created specialisation within various life spheres, which resulted in 'organizational autonomy … required in directing complex communities and their politics'.[110] Often it appears from Finnis' writing that 'religion' serves to 'heighten' the other goods. Friendship, for example, is now pursued for a *further* reason – valuing what God values.[111] The reason is 'further' in the sense that it creates an added incentive on top of the already existing radical capacity of participating in the human goods possessed by all persons and developed by practical reason's first principles.[112] 'Religion', in other words, gives added support to what is already taking place – the pursuit of goods through practical reason. All the components of a Weberian analysis appear to be present. A religious value sphere, characterised primarily as cognitive belief and added incentive, is coupled with specialisation of immanent spheres which combines, on Finnis' account at least, both a plain of natural moral reasoning (the NNL contention) and technical management.

> Augustine as affirming the earthly city as a proper custodian of temporal goods or penultimate ends, whereas the city of God is concerned with eternal goods and ultimate ends. … [A]s if the distinction between the two cities was a relation of subsidiarity.

[109] Finnis, 'Secularism's Practical Meaning' (n 106) 56.

[110] ibid

[111] Finnis, *NLNR* (n 76) 406-07.

[112] See John Finnis, 'Introduction' in *Collected Essays: Human Rights & Common Good*, vol 3 (OUP 2011) 1, 8.

(b) Maritain and Vatican II

In the 1864 encyclical, the *Syllabus of Errors*, Pope Pius IX offered what Calo calls 'a comprehensive and unqualified condemnation of the basic tenets of modernity'.[113] The *Syllabus* lists and rejects numerous propositions associated with modern progress and liberalism. Chief amongst these, as Calo notes, was church-state separation.[114] According to nineteenth century Catholic antiliberalism, to agree with church-state separation (understood as separation of the state from Roman Catholic doctrine) would be contrary to the authority of the Pope and a dubious concession to the erroneous view that people could believe in mistruths. In the 1885 encyclical *Immortale Dei*, Pope Leo XII continued this thought, arguing that the Roman Catholic Church must stand against the modern understanding of religious freedom as a theory that 'all questions that concern religion are to be referred to private judgment'.[115] Such a theory would, the Pope considered, give rise to private judgement independent of objective law and an unrestrained form of claim couched in the individual's own sense of the divine.

This condemnation was paralleled in Jacques Maritain's early writing. Maritain, a French Catholic philosopher, was later instrumental in the drafting of the Universal Declaration of Human Rights and influential in post-World War II Catholic thought. In his earlier writing, however, Maritain had been critical of rights discourse as a form of bourgeois

---

[113] Zachary R Calo, 'Catholicism, Liberalism, and Human Rights' (2011) 1 Journal of Christian Legal Thought 7.

[114] ibid 8.

[115] Pope Leo XIII, Immortale Dei: *On the Christian Constitution of States* (*The Vatican*, 1 November 1885) <www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html> accessed 12 July 2012, [26].

individualism.[116] In keeping with this criticism, he held an integralist view of society, advocating that the line between church and state should fade away.[117]

However, in the 1940s and through the post-war period, Catholic thought took a 'fateful step'.[118] Moyn describes this as the claim 'that a retrieval of natural law implies a broad set of prepolitical rights'.[119] Calo refers to it as the creation of an 'authentic Catholic liberalism'.[120] What was the content of this new outlook? Two components, I suggest, point towards Catholic thought arguably uneasily accepting, or giving rise to the perception of accepting, a differentiation thesis: first, the centrality of individual conscience; and second, the autonomy of the state.

The Roman Catholic Church's declaration *Dignitatis Humanae,* part of the Second Vatican Council, was central to this new outlook.[121] The Vatican Council declared that the human person 'has a right to religious freedom.'[122] This right, the Council argued, was based on 'conscience'.[123] An individual could not be 'forced to act in a manner contrary to his own

---

[116] See Samuel Moyn, 'Jacques Maritain, Christian New Order, and the Birth of Human Rights' (2008) Columbia University, 13, 18 <http://ssrn.com/abstract=1134345> accessed 11 July 2012. One finds echoes of this still in, e.g., Jacques Maritain, *The Person and the Common Good* (Geoffrey Bles 1948) 68.

[117] Moyn, 'Jacques Maritain' (n 116) 4.

[118] Ibid 15. Moyn argues that the threat of communism precipitated the shift. See Samuel Moyn, 'Religious Freedom Between Truth and Tactic' (*Immanent Frame*, 27 March 2012) <http://blogs.ssrc.org/tif/2012/03/27/religious-freedom-between-truth-and-tactic/> accessed 12 July 2012.

[119] Moyn, 'Jacques Maritain' (n 116) 15.

[120] See Calo, 'Catholicism' (n 113) 7.

[121] Pope Paul VI, Dignitatis Humanae: *On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious* (*The Vatican*, 7 December 1965) <www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html> accessed 10 May 2012. *Dignitatis* has more recently been appealed to in Evangelicals and Catholics Together, 'In Defense of Religious Liberty' (*First Things*, March 2012) <www.firstthings.com/article/2012/02/in-defense-of-religious-freedom> accessed 26 September 2012.

[122] *Dignitatis Humanae* (n 121) [2].

beliefs'.[124] What did the Council mean by 'conscience'? There is a principle of voluntariness or subjectivity of belief, but is this in service of any particular ends? In *Pacem in Terris*, the forerunner to *Dignitatis Humanae*, Pope John XXIII had written that it is among 'man's rights' to be 'able to worship God in accordance with the right dictates of his own conscience'.[125] During the same period, Maritain wrote of a freedom of individuals to 'seek truth in their own way'.[126] Such statements could be used to read *Dignitatis Humanae* as ultimately alluding to a right of individuals to forge their own conscientious path and their own conception of the object of worship (if there is one). For some, therefore, *Dignitatis Humanae* has been read as a rapprochement of the modern conception of conscience as an inalienable freedom held equally by all persons.[127]

But both Maritain and *Dignitatis Humanae* also emphasised that conscience is orientated towards truth and the worship of God.[128] *Dignitatis Humanae* contends that one follows conscience 'in order that he may come to God, the end and purpose of life'.[129] By pointing to 'the end' of conscience, Catholic thought (in at least many statements) contrasts the more open-ended conception of conscience as freedom to articulate one's own truth.[130]

---

[123] ibid

[124] ibid [2]-[3].

[125] Pope John XXIII, Pacem in Terris: *On Establishing Universal Peace in Truth, Justice, Charity, and Liberty* (*The Vatican*, 11 April 1963) <www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html > accessed 12 July 2012, [14].

[126] Jacques Maritain, *On the Use of Philosophy: Three Essays* (Princeton University Press 1961) quoted in Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008) 23.

[127] See, e.g., Wood (n 71) 466 and Kevin J Hasson, 'Religious Liberty and Human Dignity: A Tale of Two Declarations' (2003) 27 Harv J L & Pub Pol'y 81.

[128] Jacques Maritain, *Man and State* (Chicago University Press 1951) 161-62.

[129] *Dignitatis Humanae* (n 121) [3].

[130] See Russell Hittinger, '*Dignitatis Humanae*, Religious Liberty, and Ecclesiastical Self-Government' (2000) 68 Geo Wash L Rev 1035, 1046-47.

But this understanding of conscience as drawn towards an end, namely worship of God, nevertheless maintained a principle of subjectivity. One cannot come to know and enjoy God as a person's true end unless God is accepted as the subject of one's own love. Truth, to be accepted as true, must be a free assent.[131] Conscience accordingly is understood as the site for persuasion towards a true end.[132]

This argument against coercion of belief, and in favour of a personal assent to truth, is a valuable way of understanding conscience without collapsing conscience with an expansive freedom to pursue individual 'styles' or conceptions of the good. However, while this is readily endorsed, the focus on conscience does create a problem, or at least an ambiguity. The differentiation thesis attempts to identify an essential sphere of religion. Typically, this is associated with individual belief or conscience, a reserve that is private in orientation and distinguishable from the public realm of secular politics. Arguably, there are indications in modern Catholic thought of precisely this kind of differentiation.

Both Maritain and Vatican II wrote of the material presence of the church – its life of worship, discipline, sacraments, and association manifested institutionally.[133] *Dignitatis Humanae*, for example, emphasised the Catholic Church's institutional freedom, including internal control over the appointment of Bishops.[134] And Maritain envisaged the Catholic

---

[131] See Joseph HH Weiler, 'A Christian Europe? Europe and Christianity: Rules of Commitment' (2007) 6 European View 143, 148 (discussing the encyclicals).

[132] See also Pope John Paul II, Redemptoris Missio: *On the Permanent Validity of the Church's Missionary Mandate* (*Vatican*, 7 December 1990) <www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio_en.html> accessed 26 April 2012, [36] ('The Church proposes; she imposes nothing').

[133] Maritain, *Man and State* (n 128) 151 and *Dignitatis Humanae* (n 121) [13].

[134] ibid [4].

Church establishing diplomatic relations with states.[135] But these post-War contributions to political theology and religious liberty also displayed a tendency to 'interiorise' the religious life. *Dignitatis Humanae* refers to the exercise of religion as consisting 'before all else' in '*internal*, voluntary, and free acts.'[136] This reflects the argument noted above, that the worship and orientation of one's life towards God requires subjective consent, but it also raises an understanding of religion as primarily an 'internal' act of the individual. The institutional church, on this view, is a body seeking to persuade and assist the orientation of this internal act, what Maritain called a 'vivifying inspiration' upon 'the heart of man'.[137] Here, as with Finnis, a distinction is arguably raised that mirrors Article 9 of the European Convention on Human Rights. Internal belief, the *forum internum*, is the primary site of religion; external manifestation of belief (or indeed, the formation of a community) is secondary. As I discuss in Chapter Four, this distinction is central to the development of a religious-secular, private-public distinction used to limit the scope of religious liberty.[138] It is, in other words, an instrumental component in religious liberty discourse's adoption of the differentiation thesis.

Both Maritain and Vatican II arguably further the echoes of a differentiation thesis by insisting on the rightful autonomy of the world. Maritain promoted the 'full autonomy' of the state and its 'complete differentiation' from the church, understood as the forms of religion.[139] *Gaudium et Spes*, the Catholic Church's 'Pastoral Constitution on the Church in the Modern World', refers to the increasing sense of persons as 'authors and artisans' within

[135] Maritain, *Man and State* (n 128) 165-66, 175.

[136] *Dignitatis Humanae* (n 121) [3] (emphasis added).

[137] Maritain *Man and State* (n 128) 162 and Jacques Maritain, *Integral Humanism* (Charles Scribner's Sons 1968) 124.

[138] See Chapter Four, Part II.

[139] Maritain *Man and State* (n 128) 153, 159.

an autonomous realm of culture, while the 'political community' is said to be 'autonomous and independent' of the Catholic Church.[140] Understanding what is meant here by 'autonomy' has created an on-going debate.

On the one hand, one *could* give this a Weberian interpretation. *Gaudium et Spes* goes on to characterise the autonomy of earthly affairs as enjoying 'their own laws and values' to be deciphered.[141] On this interpretation, the Catholic Church supports the endeavour to master different spheres according to their own natural and technical laws and order, outside of a theological referent. Some have taken this line of thought, interpreting Vatican II as the Catholic Church's attempt to update itself to meet the standards of the modern world.[142] Culture, society, and politics are understood through the application of 'scientific' methods, the latter for example concerning the balancing of interests to avoid the breakdown of social cohesion (that a community not 'be torn apart while everyone follows his own opinion').[143]

On the other hand, there are those who have conceived of the openness to the 'modern world' as a process of *ressourcement* – reading the modern world in light of an engagement with Patristic thought.[144] On such a reading, *Gaudium et Spes* itself is condemning of a

[140] Pope Paul VI, Gaudium Et Spes (*The Vatican*, 7 December 1965) <www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html> accessed 16 July 2012, [55] and [76].

[141] ibid [36].

[142] See Tracey Rowland, *Culture and the Thomist Tradition: After Vatican II* (Routledge 2003) 19 (discussing interpretations of *aggiornamento* as an 'updating to meet the requirements of an external standard', namely the modern world).

[143] *Gaudium Et Spes* (n 140) [74].

[144] See Rowland (n 142) 6, 93.

humanism outside of God.[145] So, for example, describing the person as an artisan of culture could be understood as a reflection on the person's participation in God's creative life. Creativity, on this view, mediates the divine glory by cultivating particular expressions of God's never fully graspable beauty.

In my view, Vatican II displayed tendencies in both directions. The authors, I argue, saw the pull towards modernity and a rootedness in tradition as reconciled under a central contention: modern developments – notably liberal democracy based on a regime of rights – are at one with the Christian project. *Gaudium et Spes* refers to the autonomy of political authority, but this is because modern understandings of political authority were understood to be congruent with Christian teaching. Political authority was said to be purposed towards the 'common good'.[146] And this 'common good' was understood to be securing the 'conditions of social life'.[147] Typically, Vatican II associated these conditions with the maintenance of rights – for example, to association, religious liberty, and expression, but also to economic and social development – and duties.[148] In other words, the autonomy of political authority rested on the thought that Christian teaching had been incorporated, so to speak, into the language of the state. Maritain reflected precisely this point when he argued, 'The Kingdom of God is essentially spiritual, and by the very fact that its own order is not of this world, it in no way threatens the kingdoms and republics of the earth.'[149] This sounds dramatically quietist, and indeed it might be. For Maritain, however, this division and lack of challenge

[145] *Gaudium Et Spes* (n 140) [57].

[146] ibid [74].

[147] ibid

[148] ibid [73].

[149] Maritain *Man and State* (n 128) 153.

was possible because, in what he called the 'New Christendom', all people can participate in the Christian understanding of society and politics, now reflected in a discourse of rights.[150]

Maritain and the Second Vatican Council arguably were optimistic as to the marriage of Christian discourse and the language of rights, at least in the sense of a modern synthesis of views. The autonomy of the political, exercising a rights discourse, was understood to be in reality the application of a Christian discourse of natural law. But this autonomy of politics has, arguably, moved in a different direction. As discussed in Chapter One, human rights are appealed to as a 'political' discourse that transcends religion to negotiate competing comprehensive views of the good. This is said to be on the basis of an autonomous 'reason'. For some within the Catholic tradition, an appeal to reason alone is welcomed (as with NNL writers). But the difficulty is that what counts as reason on the political conception of justice is radically different. On this view, focused on equal concern and respect, reason points towards value pluralism. This turns politics, applying the instrument of human rights, into a means through which individuals can develop their own conception of the good. As we saw in Chapter One, the autonomy of politics and of the individual consequently is framed in terms of emancipation from the monolithic value and sectarian divisions of religion. In the words of Michael Ignatieff, 'human rights' 'is the language through which individuals have created a defense of their autonomy against the oppression of religion.'[151] More charitably, religion can survive, but it must do so after being 'interiorised' as personal conscience, a view central to the differentiation thesis.

---

[150] ibid 159.

[151] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 83 quoted in Zachary R Calo, 'Religion, Human Rights and Post-Secular Legal Theory' (2011) 85 St John's Law Review 495, 500.

More recently, Papal writing (as well as some currents of Catholic thought) has arguably recognised this tension. Pope Benedict XVI has been more cautious in his use of rights language, reflecting a critical stance against the modern conception of autonomy as radical freedom uncoupled from the dependence of all of creation on God. Just prior to becoming Pope, then Cardinal Ratzinger wrote that this autonomy leads to 'the increasingly vacuous entertainments of leisure-time society, a society … sated by the usual shabby pleasures.'[152] Consequently, when it comes to 'rights' discourse, arguably we are seeing the development of competing and distinctive rights traditions, or else attempts from the Catholic Church to engage in a dialogue that brings Christian anthropology (of a more personalist and communitarian vein) to bear on the secular language of rights.[153] Most notably for our purposes, in the field of religious liberty, the Catholic Church continues to emphasise, against contemporary rights theory, that freedom is derivative of a duty to seek one's true end – the object or subject of worship.[154] And, further, papal interventions have been increasingly characterised by a more self-consciously theological construal of political and social space.[155] For example, against the 'interiorisation' I have been describing, there is also a more recent focus on the primacy of the universal church body as a distinct society, central to the body

[152] Joseph Ratzinger and Marcello Pera, *Without Roots: The West, Relativism, Christianity, Islam* (Basic Books 2006) 126, quoted in Zachary Calo, 'Human Rights and Healthy Secularity' (2010) 7 Journal of Catholic Social Thought 231.

[153] See Calo, 'Catholicism' (n 113) 6. For a review of the tensions in this dialogue, see Christopher McCrudden, 'Benedict's Legacy: Human Rights, Human Dignity, and the Possibility of Dialogue' (draft, on file with the author). On the invocation of personalist arguments in relation to rights, see, e.g., John Paul II, Laborem Exercens: *On Human Work* (*The Vatican*, 14 September 1981) available at <www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html> accessed 31 March 2013, [15] (emphasising the connection between the rights of the worker and the personality of the worker).

[154] See Christopher McCrudden, 'Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?' Ox J Law Religion (2012) 1 185, 195 (noting Catholic encylicals' emphasis on duty).

[155] Pope Benedict XVI's first encyclical letter, Deus Est Caritas: *On Christian Love* (*The Vatican*, 25 December 2005) <www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html>) focuses on biblical narrative, the lives of saints and the church, and theological discussion on love as providing a 'purification of reason' and 'reawakening of those moral forces without which just structures are neither established nor prove effective in the long run' ([29]).

politic. Pope John Paul II notably emphasised evangelisation as a *political* task of the Catholic Church.[156] This reflected his argument that 'there can be no genuine solution of the "social question" apart from the Gospel.'[157] It is in keeping with this, what Bretherton calls a 'renewed emphasis on the political dimensions of ecclesiology',[158] that I turn to writers operating from a more post-secular outlook.

III The 'Post-Secular' View: Church as the True Politics

Daniel Bell refers to an 'emergent tradition' that consists in writers who identify 'the Church' as the 'true politics'.[159] Undoubtedly, there are overlaps between the writers discussed in Part II and this 'emergent tradition'. The emphasis given to the internal institutional independence of church bodies; the rejection of coercion as contrary to subjective consent in worship; and the belief that there are 'goods' that people participate in, which have some sort of relationship to their fulfilment and to the state's responsibilities, are affirmed by different writers. But the acceptance of an autonomous political sphere within a differentiation thesis and the characterisation of religion with primary reference to conscience or internal belief is criticised. For the emergent tradition, understanding Christianity as vivifying (that is, supporting or adding resources to) an autonomous political discourse or practice thins it down to fit within the terms of that political discourse or it leads Christianity to adopt a conception of politics that is foreign to the Christian tradition.[160] Thinned down or subordinated to

[156] See Bretherton (n 70) 54-55.

[157] Pope John Paul II, Centesimus Annus (*The Vatican*, 1 May 1991) <www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html> accessed 14 July 2012, [5].

[158] Bretherton (n 70) 54.

[159] Bell, 'State and Civil Society' (n 69).

'politics', Christianity fails to offer and sustain an alternative mode and vision of politics in the world. Against this, Milbank writes, the 'pathos of modern theology is its false humility'.[161]

In this section I will trace RO's more muscular assertion of theology (and ultimately ecclesiology) through its antecedents – the work of Alasdair MacIntyre and Stanley Hauerwas. Both of these writers emphasise the importance of the particularity of a tradition to reasoning, with Hauerwas taking a distinctly theological and ecclesiological turn. With this turn in mind, we are met with a central theme of RO writing: construing politics, the state, and civil society as fundamentally centred upon and modelled after ecclesiology. Here we find an explicit rejection of the differentiation thesis.

(a) Alasdair MacIntyre and Stanley Hauerwas

MacIntyre's project can broadly be described as the attempted recovery of rational enquiry as embodied in a tradition in the wake of an inheritance of multiple moralities.[162] On his account (which is not his alone), the Enlightenment in part entailed an attempt to articulate a universal reason removed from any particular tradition of reasoning, not dependent upon various religious positions. In some instances, reason was proposed as at least consistent with religion, in others arguably it was seen as supplanting religion. But a universal 'reason'

---

[160] See James K A Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker Academic 2004) 35 (arguing 'the structures of a given culture or politico-economic system [come to] function as a normative source for the theological project').

[161] Milbank, *TST* (n 3) 1.

[162] See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (3rd edn, Duckworth 2007); Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth 1988) (*WJWR*); and Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy and Tradition* (University of Notre Dame Press 1990).

has been notoriously difficulty to articulate.[163] Different candidates are proposed. Is it nature? Freedom? Utility? Power? *Eros*?[164] In the wake of this contest, we are left, MacIntyre argues, with incommensurable forms of moral assertion.

One particular account of justice becomes seemingly well suited to this incommensurability, what MacIntyre calls a 'tradition' of 'liberal individualism'.[165] This is a tradition in which every individual 'is to be equally free to propose and to live by whatever conception of the good he or she pleases, derived from whatever theory or tradition he or she may adhere to, unless that conception of the good involves reshaping the life of the rest of the community in accordance with it.'[166] Despite its characterisation as 'neutral' by some theorists, MacIntyre argues, this tradition entails imposing a conception of the good, one which creates a parallel between the economic and political realm. In both realms the concern is for the facilitation and regulation of individual preferences.[167] Subjective, pre-political rights (that is, rights the person naturally holds prior to any social arrangement) are the appropriate idiom of this tradition. For MacIntyre, rights obfuscate moral disagreement through the language of 'naturalness' or 'universality'.[168] And, in keeping with the reality of moral disagreement, they are also inevitably concerned, MacIntyre contends, with maximising individual choice rather than co-operative endeavour. In the words of Hauerwas, 'Contemporary political theory has tended to concentrate on the language of rights, not

[163] MacIntyre, *WJWR* (n 162) 334.

[164] See Milbank, 'On Theological Transgression: The Theological Virtues' in *The Future of Love: Essays in Political Theology* (SCM Press 2009) 145.

[165] MacIntyre, *WJWR* (n 162) 4.

[166] ibid 336.

[167] ibid 337.

[168] See Alasdair MacIntyre, 'The Claims of *After Virtue*' in Kelvin Knight (ed), *The MacIntyre Reader* (Polity Press 1998) 69, 70.

because we have a vision of the good community, but because we do not.'[169] On MacIntyre's account then, rights discourse entails the regulation of preferences, taking the shape merely of their aggregation, or the assertion of the powerful.[170] Individuals are conceived of as pursuing a range of goods within different value spheres that have no necessary unity or ultimate end.[171] Politics, within this frame, can only be understood as the balancing of clashing interests with no particular end or purpose.

In response, MacIntyre advocates a conception of rational enquiry as embodied in a tradition. For MacIntyre, this entails a revival of a form of Aristotelianism, read through its Christian inheritance. A 'tradition', MacIntyre writes, is 'an historically extended, socially embodied argument' over, in part, practices aiming for a form of perfection of character.[172] Acting ethically, within this tradition, is to engage in practices in which the goal of the practice is, at least in part, internal to the act itself – the cultivation of a habit of virtue.[173] So, for example, a community will form together to discern and pursue, in part, the common good of education which entails the formation of the person as a citizen of the *polis*, whether, in the classical mould, the city-state or, in the Christian mould, the *ecclesia*.

Stanley Hauerwas' work, a second major influence on RO, could in many respects be described as 'a theologised MacIntyre'.[174] Also Aristotelian in outlook, Hauerwas takes

---

[169] Stanley Hauerwas, 'On the Right to be Tribal' (1987) 16 Christian Scholar's Review 238 quoted in Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press 2008) 4.

[170] MacIntyre, *WJWR* (n 162) 336-37.

[171] ibid 337.

[172] MacIntyre, *After Virtue* (n 162) 222.

[173] ibid 187, 191. See also John Milbank, 'A Critique of the Theology of Right' in *The Word Made Strange: Theology, Language, Culture* (Blackwell 1997) 7, 25.

MacIntyre's call for the formation of virtue within a community and tradition and applies this to Christian ethics. He argues, in light of this, that the first task of Christians is the formation of a distinct body, the church. (Here, Hauerwas is first describing the universal body of Christians manifested in different institutional churches (which are undoubtedly broad in their common lives) and united by common practices. A second sense of 'the Church' as a practice re-shaping all of life is discussed below with respect to RO writing.) The result in Hauerwas' work is an explicitly and unapologetically theological discourse, emphasising the distinctiveness of Christian ethics. In part, this reflects a MacIntyrean argument: that, while there may be *ad hoc* agreement between different forms of moral life, arguments as to a 'natural law' or universal ethic are either minimalistic because of an absence of a point of common reference, foreign to Christian ethics, or, where properly teleological, only comprehensible within Christian frames.[175]

Like MacIntyre, Hauerwas is deeply critical of Rawls, viewing him as an exemplar of the tradition of 'liberal individualism'. His criticisms (as with MacIntyre) are similar to those discussed in Chapter One – that Rawls's contractarianism offers no place for a (in this case Christian) substantive vision of the good in politics, it requires Christians to check their commitments at the door of public discourse, and it results in an empty marketplace of subjective desires.[176] The difference Hauerwas brings, however, is in his response. Others have shown similar concerns over a slouching towards subjective desires. Richard John Neuhaus, a contemporary of Hauerwas', responded to this concern by arguing for a revival of public engagement (civil society groups and individuals) in the project of ordered liberty

---

[174] John Perry, 'Two Questions for Wolterstorff: On the Roles Played by Rights-Talk in History and the Measuring of Worth' (2010) 32 Studies in Christian Ethics 147, 149 n 6.

[175] See Stanley Hauerwas, *The Peaceable Kingdom* (University of Notre Dame Press 1983) 60-61.

[176] See Stanley Hauerwas, *After Christendom? How the Church is to Behave if Freedom, Justice, and a Christian Nation are Bad Ideas* (Abingdon Press 1991) 45.

consistent with 'public reason'.[177] For Hauerwas, however, this is problematically 'accommodationist'.[178] The purpose of religion on an account like Neuhaus's, Hauerwas argues, is to underwrite a political project, namely 'devotion to liberal democracy'.[179] It is this project which Hauerwas argues Christians cannot be hooked on to. It cultivates 'a vast supermarket of desire', construes politics as self-interest limited by self-interest and, perhaps fundamentally for Hauerwas the American pacifist, calls on citizens to kill in its name.[180]

While MacIntyre has not discussed religious liberty discourse directly, Hauerwas, drawing from and extending on MacIntyre's ideas, has. He argues, speaking to the American context, that religious liberty has been construed as a freedom to pursue one's own interest, whether individually or through a group.[181] The church in its different institutional and denominational forms, against this backdrop, Hauerwas contends, has emphasised its *freedom as such*, defining itself as a denominational marketplace with merely sectional interests rather than asking whether it is preaching the gospel as truth.[182] This is consistent with MacIntyre's critique that rights discourse in modernity are underpinned by maximising a market of individual choice rather than co-operative endeavour, right ends, or the formation of a *polis* in which people are aided in the pursuit of flourishing. Hauerwas argues, however, that the market conception does not signal an absence of public religion. Rather, it is itself part of a

[177] See Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (2nd edn, William B Eerdmans 1986).

[178] Stanley Hauerwas and William H Willimon, *Resident Aliens: Life in the Christian Colony* (Abingdom 1989) 32-33.

[179] Neuhaus (n 177) 69.

[180] Hauerwas and Willimon (n 178) 32-33.

[181] Hauerwas, *After Christendom?* (n 176) 72.

[182] ibid 71.

civic religion, shared by both the Religious Right and liberal Protestants – a commitment to freedom, devotion to liberal democracy, or nationalism itself.[183]

In contrast, Hauerwas argues that the church is a distinct body of people that enacts its own politics. Against any sense of the collective as simply the vehicle for individual pursuits of the good (as is arguably the case with Finnis), Hauerwas emphasises the formation of a new *body*. He draws from Saint Paul's understanding of the body of Christ and argues the individual Christian's body 'is quite literally not our "own"'.[184] Entering into Christian practice, he argues, is the formation of a new body that determines who the person is and what his or her own body (as a part) can and cannot do.[185]

On this view, we are moving towards understanding religious liberty as an aid to forming new groups with specific purposes. Hauerwas himself does not take this step, but his critiques and ideas open up the possibility. Importantly, this also entails rejecting the focus on interiority or belief as the prime characteristic of religion, as was arguably the case with NNL and post-WWII Catholic thought. 'Belief', Hauerwas writes, can only ever truly reside for the Christian in the practices of a body, the church.[186] Outside of this participation, which conveys and shapes what it means to be a Christian, belief is 'mere belief', the identification of an apparent interior space in contrast to public space. Hauerwas thus emphasises that the rites of the church – baptism and the eucharist, notably – are not simply additional 'religious

[183] ibid 73-74.

[184] Stanley Hauerwas, *In Good Company: The Church as Polis* (University of Notre Dame Press 1995) 24 (see 1 Corinthians 6:19 for the allusion).

[185] ibid

[186] See Stanley Hauerwas and Michael Baxter, 'The Kingship of Christ: Why Freedom of "Belief" is Not Enough' (1992) 42 DePaul L Rev 107.

things'; rather they are 'rituals of our politics' which form a new body.[187] It is this body that, in response to and shaped by these rites, engages in a unique ethic of gift exchange, almsgiving, confession, forgiveness, and a genuine vision of peace that, on Hauerwas's account, is 'capable of saying no to the state.'[188]

(b) *RO and the Post-Secular Claim: The Church as Central to the Body Politic*

For Hauerwas, the church is always a 'contrast society' in respect of the wider, 'host' society.[189] While he believes that this means the church can engage in an *ad hoc* dialogue with the dominant politics of the liberal state, he nevertheless conceives of the church as primarily surviving or enduring.[190] As Luke Bretherton comments, this reduces Christianity to 'a form of subcultural resistance'.[191] While RO writers (and others developing similar lines of thought) draw from Hauerwas's description of the church as a new body, emphasising the distinctiveness of Christian ethics, they nevertheless believe that this new body acts in the expectation that the wider society will be transfigured. Milbank writes:

> [I]f Christians rightly believe in the paradox that true power is attained through receptive weakness, in self-offering unto death, infinite forgiveness, and ecstatic reciprocity and reconciliation, then we must believe that such stances should prevail. We should *not* be courting the failure of these stances! We must seek to incarnate them throughout our culture and polity.[192]

---

[187] Hauerwas, *The Peaceable Kingdom* (n 175) 108. Cavanaugh, one of Hauerwas's students, similarly notes that 'liturgy' in the Greek (*leitougia*) suggests the 'work of the people'. See William T Cavanaugh, *Theopolitical Imagination: Discovering the Liturgy as a Political Act in an Age of Global Consumerism* (T&T Clark 2002) 83.

[188] Hauerwas, *After Christendom?* (n 176) 71.

[189] Ibid 16-17.

[190] See *Stanley Hauerwas, John Milbank & Luke Bretherton in Conversation* (King's College, London 2010) <http://christianitycontemporarypolitics.blogspot.com/2010/10/stanley-hauerwas-john-milbank-luke.html> accessed 20 March 2013.

[191] Bretherton (n 70) 190.

The primacy of the universal church (a body characterised by particular practices, stretching across different institutional forms) is maintained, but rather than survival, the paradigm is winning a contest. Success is understood as the church reconfiguring what it means to speak of the state and civil society; a reconfiguration that could be labelled contemporary Christendom.

For Milbank the universal or catholic church is the example for how all of social existence should be reshaped.[193] The ruler should now also exercise mercy; the economic 'sphere' should be characterised by just exchanges of products and talents rather than the maximisation of profit; politics should consist in the 'peaceful coordination of different human roles' and diverse corporate bodies 'for the achievement of a collectively agreed-upon common good'.[194] In all areas of life, 'it would be our ethical imperative to associate well'.[195] Milbank, against the frequent characterisation of the West as post-Christianity and post-Christendom, grounds his politics on the claim that 'Christianity' and 'Christendom' are identical in meaning.[196] Graham Ward is similarly provocative, drawing the following conclusion: 'theocratic politics is what Christians are about'.[197] Here we have a rejection of the legitimacy of differentiation as understood in secularisation theory. There is no reserved territory of the 'political' or the 'economic' that is governed by its own autonomous logic

---

[192] John Milbank, 'Shari'a and the True Basis of Group Rights: Islam, the West, and Liberalism' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 135, 155 (emphasis in original).

[193] John Milbank, 'Christ the Exception' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 203, 225.

[194] John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 Ox J Law Religion 203, 231.

[195] John Milbank, 'Paul Against Biopolitics' in John Milbank, Slavoj Žižek and Creston Davis (eds), *Paul's New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press 2010) 21, 73.

[196] Milbank, 'Shari'a' (n 192) 155.

[197] Ward (n 52) 296.

apart from the practices of Christianity. Milbank takes this to the point of making the claim that the United Kingdom, if not the West, 'really is the Church'.[198] Put another way, ecclesiology becomes social theory.

Is this a form of Christian imperialism or a kind of nostalgia for coercive Christian rule? Steven Shakespeare claims that on the RO view God cannot be known and true politics cannot be experienced '[o]utside of the Church and its worship'.[199] He argues that this leads RO writers towards a kind of church perfectionism, in which the historical and contemporary failings of the church are ignored.[200]

Shakespeare's criticisms are, however, misdirected. The RO narrative (as I discuss in Chapter Three) at its heart criticises the institutional church's wrong turnings. For example, with Charles Taylor, Milbank contends the church in the late Middle Ages increasingly emphasised a priestly caste over the laity.[201] This, he argues, contributed to a discourse of power, in which rival factions of church and state asserted their jurisdiction to discipline the lives of citizens as against instantiating a life of charity. Of course, Shakespeare also wants to read a history of religious oppression and violence. But quite aside from this history being ambiguous, recognising the failings of the church is not incompatible with ecclesiology as social and political theory unless you believe that religion, engaged in politics, is inevitably violent. At best, Shakespeare's criticism that RO writers provide an inadequate account of the institutional church's failings is a plea for further writing. Milbank himself has noted that his understanding of 'the Church' – more as a practice of charity, centrally witnessed to by

[198] Milbank, 'Shari'a' (n 192) 155.

[199] Steven Shakespeare, *Radical Orthodoxy: A Critical Introduction* (SPCK 2007) 99.

[200] ibid 84, 97-100.

[201] See Chapter Three, Part I.

the universal church, that is, the body of Christians sharing in word and sacrament – requires a 'continuous act of self-discernment which involves a critical reading of [the institutional church's] own history … [a work] scarcely the task of one person alone.'[202]

Shakespeare's main criticism then – that RO limits knowledge of God, as well as what counts as 'true politics', to 'the Church' – is an imperialism claim. We can understand this as the following contention: claiming that ecclesiology can and should act as social and political theory amounts to the imposition of Christian rule, a kind of 'soft fascism'.[203] How would RO writers respond to this?

Certainly, the RO contention is clear: Christian practice should shape all levels of society. This is the 'Christendom' claim. What this means, however, is far removed from any conception of, for example, hierocratic rule. Rather, Milbank and Ward both develop this ecclesiology as social theory in Augustinian terms, reflecting on the *civitas Dei*. This entails two related directions (which I develop in Chapter Five). First, they emphasise the importance of Christian judgement in respect of, and in contrast to, political order. The *civitas Dei* announces a new kingdom that challenges worldly authority. Second, they contend that this contrast – the challenge posed by Christian judgement – must have a transformative impact on political and social order. However, rather than entailing some kind of top-down imposition of Christian rule, the *civitas Dei's* transforming impact is experienced through the creation and sustaining of different communities engaged in, most importantly, gift exchange. Rather than this being a hierocratic rule, we are challenged by a vision of a renewed civil society, beyond the institutional boundaries of the church.

---

[202] Milbank, 'On Theological Transgression' (n 164) 168.

[203] Anthony Paul Smith and Daniel Whistler, 'What is Continental Philosophy of Religion Now?' in Anthony Paul Smith and Daniel Whistler (eds), *After the Postsecular and the Postmodern: New Essays in Continental Philosophy of Religion* (Cambridge Scholars Publishing 2010) 1, 14.

IV Conclusion

The secularisation thesis is alive. While narratives of decline may be challenged, sphere differentiation, a division between religion and politics, continues to be affirmed. I argued that this is evident in notable post-War Catholic thought, from Maritain and Vatican II through to the NNL tradition. These writers largely accept a privileging of individual conscience as the site of religion. Finnis, for example, understands religion as quintessentially, although not entirely, an operation of individual cognition. This frames religion as, further, a vivifying influence upon or addition to an already autonomous immanent domain – politics, for example. The claims of RO, and related writers, are very different. Ecclesiology becomes social and political theory. Recall Hauerwas' argument: the rites of the church are not additional 'religious things', they are the 'rituals of our politics' which form a new body.[204] From this perspective, the identification of religion as fundamentally an interior space or simply vivifying influence for a 'natural' and distinct realm of politics represents a failure of theological critique, where the critique takes precisely the form of the new body. In the RO development of this line of thought, there is no belief outside of the distinctive shape of the city of God, 'the Church' as a practice; there can be no vivifying influence unless this influence is experienced as a re-constitution of social space. Religious liberty, on this view, consists in a commitment to the outworking of a central case, the discourse and practices of the universal church, with potential always for analogies, and its impact on society as such. This is one conclusion reached in Chapter Six where I more explicitly interrogate the RO-influenced account through common questions within legal religious liberty discourse: there is no 'religion' as such, but while one particular religion can

[204] See above n 184 and accompanying text.

and should be (as desirable) of central importance, we can, through this affirmation, recognise the shared values and contribution of other traditions, to a common life. However, before reaching this conclusion, and discussing the shape of this re-constituted social space, we must consider how and why RO rejects any notion of an autonomous 'secular' as part of the differentiation thesis, and further, how religious liberty jurisprudence in its fundamental tropes or themes parallels the critiqued secular vision. This is the subject of the next two chapters.

3

Secular Order and Private Religion

The story of secularisation, rehearsed at the beginning of Chapter Two, is largely tied to a notion of 'desacralization'. This is the idea that religious faith was 'stripped away' from public (and sometimes personal) life in the face of reason's inexorable advance. Habermas' recent writing on religion and public life illustrates the point. He argues that pre-modern societies met their desire for unity through 'political theology'.[1] This he characterises as securing unity by reference to a 'transcendent authority operating beyond society'.[2] Habermas argues that the desire for unity remains constant in society, but we have evolved beyond the theological warrant.[3] Rather, religion itself turned to metaphysical explanation, and this proto-philosophy was then surpassed by political science.[4] Unity, under this more refined understanding of society, is now expressed as 'solidarity' to abstract constitutionalism.[5] What this means is a commitment to 'egalitarian premises of the morality of human rights' or equal concern and respect.[6] In other words, society stripped bare of the

[1] See Jürgen Habermas, '"The Political": The Rational Meaning of a Questionable Inheritance of Political Theology' in Eduardo Mendieta and Jonathan Vanantwerpen (eds) *The Power of Religion in the Public Sphere* (Columbia University Press 2011) 15, 21.

[2] ibid

[3] ibid 23.

[4] ibid 21.

[5] Jürgen Habermas and Joseph Ratzinger, *The Dialectics of Secularization: On Reason and Religion* (Brian McNeil tr, Ignatius Press 2006) 32-33.

[6] Habermas (n 1) 27.

superfluous unifying feature of religious legitimation is uncovered as self-legitimating, formed by natural rights bearers who come together for the mutual protection of their rights.[7]

This story of political society stripped bare of its now superfluous religious underpinnings is open to criticism. Charles Taylor identifies the central contrasting argument: while sphere differentiation (which Habermas contributes to) might mean a vision of the bounds of political and religious authority different to the West's pre-modern vision, this does not mean that the differentiated spheres are not shaped by faith.[8] For Taylor, Habermas appeals to a faith in a different kind of unity. Taylor calls this the 'modern moral order'.[9] Milbank, in similar vein, refers to the 'new science of politics'.[10] Society, on this view of 'unity', exists for the mutual protection of the rights of equal individual members. How is this view shaped by faith?

Taylor argues we have moved from a society in which belief in God was unchallenged to one in which it is one option amongst many, 'and frequently not the easiest to embrace'.[11] This movement has meant that God is treated as absent from various 'spheres', which are now construed as acting according to their own internal rationality ('maximum gain within the economy, the greatest benefit to the greatest number in the political area, and so on.')[12] Secularisation, of a sort, has happened. But it is not the

[7] See Habermas and Ratzinger (n 5) 25-28.

[8] Charles Taylor, *A Secular Age* (Belknap Press 2007) 425.

[9] Charles Taylor, 'Why We Need a Radical Redefinition of Secularism' in Eduardo Mendieta and Jonathan Vanantwerpen (eds), *The Power of Religion in the Public Sphere* (Columbia University Press 2011) 46.

[10] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (2nd edn, Blackwell Publishing 2006) 10 (*TST*). The term echoes Eric Voegelin, 'The New Science of Politics' in *The Collected Works of Eric Voegelin: Modernity Without Restraint*, vol 5 (University of Missouri Press 2000) 75.

[11] Taylor, *A Secular Age* (n 8) 3.

outworking of immanent logics or some kind of historical inevitability. Rather, Taylor argues, we have 'a very accidental terrain' brought about by changes in the social imaginary.[13] A 'social imaginary' concerns 'the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations'.[14] And this is where 'faith' comes in. Taylor, along with Radical Orthodoxy, argues that the modern moral order was shaped by changing visions (ideas and practices) of humanity's relationship to society, society to the cosmos, and the cosmos to the divine. And this change led not so much to the absence of faith, but to new kinds of faith, principal amongst which is 'authenticity' – the discovery of our own way of living, a form of intra-human search for depth unconnected to the transcendent.[15]

Taylor and RO tell complementary narratives to explain these shifts.[16] Taylor tells a 'Reform Master Narrative', in which Christian elites periodically demanded the masses exhibit a more disciplined, more intense, Christian life. This life, he continues, came to be associated with a sense of controlling created, and later technical, order. RO relates a similar narrative, arguing that the secularity of the modern moral order – society's uncoupling from participation in the transcendent and its characterisation as existing to protect and further individual interests or wills – had to be 'instituted or imagined, both in theory and in

[12] ibid 2.

[13] ibid 531.

[14] ibid 171.

[15] ibid 255-56.

[16] Taylor refers to RO's narrative as 'complementary, exploring different sides of the same mountain, or the same winding river of history. [RO] clarifies some of the crucial intellectual and theological connections.' Taylor, *A Secular Age* (n 8) 775. See, in return, John Milbank, 'A Closer Walk on the Wilder Side: Some Comments on Charles Taylor's *A Secular Age*' (2009) 22 Studies in Christian Ethics 89. Milbank writes that RO accepts Taylor's narrative is more primary, being a fusion of ideas and deep practice, but argues that because the 'disciplinary' policies of the Latin West were largely the work of intellectual elites, RO's narrative is perhaps more central to Taylor's project than Taylor envisages.

practice'.[17] For RO, this is an 'Intellectual Deviation' narrative or, as Simon Oliver puts it starkly, a 'Christian heresy' narrative.[18]

In this chapter, I explore these narratives. In doing so, I relay aspects of RO's interpretation of a number of key figures – for example, John Duns Scotus and William of Ockham on the development of a subjective rights discourse. These interpretations can and have been criticised. However, rather than attempting to find the true interpretation of these different figures, the aim of this chapter is limited: to describe central claims of RO (which align with Taylor's thesis) as they critique what is characterised as the modern social order arising with secularisation, especially with reference to religious liberty themes. Ultimately, I am more concerned with several core themes developed by RO writers and the contingent historical shifts that their narrative points to. This thesis develops a conversation between RO thought and religious liberty discourse, exploring RO as a resource for critique and for re-envisioning religious liberty. It is consequently important then that the 'deviant' ideas RO writers discuss really do have some purchase in the modern moral order, that there have been real, but contingent historical shifts, and that these are reflected, at least in part, in religious liberty discourse. However, establishing the precise *origins* of these changes is of less importance for this thesis. RO (along with Taylor) provides arguably important aspects of these changes, but is not necessarily exhaustive.

Accordingly, I will only relate the narrative, and sometimes broadly, in respect of three components that have a central bearing on religious liberty discourse. First, the rise of secular order understood as the protection of individual rights or, on the RO account,

[17] Milbank, *TST* (n 10) 9.

[18] See Taylor, *A Secular Age* (n 8) 774 and Simon Oliver, 'Introducing Radical Orthodoxy: From Participation to Late Modernity' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 3, 6.

reflections on the need for self-preservation; second, RO's claim that a private form of religion was invented in modernity to secure the autonomy of secular order; and third, the development of a discourse of 'authenticity', in which privatised religion becomes individual experiences of 'spirituality', 'depth', or 'ultimate concerns'. I argue that these three themes are echoed in religious liberty discourse and jurisprudence. I develop this argument further in Chapter Four. These themes reflect a movement, away from a teleological discourse in which individuals and the community pursue right ends, towards a focus on power. Within what RO labels deviant theology, individuals are understood as owning themselves, a matter of self-possession granted by God, and thus exercising a sovereign will or power to discipline themselves and control creation. This points to religious liberty as, in a later development, a power to develop a capacity for autonomous moral choice, which arguably gives support to a contemporary discourse of diffuse spirituality. We now debate whether 'Jedi' is a religion and, if so, whether religion should be protected as a legal category.[19] But, further, the turn to individual will or autonomous moral choice also precipitates the *containment* thesis. The exercise of diverse individual wills can lead to conflict. And such conflict is settled through the supremacy of one central will, the state. Religious difference is, on this account, the primary source of conflict and must be privatised.

[19] See below n 240 and accompanying text.

I The Rise of Secular Order

(a) Reform Master Narrative

(i) Introduction

Taylor argues that our current social imaginary – in which belief in the transcendent is but one option amongst others, and a frequently untenable option at that – is unique in history. His work, *A Secular Age*, poses a response to the question of how this imaginary has arisen. Although the book provides a comprehensive and weighty sweep of intellectual and social history, its central thesis is clear. Taylor argues that our secular age was ushered in by a series of 'reform' movements experienced as disciplining the person, which would in time come to be understood as an ability to control and impose our own purposes upon self and nature. Why is this important for religious liberty discourse? Taylor's thesis highlights how a turn towards law as a disciplinary measure within the institutional church was entangled in the birth of a secular order focused on power. He paints an implicit contrast, which is also central to RO thought. The Church as a practice forming a community is understood as a true society, cultivating networks of charity or *agape* participating in God's own life and eternal time, contrasting the still present time of the 'secular' (*saeculum*), a time in which temporal authority necessarily but tragically makes use of coercive power. But, Taylor continues, the institutional church failed to cultivate this network, instead asserting a sovereign jurisdiction of power, its formation as a coercive and disciplinary body of law that would, in due course, be emulated by the unitary sovereign state. This gave rise, Taylor and RO argue, to society as the modern moral order, characterised by the power of individual wills and the state's will. For religious liberty purposes, Taylor's Reform Master Narrative consequently both points to

how a discourse of power, in which the church was an originator, gave rise to an autonomous modern state that would 'bracket' God from politics *and* hints at an alternative, namely supporting the cultivation of networks of charity.

Importantly, this account moves us closer to a critique of the modern understanding of religious liberty as based on personal autonomy, an understanding falling within the modern moral order. But it also contrasts recent attempts by prominent religious liberty scholars to retrieve a focus on the 'jurisdiction' of religious associations. These attempts follow Harold Berman, who contended that the Western legal tradition is based on the law (and its claim to supremacy) responding to and managing competing claims of jurisdiction first arising from the church.[20] In contrast to Taylor, Berman read the turn to law within the church and society altogether more positively. But I argue that Berman's own narrative is ultimately an apologetic for secular order framed as the bare management of competing interests. In religious liberty terms, as I argue in Chapter Five, this narrative points to the dominance of secular power over religious institutions, framed abstractedly as sites for liberty.[21]

(ii) Taylor's Argument

Taylor points to the Hildebrandine reforms as the first 'attempt to make the mass of the laity, living in the *saeculum*, shape up more fully as Christians.'[22] In the eleventh century, Pope Gregory VII (Hildebrand) was beset by the practices of simony (purchasing holy orders or offices), clerical marriage and concubinage, and lay investiture (the granting of ceremonial

[20] See below n 52 and accompanying text.

[21] See Chapter Five, Part II (c).

[22] Taylor *A Secular Age* (n 8) 265 (e.g. pointing to the institution of a regime of once-yearly confession, absolution, and communion on all lay people at the Fourth Lateran Council).

office by lay patrons). To respond, he set about introducing a series of social and political reforms. Socially, the lower ranks of the church, clerical and lay, were subjected to papal authority and there developed a greater emphasis on personal devotion, ascetic discipline, and coercion. At the same time, the laity were increasingly removed from church functions (for example, the appointment of clergy).[23] Politically, he construed papal authority as extending to the external government of temporal rule. Inescapably political and legal, Gregory contended this authority included the power to act as supreme judge over disputes involving princes. This was manifested most dramatically when he excommunicated the emperor, Henry IV, 'releasing all Christian men from the allegiance which they have sworn or may swear to him, and … forbid[ding] anyone to serve him as king.'[24]

Gregory interpreted his power in Augustinian terms: resistance to him was a manifestation of self-love against the love of God, which is expressed through the 'church militant'.[25] For some, this Augustinian characterisation is accepted.[26] But this characterisation is problematic.[27] For Augustine, as I discuss further in Chapter Five,[28] the 'church militant' was to be characterised by a virtue, in Milbank's words, of 'self-forgetting conviviality'.[29] It benefited from the coercive restraint exercised by temporal authority, but was not to emulate its rule.

---

[23] ibid

[24] Steven Smith, 'Discourse in the Dusk: The Twilight of Religious Freedom?' (2009) 122 Harv L Rev 1869 (quoting the 'Excommunication of King Henry IV' by Pope Gregory VII (Feb 1076)).

[25] Gregory VII, 'Dictatus Papae (1075) and Letter (1081)' in Oliver O'Donovan and Joan Lockwood O'Donovan (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans Publishing Co 1999) 245-47.

[26] See, e.g., Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth 1988) 161-62.

[27] See also Taylor, *A Secular Age* (n 8) 243.

[28] See Chapter Five, Part IV.

[29] Milbank, *TST* (n 10) 394.

Gregory's invocation of Augustine's own differentiation between the church and temporal authority followed in the footsteps of others. Some fifty years after Augustine, Pope Gelasius I wrote in his *Letter to Emperor Anastasius*, 'Two there are, august Emperor, by which this world is ruled: the consecrated authority of priests and the royal power.'[30] But between the eleventh and fourteenth centuries, rulers within the Roman Church and the Roman Empire would invoke Gelasius' dualism anachronistically, combining the two forms of rule into the one person. For example, Bernard of Clairvaux argued that both the temporal and spiritual swords belong to the church, but that the former is only at its disposal to command rather than directly exercise.[31] There arose a 'fateful consensus' among both temporal and spiritual rulers that each assumed superiority over the other for the purpose of protecting the faith of Christ and promulgating his laws.[32] Gregory VII expressed this clearly, although it would be temporal authority that would eventually win the day in this competition of absolute authority by sovereign decree. Taylor discusses how the Hildebrand reforms imagined a regime in which sinners, although always present, could be forced to conform through subordination to the rule of the truly good – exercised by kingly power, following the hierarchy of the church that articulates God's will.[33] Quoting Diarmaid MacCulloch, this was the first 'formation of a persecuting society' intent on the 'regulation of the whole of society'.[34]

---

[30] Gelasius, 'Letter to Emperor Anastasius' in O'Donovan and Lockwood O'Donovan (n 25) 179.

[31] See Oliver O'Donovan and Joan Lockwood O'Donovan, 'The Struggle over Empire and the Integration of Aristotle' in O'Donovan and Lockwood O'Donovan (n 25) 231, 234.

[32] ibid 231.

[33] Taylor, *A Secular Age* (n 8) 243.

[34] ibid quoting Diarmaid MacCulloch, *Reformation* (Allen Lane 2003) 27-28.

Taylor argues that underlying the Hildebrand reforms was the 'promise of the Parousia', the arrival of the kingdom God, through 'disciplined imposition'.[35] This imposition was emulated numerous times by clerical elites and later confessional governments. Poor laws, ordinances designed to regulate the well-being of subjects (including catechesis and manuals of pastoral care),[36] the institution of minute disciplinary procedures in education and the military, and restrictions of carnival, revelry and dancing were all features of different disciplinary movements, from papal reforms to Calvin's Geneva and the Anglican state, and on to the puritans.[37]

Taylor argues that these disciplinary movements reflected a wider attempt to re-shape the masses away from supposedly pagan impulses and instil practices of civility.[38] Prior to the clerically-inspired reform movements, the person and the social order were understood as surrounded and punctured by spirits, a sense of 'magic' or 'enchantment'.[39] So, for example, church bells might be rung when lightning struck, or the host and local relics might be carried around parish boundaries to ward off evil spirits.[40] But, Taylor continues, the idea that an object could hold a charge or causal power fell under suspicion, and along with it, practices of popular piety.[41] Such practices were seen as binding God's will by our actions and

[35] Taylor, *A Secular Age* (n 8) 128, 243.

[36] See also Catherine Pickstock, *After Writing: On the Liturgical Consummation of Philosophy* (Blackwell 1998) 151 (describing the increased use of manuals of pastoral care as discipline such that 'Christian virtue itself was being redefined as obedience to authority').

[37] Taylor, *A Secular Age* (n 8) ch 2.

[38] For example, Erasmus considered dancing and carnival 'unchristian' because of its apparent connections to paganism and licentiousness. See ibid 109.

[39] ibid 42.

[40] ibid

[41] ibid 71.

therefore contrary to God's sovereignty.[42] Reform, in other words, included a shifting understanding of God's relationship to creation. Taylor contrasts the normative order, inherited and developed by Aquinas, with a new focus on God (and human) will.[43] In the former, God revealed himself through signs and symbols, which instantiated a 'form' tending of its nature towards an end.[44] Like pagan or 'magical' practices, this view was criticised by nominalist writers as constraining the sovereignty of God by the form of his creation; it was against what Descartes would later describe as God's *potentia absoluta*.[45]

This shift to a focus upon God's will, Taylor argues, reverberated down the various reform movements in at least two important ways. First, the expulsion of 'all hint of intrinsic teleology' from nature meant it was increasingly construed mechanistically.[46] The world became 'a theater of increasingly calculable forces and counterforces' that must be worked over to reflect God's purposes, now located in his concentrated will or command.[47] God is thus removed from nature (which is de-mystified), but he also releases us to re-order nature for the best in accordance with our understanding of his divine commands.[48] Second, Taylor argues that this new focus on God's will and rationalisation of a technical-natural order had consequences for the person. Like control over nature, the person was to be disciplined. Civility, Taylor argues, became paramount in exhibiting order in contrast to carnival.[49] But this discourse of control and rational ordering resulted in a slide, Taylor continues, from

[42] ibid 73.

[43] ibid 98.

[44] ibid 113.

[45] ibid

[46] ibid

[47] ibid 80, 113.

[48] ibid 80

[49] ibid 105.

understanding ourselves as imposing God's commands and purposes towards imposing 'simply our goals'.[50] The rational commanding God posits ethical rules that the rational individual uncovers, and this eventually gives way to the sense that the ethical rules are entirely immanent.[51] God might continue to exist, but as a distant creator or sublime on a far removed horizon, leaving the separate existence of distinct individuals. At this point, we have reached the modern moral order: society existing by its own autonomous law, namely the protection of rights-bearing individuals.

Taylor's narrative curiously echoes Harold Berman's description of the emergence of the Western legal tradition, although no explicit reference is made. Berman considered that the Western legal tradition – of 'modern legal values' and philosophy, the 'modern state', and the 'modern church' – 'originated in the period 1050-1150 *and not before*.'[52] This led him to focus similarly on Gregory and the Investiture Crisis. Berman argued that this was revolutionary because it was here that law became a distinct and autonomous branch of political science, coupled with a class of jurists: 'Law became disembedded. Politically, there emerged for the first time strong central authorities, both ecclesiastical and secular, whose control reached down, through delegated officials, from the center to the localities.'[53] In contrast, Berman argues, 'church' or *ecclesia* prior to 1000 'was conceived as the Christian people, *populus christianus*, which was governed by both secular and priestly rulers (*regnum* and *sacerdotium*).'[54] Focusing on this revolutionary moment led Berman to argue that the most distinctive character of the Western legal tradition was 'the coexistence and competition

[50] ibid 234.

[51] ibid Part II, 'The Turning Point'.

[52] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 4 (emphasis in original).

[53] ibid 86.

[54] ibid 91.

within the same community of diverse jurisdictions and diverse legal systems.'[55] Such a plurality, he continued, made 'the supremacy of law both necessary and possible.'[56]

Berman, similar to the narrative told by Taylor and RO, pushed modernity back to a period others have often referred to as part of the 'dark ages'.[57] The difference, however, is that he celebrated this as the beginnings of the Western legal tradition – the development of the modern state, governed by law and a class of jurists.[58] He noted that this became the liberal democratic polity, in which the only law, the only sovereignty, is the nation state.[59] But this shift itself did not trouble Berman.[60] Indeed, he considered that values of 'individualism' (developed in the eighteenth century) and 'liberalism' (as it had developed since the sixteenth century) were part of a continuous Western tradition focused on the rule of law.[61] For Berman, this rule was first identified with 'divine and natural justice', but, seemingly seamlessly, came to be identified with 'human rights, democratic values, and other related beliefs.'[62]

Berman's thesis has been influential, especially with American religious liberty scholars. (I discuss their writing in Chapter Five.[63]) His argument, re-framed in religious

---

[55] ibid 10.

[56] ibid

[57] ibid 14.

[58] ibid 23, 28, 109, 521.

[59] ibid 29-33.

[60] Berman's real concern was with 'socialism', understood as the expansion of the administrative state into areas of life previously thought 'private'. See ibid 33-35.

[61] ibid 37.

[62] ibid 294.

[63] See Chapter Five, Part II (c).

liberty terms, appears to point to the following conclusion: The rule of law arose from the necessary resolution of competing jurisdictions (law 'transcends' us). This rule is associated with human rights and democratic values. Paradoxically then, the maintenance of rights and democratic values depends on the maintenance of competing sites of authority (which may be institutional, as with Gregory, or entail a sphere of private judgment, as with liberalism).

But from the Reform Master Narrative perspective, and the RO perspective, developments after the Hildebrandine reforms were much more ambiguous or outright problematic. The intense focus on law, with Taylor, is understood as a secularising movement towards bracketing God from spheres of life in favour of technical control both of persons and of creation. From this perspective, the clash of jurisdictions is settled by secular order, which is characterised as protecting individual wills or mutual rights. And, on the RO account, the development of an autonomous secular order, located in the state, is a *threat* to liberty; paradigmatically, the liberty of associations, because what develops is a concentration of power in the single sovereign to ensure the rights of individuals. This is Milbank's conclusion following on from his critique of rights discourse within the modern moral order or new science of politics. Expanding on this argument is the subject of the next section.

(b) Intellectual Deviation: 'Rights' and the New Science of Politics

Oliver O'Donovan points to the existence of several 'critiques of modernity',[64] unified by a persistent theme: calling into question 'the notion of the abstract will, exercising choice prior

[64] Some of the 'modernity critique' voices have already been discussed. As Perry notes, notable theologians (the O'Donovans, Hauerwas, Ratzinger, and Milbank) parallel other versions of the critique (Leo Strauss and communitarians like Sandel, for example). See John Perry, 'Two Questions for Wolterstorff: On the Roles Played by Rights-Talk in History and the Measuring of Worth' (2010) 23 Studies in Christian Ethics 147, 149 n 6.

to all reason and order, from whose *fiat lux* spring society, morality and rationality itself.'[65] Certainly we can see indications of this in Taylor's narrative, where a teleological normative order gave-way to a focus upon the concentrated will of God and of persons. The 'modern moral order', based on this focus, entails viewing society as arising from individuals contracting with one another for the mutual protection of their rights. The RO 'intellectual deviation' narrative attempts to take this further, exploring how theological and intellectual shifts contributed to the rise of 'subjective rights'. Within this deviation narrative, RO writers give especial attention to John Duns Scotus, a thirteenth century Franciscan theologian-philosopher.[66] Milbank has referred to Scotus' writing as a kind of tragedy or fall, 'the turning point in the destiny of the West'.[67] The central objection is to Scotus' development of the 'univocity of being'. Here, I briefly outline RO's interpretation of Scotus as a backdrop to Milbank's critique of 'rights'.

In the *Summa Theologica*, Aquinas wrestles with a fundamental dilemma in Christian thought: 'It seems that no name can be given to God.'[68] We are 'trapped' in the language of finite creation, and so to speak of God, who is infinite, is seemingly impossible. For Aquinas, however, the use of words we commonly associate with finite creation is permitted when speaking of God because these are analogical. When someone says, 'God is good' and 'Simon is good', how do those two assertions of goodness relate? First, it could be said equivocally. 'God is good' could be completely different in kind from 'Simon is good' – goodness, as a quality, refers to something different in each case. This would mean,

---

[65] Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (CUP 1996) 274. *Fiat lux* means 'let there be light', in this context the self-contained light of the individual's will.

[66] See generally Oliver (n 18) 12, 22.

[67] John Milbank, 'Only Theology Overcomes Metaphysics' in *The Word Made Strange: Theology, Language, Culture* (Blackwell 1997) 36, 44.

[68] Thomas Aquinas, *Summa Theologiae* (NovAntiqua 2008) I.13.1 ('ST').

however, that we cannot say anything intelligible about God. Second, the two statements could be said univocally. This would mean that to speak of the goodness of Simon is identical to the goodness of God. But this would mean that God is only different in degree, rather than different in kind. For Aquinas, we in fact speak in neither mode when we say 'God is good'. Rather, we speak by analogy. God himself is good, and our goodness is a reflection of his goodness – a share in it that arises only through our relation to God. Thus to say 'Simon is good' or 'this action is good' is to signify different and never exhaustive aspects of the ground of all goodness, God.[69] The analogical relation goes further. For Aquinas, there is a distinction between God and creatures. God is simple, meaning that it is of his essence to exist. He simply *is* existence, as he *is* goodness, *is* wisdom, and so forth. Just as 'goodness' is only understood as attributed to humanity from the ground of all goodness, so to existence. Existence for the creature is due to a relation with the source of being itself, God.[70] We *participate* in the being of the Creator, who sustains us as a gratuitous gift at every moment. We are, accordingly, natural bodies continually interpenetrated by the transcendent.[71] What this means is that there is no autonomous existence outside of our relationship to God.

Scotus, RO writers argue, held that we can speak of God univocally.[72] As noted when discussing Taylor's narrative, the idea that creation participated in God's being was criticised

[69] I.13.5. See further, Oliver (n 18) 12-16.

[70] ibid 16.

[71] See John Milbank, Catherine Pickstock and Graham Ward, 'Suspending the Material: The Turn of Radical Orthodoxy' in John Milbank, Catherine Pickstock and Graham Ward (eds), *Radical Orthodoxy: A New Theology* (Routledge 1999) 1, 2.

[72] See Milbank, *TST* (n 10) 15, 305; Catherine Pickstock, 'Duns Scotus: His Historical and Contemporary Significance' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 116; and Oliver (n 18) 16.

on the basis of agency.[73] That God would be known only through the mediation of creation was seen as limiting God's sovereignty, and that our own acts depended on a continual participation in God's being was seen as robbing us of the thing which we most perceive, our existence as agents. Scotus therefore considered that we can first speak of finite things when speaking of God because they fall under the same common concept of 'being'. So, to say 'God is good' is to use goodness in exactly the same manner as when we say 'Simon is good', with the caveat that God possesses infinitely more of the same goodness. Likewise to say 'God exists' is the same as stating 'Simon exists' – while God first causes such existence, it now 'is' in the same manner that God 'is'. RO writers describe this as the univocity of being – no longer is being for the creature a matter of continual suspension from or participation in God, but rather it stands above both God and creatures.

Such a conception might be considered as bringing God closer to humanity through a shared possession. However, RO writers contend that the implication was a separation of God and creature. Catherine Pickstock argues that by moving away from analogy, which both ontologically distinguished Creator and created while articulating a continual interpenetration of the transcendent, the difference between Creator and created is simply put in terms of an infinite gulf of being.[74] God is unmediably distant as removed from creation (although in keeping with his radical sovereignty, he may intervene through his absolute power).[75] This distance, RO writers argue, opens up the plausibility of an autonomous space for creation that can be rationalised and controlled by humans who are now conceived of as independently existing agents exercising will.[76]

---

[73] See above n 43 and accompanying text.

[74] Pickstock, *After Writing* (n 36) 123.

[75] ibid

Milbank argues that the 'univocity of being' deeply influenced modern conceptions of political authority and 'rights', providing one key intellectual thread complementing Taylor's reflections.[77] Consistent with univocity, what developed, Milbank contends, was a focus on the autonomous will and power of God and individuals, exercising self-ownership. Milbank points to William of Ockham who he argues followed the Scotist legacy and developed an understanding of 'right' as a divinely granted and exclusive power of disposal effective against the world.[78]

Ockham's intellectual role in the development of spiritual and secular differentiation is well known.[79] His political writing was spurred on by on-going conflict with Pope John XXII.[80] Against the Pope, Ockham, a Franciscan, considered that Christians ideally should not have *dominium* in property (a power of disposal), thus supporting a commitment to absolute poverty. Facing excommunication, Ockham fled the papal court at Avignon and found patronage and protection under the Holy Roman Emperor, Ludwig of Bavaria, who was himself in conflict with the Pope. Within this context, Ockham developed into what A S

---

[76] See also Kristen Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance* (CUP 2007) 188 quoting Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2000) 71: 'Scotus' belief that "every entity has a single essence" essentially "subverts the medieval conception of being as an object of analogical, and thus dualistic predication – a being with one foot in this world and one in a transcendent realm," and thereby contributed to what they identify as the primary event of modernity, namely "the affirmation of the powers of *this* world, the discovery of the plane of immanence."'

[77] See John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 Ox J L and Religion 203, 222-25.

[78] ibid 223. See also Joan Lockwood-O'Donovan, 'Historical Prolegomena to a Theological Review of "Human Rights"' (1996) 9 Studies in Christian Ethics 52, 56-57.

[79] On different interpretations of Ockham's political writing, see Arthur Stephen McGrade, *The Political Thought of William of Ockham: Personal and Institutional Principles* (CUP 1974) 28-43.

[80] See Oliver O'Donovan and Joan Lockwood O'Donovan, 'William of Ockham' in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (William B Eerdmans Publishing Co 1999) 453.

McGrade called 'the proponent of secular world government essentially independent of traditional ecclesiastical sanctions.'[81]

Ockham concerned himself with articulating clear boundaries between ecclesiastical and secular authority. He rejected both hierocratic papalism – that all power, spiritual and temporal, flowed through the papal office (as seen, for example, in Bernard of Clairvaux, above)[82] – and the excesses of imperialism, in which, as with Marsilius of Padua, the institutional church is an organ of the state.[83] (Although, as we will see, he arguably tended towards a stronger view of imperial authority, one influential in later conciliarist thought.) On the papalist view, all power and authority flowed 'from above', that is from God as represented through the pope, such that there was 'no true and legitimate jurisdiction outside the church'.[84] On the competing, eventually conciliarist view, power and authority was 'ascending' – emperors and kings derived their power from the people without reference to ecclesiastical authority.[85] Ockham, in contrast, envisioned a dualism of spiritual and temporal authority. He contended that there should be minimal overlap, arguing that ecclesiastical and secular authorities could act outside of their jurisdiction only in exceptional circumstances.[86]

Nevertheless, Ockham did consider that secular power arose as a matter of original consent. He argued the people had authority directly by divine grant, and it was this that was

[81] McGrade (n 79) 4. See also E F Jacob, 'Ockham as a Political Thinker' in *Essays in the Conciliar Epoch* (Manchester University Press 1943) 85, 103 (calling Ockham a 'constitutional liberal').

[82] See above n 31 and accompanying text.

[83] McGrade (n 79) 21-22, 39 and E F Jacob (n 81) 89, 93 (arguing that Ockham is 'far closer to the Gelasian tradition').

[84] McGrade (n 79) 82.

[85] ibid 83. See also Julian Rivers, 'Liberal Constitutionalism and Christian Political Thought' in Paul Beaumont (ed), *Christian Perspectives on the Limits of Law* (Paternoster Press 2002) 11, 18 (describing competing 'descending' and 'ascending' theories of authority in the Middle Ages).

[86] McGrade (n 79) 78-9, 84-5.

consensually transferred to kings and emperors.[87] This supported his attempts to provide secular power with a basis independent of the church.[88] Secular authority, Ockham argued, was not transformed by Christ's advent or the establishment of the church, and was not, therefore, subordinated to specifically religious ends.[89] For example, he considered that the government was not tasked with promoting virtue; this was a non-essential feature of secular authority that, if adopted as a requirement, would subordinate kings and emperors to the church.[90] He consequently gave a largely instrumental account of the autonomy of secular power. Reaching all stations of life, secular power existed for the most part to punish injustice by recognising individual wrongs and rights.[91]

Within this frame, commentators debate the extent to which Ockham's writing tended towards individualism. At times Ockham's concern was the promotion of evangelical liberty, in contrast to the legalism that had pervaded papal government (instances of the reform and discipline movements discussed by Taylor).[92] For example, while he accepted that the pope has limited authority (insofar as he is wise and on account of needing one final arbiter of authority), Ockham objected to papal absolutism on the plausible basis that the Christian's freedom should not be potentially more onerous than the law of Moses.[93] But these contentions fit within a wider thesis concerning personal authority. In his writing on papal heresy, Ockham contended that any person might be called upon to disobey and challenge the

[87] See William of Ockham, 'Eight Questions on Papal Power' in O'Donovan and Lockwood O'Donovan (n 25) 466-68. See also Milbank, 'Against' (n 77) 227 and McGrade (n 79) 84-85.

[88] ibid 96.

[89] ibid 100-01.

[90] ibid 115 and Rivers, 'Liberal Constitutionalism' (n 85) 19.

[91] McGrade (n 79) 113-14, 116.

[92] ibid 133, 141.

[93] ibid 141.

pope (who was, after all, simply one man).[94] Anthony Black writes, 'The stark fact is that Ockham threw the whole liability for judgement and political decision-making back onto the individual conscience.'[95] Indeed Black argues that Ockham, perhaps despite himself, determined that the ecclesiastical polity was not a polity at all; rather, principles of divine truth and human rationality pointed to a more 'anarchic individualist' understanding of church and faith.[96] In contrast, once the people had granted political authority power, they were obliged to give it their full support.[97] At times this dualism supported Erastian notes in Ockham, the argument, for example, that all ecclesiastical authority was subject to the king in respect of temporal possessions.[98]

In Ockham we see a movement towards a different vision of the political community. His arguments supported understanding natural rights, to freedom and property, as entitlements from God that secular authority was tasked with protecting.[99] This was, at least, a shift away from viewing secular authority as concerned with coordinating different groups, persons, and roles towards a common, religious end.[100] McGrade, for example, argues that Ockham's political writing – from his Franciscan renunciation of dominium over property to his concerns for personal authority – had the net effect of treating politics as merely the background for 'the exercise of the moral and intellectual powers of free individuals'.[101]

---

[94] McGrade (n 79) 47-77 and Anthony Black, *Political Thought in Europe, 1250-1450* (CUP 1992) 33.

[95] ibid 75.

[96] ibid 76.

[97] ibid 106-09.

[98] Jacob (n 81) 101.

[99] Black (n 94) 40 and Brian Tierney, *The Idea of Natural Rights* (William B Eerdmans 1997) 184 (noting that Ockham's rights sometimes focused on moral choice and sometimes focused on a protected interest).

[100] McGrade (n 79) 221-23. As Black notes, the focus on role had supported the view that the 'good of each was identical with the good of the whole'. Black (n 94) 16.

Throughout this movement, a question remains as to how Ockham's political writing, pointing to a differentiation of spheres as between secular and religious authority, was supported or generated by his philosophical writing. Several commentators have argued that these two genres are relatively distinct for Ockham, or that we should treat any relationship cautiously.[102] Ockham's voluntarism – his focus on individual and divine will as the grounds for morality – is an example. McGrade points to Ockham's arguments concerning whether only acts of will are intrinsically morally good or bad and how this might make morality a 'radically private affair'.[103] Tierney discusses the view, held by Ockham scholars, that by making reality contingent on God's will, which might change, Ockham uncoupled law from the inherent nature of things; that is, he detached it from an essential end.[104] But, for both McGrade and Tierney, Ockham's voluntarism did not reach far into his political writing; Ockham was, they argue, fundamentally rationalistic, meaning he considered there was an objective end open to individuals on the basis of right reasoning.[105]

Others contest this separation of genres. Milbank argues that while right is, for Ockham, to be exercised according to right reason, this is understood in non-teleological terms as, in particular, recognising positive agreements, the commands of revelation, and following instincts of self-preservation.[106] For Ockham, Milbank contends, 'natural reason does not … suggest that we can infer from natural *relations* between people, and between

---

[101] McGrade (n 79) 205.

[102] See, e.g., ibid 28 and Tierney (n 99) 31.

[103] McGrade (n 79) 45, 190.

[104] ibid 197.

[105] ibid 118 and Tierney (n 99) 193.

[106] Milbank, 'Against' (n 77) 226.

people and things, the *ends* of these relationships and the proper way of composing them according to a "right distribution" that is not founded in mere mutual agreement.'[107]

Ockham, on this view, represented a high-point in a longer term drift towards individualism. This included an increasing focus on individual conscience (or individual will) in ethics and the Franciscan understanding of a right of use. Pope John XXII had argued that consumption of material goods was inseparable from *dominium* over them, a power of disposal. Ockham argued that there was a non-proprietary natural right of use, but he nevertheless understood this as a subjective power necessary for self-preservation and outside of any necessary relational ends.[108] Such a subjective power and capacity was, for Ockham, derived from an original divine grant, itself characterised as 'an absolute power and possession'.[109]

Alongside voluntarism, some also argue that Ockham's political theory and development of a natural rights discourse was supported by his nominalism. Nominalism is 'the view that universals (such as "society") are not real entities, but only the names for collections of individuals.'[110] As noted above, Ockham tended to view the church as a collection of individual believers and political society as arising from individual consent.[111] Black, describing Ockham's focus on individuals and their rights as the 'atoms of the social and judicial system', considers, 'it would be hard to deny that the spirit of philosophical

[107] ibid 226-27.

[108] See Lockwood-O'Donovan (n 78) 56.

[109] Milbank, 'Against' (n 77) 225 and Lockwood-O'Donovan (n 78) 56.

[110] Oliver (n 18) 3, 9.

[111] See above n 95 and accompanying text.

nominalism was blowing here'.[112] Michel Villey, who Milbank follows, argued that once it was accepted that only the individual has real existence, there could be no juridical or social order not proceeding from individual will; there could be, in other words, no common end.[113] The Christian tradition had, Milbank argues, envisaged and aimed for the entire human community elevated to share in 'the common good', understood as participation in God's own life of charity.[114] Roles and persons were positioned in light of this, reflecting a relational pursuit. Instead, viewed through his nominalism, political relationship for Ockham concerns the mutual recognition of one's rights, to person and property.[115] This gave him a particular understanding of political authority: that, after the Fall, persons had the power conferred upon them by God to set up rulers for the purpose of protecting each individual against wrongs.[116]

As Joan Lockwood O'Donovan relates, the Parisian nominalist Jean Gerson followed in this vein, associating 'right' with a *facultus* or power of liberty, joined with a natural *dominium* to take things for one's own self-preservation.[117] Drawing from this connection of human freedom and property, Francisco Suárez in the seventeenth century would take up Gerson and argue that individuals, having this power, could lawfully alienate their liberty and enslave themselves.[118] And such a liberty, Suárez argued, applied to a whole people.[119]

---

[112] Black (n 94) 77. McGrade does not go so far, but he does note that Ockham's tendency to see the church as a community of individuals at least accorded with his nominalism. McGrade (n 79) 224.

[113] See Tierney (n 99) 29-30.

[114] See John Milbank, 'Paul Against Biopolitics' in John Milbank, Slavoj Žižek and Creston Davis (eds), *Paul's New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press 2010) 57-58. On the 'common good', the appeal here is also to St Paul's description of exercising gifts within the body of Christ. See 1 Corinthians 12:7. See further Chapter Five, Part IV (b).

[115] Milbank, 'Against' (n 77) 224-27.

[116] McGrade (n 79) 105-13 and Milbank, 'Against' (n 77) 225-27.

[117] Lockwood O'Donovan (n 78) 56.

It was these ideas, Milbank contends, that provided the *intellectual* basis for the 'modern moral order' or 'new science of politics' largely associated with contractarian thinkers. These more familiar modern writers, in other words, inherited a focus on individual will, property, and power from a long line of theological debate.[120]

To be sure, there was a rich debate, into the seventeenth and eighteenth centuries, over whether certain liberties were indeed alienable, as Suárez contended.[121] Hobbes and Locke, notably, discussed inalienable rights. But how they discussed inalienability remained in keeping with the Okhamist lineage of a right as a personal power and possession. For Hobbes, persons held an inalienable right to self-preservation. This meant a person may forcibly resist violent assaults against his or her life by the civil authority.[122] Such a vision of self-preservation was in keeping with his understanding of right and law. He considered a right was an unrestrained liberty to use one's own power, a freedom independent of the will of others.[123] Only the spectre of conflict as between bearers of right necessitated the 'laws of nature'. Such laws included the contractual transferring of power to a civil power tasked with securing individual right.[124] Lockwood-O'Donovan describes this interaction of right and law as creating a 'competition among sovereign subjects to maximise their freedom, ie. to

---

[118] ibid 57. See also Francisco Suárez, 'Laws and God the Lawgiver, Book 2 (1612)' in O'Donovan and Lockwood O'Donovan (n 25) 735.

[119] See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (CUP 1979) 56.

[120] See also Lockwood O'Donovan (n 78) 57.

[121] Often those opposed to the strong version of inalienability did not deny the possibility that a person could alienate him or herself. As Tuck discusses, writers interpreting Grotius in particular considered such a claim must be read with 'interpretive charity' – that while it is possible to alienate oneself (be free to renounce one's freedom), no rational person should be taken as having done so. Tuck (n 119) 141.

[122] See ibid 119 and Lockwood-O'Donovan (n 78) 58.

[123] ibid 57 and Tuck (n 119) 130.

[124] ibid 120 and Lockwood-O'Donovan (n 78) 58.

maximise protection of and provision of their rights'.[125] Locke also articulated a view of inalienable rights within a contractarian theory. Self-preservation was coupled with an inalienable right to hold property before the social contract and further linked to an inability to enslave oneself ('a man, not having the power of his own life').[126] As with Hobbes's view of an inalienable right, Locke's argument supported his contractarian idea of civil authority. The supreme power of the commonwealth could not, he argued, possess an absolute and arbitrary power over the lives of people, such as enslavement, because it only possessed that power actually held and given up by every person when in the state of nature.[127] Civil authority thus still exists for the protection of the rights of individuals – self-preservation and an exclusive proprietary right over the objects of a person's labour.[128]

Suárez's radical view of alienability, entailing potential alienation of an entire people, is certainly backed-away from in the later development of natural rights discourse. Indeed, one could read some theories of inalienability as reflecting an emphasis on duty.[129] For example, we must retain (that is, not alienate) a right to parenthood on the basis that, more fundamentally, parenthood is a duty that cannot be transferred to another.[130] On this view,

---

[125] ibid 64. See also Tuck (n 119) 129-30 (arguing that on this view the sovereign did not simply defend himself, but acted as the agent defending each member of the community in his or her liberty).

[126] See Jeremy Waldron, 'Dignity, Rights, and Responsibilities' (2011) 43 Ariz St LJ 1107, 1128 (quoting John Locke, *Two Treatises of Government*, book II, § 22 (Peter Laslett ed, CUP 1988) (1690)). On Locke's inclusion of a right to property, see Tuck (n 119) 171-72 and Edward L Rubin, 'Rethinking Human Rights' (2003) 9 Int'l Legal Theory 5, 23-25.

[127] See Waldron (n 126) 1129 (discussing Locke, *Two Treatises of Government* (n 126) § 135).

[128] See Lockwood-O'Donovan (n 78) 59. An inalienable right to property still entails the ability to alienate property. Indeed, the right was understood as an unrestrained right to dispose of property; what could not be alienated was the right to hold property as such. See Craig A Stern and Gregory M Jones, 'The Coherence of Natural Inalienable Rights' (2008) 76 UMKC Law Review 939, 949.

[129] ibid 965-66 (arguing that Madison's focus on religious liberty as inalienable reflected an emphasis on duty – the duty to seek out God).

[130] See ibid 970-71. See further below n 311 and accompanying text.

human will is limited by something other than human will – a moral order.[131] (I continue this theme of a potentially on-going objective sense of right, appealing to duties, further below.)[132] But there is also throughout this conversation a continuing thread which associates rights with autonomous power. In an Ockhamist vein, a person's rights concern most fundamentally his or her own self-preservation, and political authority is understood, consequently, as the background for the exercise of power by free individuals. Locke, Milbank argues, considered people exist in formal equality, having 'a property in his own person' and that civil authority is mostly concerned with securing the private interests of life, property, and contract.[133] Hobbes, who Milbank characterises as a more 'clear sighted' (and nominalist) thinker,[134] construed the 'political' as an artificial sphere of pure power necessary to secure individual rights to engage in private pursuits against the spectre of continually conflicting wills.[135] Milbank argues that this conceived of both the sovereign and the individual as like an original Adam in the state of nature – most emulating the image of God's 'Irresistible Power' when exercising unrestrained property rights or liberty.[136] Through this, Milbank contends, we see the invention of 'the secular' – an autonomous sphere regulating the assertion of subjective right, independent wills claiming self-ownership, through an independent state-power based on rules construed as reflections upon the necessity of self-preservation.[137]

---

[131] ibid 958.

[132] See below n 310 and accompanying text.

[133] See Milbank, *TST* (n 10) 14, 30 (quoting John Locke, *Two Treatises on Government* (CUP, Cambridge 1967), Book II, ch 5, 27.

[134] ibid

[135] See ibid discussing Thomas Hobbes, *Leviathan* (Penguin 1968) 81-83.

[136] Milbank, *TST* (n 10) 16 quoting Hobbes (n 135) Part II, ch 31, 397.

[137] Milbank, *TST* (n 10) 10.

How was this a deviation? What was the prior state before this focus on subjective right as self-ownership? Milbank joins other theorists in arguing that 'subjective right' (or 'subjective rights' as it applies to an expanding list of claims made by individuals) is a break from a focus on 'right order'.[138] Joan Lockwood O'Donovan summarises the claimed contrast: 'In the older traditions [patristic and medieval] the central moral-political act on the part of the ruler and ruled alike was to consent to the demands of justice, to the obligations inhering in communal life according to divine intention and rationally conceived as laws.'[139]

Aquinas, notably, considered 'right' (*ius*) to be the object of justice – 'the just thing itself'.[140] This reflects an objective understanding of right as order, a 'thing' or 'ideality' in which we creatively participate.[141] Participation in 'right' concerned just distribution, ensuring that each person has 'a proper "share" in things (material and ideal) … according to justice'.[142] And this took place within a social order, in which persons were accorded their share based on roles within a community.[143] For example, Aquinas considered it permissible to own land and objects for the purpose of taking proper care of them, but such ownership was subordinate to the use of the commons in order 'to communicate [property] to others in need.'[144]

---

[138] Other theorists notably include the O'Donovans and MacIntyre. See, e.g., Lockwood O'Donovan (n 78); Oliver O'Donovan, 'The Language of Rights and Conceptual History' (2009) 37 Journal of Religious Ethics 193; and Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (3rd edn, Duckworth 2007) 66-70.

[139] Lockwood O'Donovan (n 78) 54.

[140] See ST II-II.57.

[141] Milbank, 'Against' (n 77) 213.

[142] ibid. See ST II-II.58.1 (justice is rendering 'each one his due by a perpetual and constant will').

[143] See Jean Porter, 'From Natural Law to Human Rights: Or, Why Rights Talk Matters' (2000) 14 J L & Religion 77, 85.

[144] ST II-II.66.2.

Milbank consequently characterises 'right order' as fundamentally relational. 'Rights' were attributed to persons within the community based on a sense of intrinsic justice, what Milbank calls 'the idea of a reciprocalist pursuit of common ends'.[145] What this meant was that a person *could* possess a 'right', which could then take the form of a claim to recognition. But, Milbank argues, this was entirely within the frame of a claim to be participating in an objective order for the ends of relationship with others.[146] So, for example, when a valid marriage is denied, this can give rise to a claim for recognition.[147] (And validity here ('right') was understood also as a restriction; one could only marry certain categories of people.)[148] More fundamentally, Milbank argues, the portioning of 'rights' was for the exercising of a duty within the community.[149] This is what underlies the claim of 'reciprocalist pursuit'. A person may, for example, be given the right of judgment over others, but this was in order to undertake the duty of promoting justice; as, similarly, ownership of land was subordinated to common ends (and, in this sense, a right could be forfeited).[150]

Put simply, right order refers to undertaking right action: '*a* right thing to be done'.[151] Explained in religious liberty terms, if the end of the person is freely to worship God then this means it is wrong (i.e. acting against right) to coerce a person into religious worship. This is

[145] Milbank, 'Against' (n 77) 204.

[146] ibid 213. Nigel Biggar, reflecting on the rights and right order debate, has suggested 'the problem lies in the concept, not of multiple rights as such, but of multiple rights as "specific", that is, as determined in advance of any larger process of moral deliberation.' Nigel Biggar, 'Nicholas Wolterstorff, *Justice: Rights and Wrongs*' (2010) 23 Studies in Christian Ethics 130, 132-33 n 8.

[147] Milbank, 'Against' (n 77) 215.

[148] See Pickstock, *After Writing* (n 36) 140-42.

[149] Milbank, 'Against' (n 77) 219.

[150] ibid 215-16.

[151] O'Donovan, 'The Language of Rights' (n 138) 194 (emphasis in original).

in contrast to a notion of rights as self-ownership or possession of a natural capacity for autonomous moral choice where, in Perry's words, 'I can claim a right to religious freedom even while denying (or being agnostic on) worship of God as a true human good.'[152]

More generally, and consistent with the wrong of coercion, the reciprocalist conception of right action or order points to the deeper purpose of justice: the pursuit of charity. 'Charity' is the divinely infused virtue of love of God and love of persons in light of loving God.[153] It provides, Aquinas wrote, 'sustenance and nourishment' to all other virtues, directing them 'to its end', a shared love or common participation in God's own life.[154] What this means is that 'justice' is the outward expression of charity, or, put another way, justice is not truly justice unless it is a work of charity.[155] This raises a new layer to the deviation thesis, namely a claim of Christian failure to instantiate and support charity or what Milbank calls expanding 'bonds of trust and gift exchange'.[156]

Taylor reaches this conclusion. He describes the 'heart of orthodox Christianity' as 'communion', which also evokes charity.[157] Communion, Taylor relates, entailed the love of God shared to the disciples through Christ 'eventually ramifying through the church to humanity as a whole'.[158] The church community is described as a network of expanding

[152] Perry, 'Two Questions' (n 64) 147, 151.

[153] ST II-II.23.1.

[154] ST II-II.23.8.

[155] See Milbank, *TST* (n 10) 412 (noting this was in keeping with Augustine). See also Stephen J Pope, 'Aquinas on Almsgiving, Justice and Charity: An Interpretation and Reassessment' (1991) 32 Hey J 167, 170.

[156] Milbank, 'A Closer Walk' (n 16) 99.

[157] Taylor *A Secular Age* (n 8) 282.

[158] ibid

relations of *agape*.[159] Taylor considers that the church 'lamentably and spectacularly' failed (and fails) to live up to this vision.[160] But nevertheless, on the RO account it is this somewhat lost vision of charity, 'ramified' through the church to society as a whole, which stands in contrast to the advent of a 'secular' space, the negotiation of individual subjective claims of right by a single sovereign power.

What were the consequences of this advent? Milbank, with others, argues that the focus on 'rights' precipitated 'possessive individualism'.[161] Society on this new conception exists for the protection of individual claims of liberty, for property and self. Here, the emphasis is on a zone of non-interference or negative liberty – a right to be left alone. RO writers argue that this is not truly a 'social' understanding of society because it does not concern any shared goal or end other than mutual protection. Authority, rather than coordinating diverse groups towards a shared end, is consequently re-conceived instrumentally as regulating competing subjectivities.

Milbank argues that this is consistent with the rise of state, centralised power. In order to mediate diverse claims to absolute (inherent) individual rights, the state must be 'invented' as itself a kind of absolute or ultimate individual that settles conflict and protects us each against the infringement of our rights by others. Milbank contends that because infringing upon another's claim to liberty is a continual possibility, the logical solution is an ever-increasing surveillance, or disciplining of the polity to the single rule of the state.[162] In

[159] ibid

[160] ibid

[161] Milbank, 'Against' (n 77) 203.

[162] See ibid 206 and Milbank, *TST* (n 10) 164.

other words, for the very purpose of protecting the individual's rights, sovereign power must be centralised and unlimited.[163]

RO writers claim that paradigmatically, and historically, the exercise of this sovereignty has been at the expense of associational freedom. The modern moral order is described as exhibiting a 'flattening' tendency.[164] Sociologist Robert Nisbet argued that the history of the Western state is 'characterized by the gradual absorption of powers and responsibilities formerly resident in other associations and by an increasing directness of relation between the sovereign authority of the State and the individual citizen.'[165] Different associations – churches, guilds, the village or town, for example – may develop an ethos that is not compatible with subjective rights or the association itself may be construed as a competing site of authority. They are, in other words, seedbeds for restricting freedom and (much like individuals themselves) creating friction. The most secure means of ensuring liberty, therefore, is to 'flatten', that is, eliminate difference. Thus, evoking more contemporary concerns, Milbank raises the possibility that on the construal of secular authority regulating individual liberty interests the state could decide that religious liberty 'is a threat to individual liberty (for example the rights of women, the rights of gay people, or the democratic rights of a congregational body against their own bishop or the norms of their own tradition)'.[166] The end result would be to subject the religious group to a law representing a universal or general will in favour of individual liberty, which would have the

[163] ibid 14.

[164] See Oliver (n 18) 9.

[165] Robert Nisbet, *The Quest for Community* (OUP 1953) 104 quoted in William T Cavanaugh, 'The City: Beyond Secular Parodies' in John Milbank, Catherine Pickstock and Graham Ward (eds), *Radical Orthodoxy: A New Theology* (Routledge 1999) 182, 192.

[166] Milbank, 'Against' (n 77) 232-22. I discuss the subjection of groups to a single law further in Chapter Five, Part III.

consequence of eliminating the very mode of communal practice by which religious liberty is experienced.[167]

But RO writers also note that this accumulation of sovereign power by the state, totalising in its claim to regulate the public realm, still had to contend with an institutional church that claimed public authority.[168] Overcoming this was part of the flattening tendency. RO writers argue that this took the form of a new understanding of religion as a private genus of belief. Privatisation was, they contend, instrumental in the subjecting of all groups to a single sovereign law; the more religion was identified with private belief, the less 'external' matters of practice and ecclesiastical institution mattered, leaving the religious life to be regulated just like any other interest. This development is the subject of Part II.

II 'The Migration of the Holy'[169]

What is 'religion'? As noted in the Introduction to this thesis, this is a much debated question in religious liberty discourse, as elsewhere.[170] Nevertheless, our contemporary use of religion implicitly adopts a differentiation thesis. We believe that there exists a distinct category, 'religion', that is both capable of application across cultures and is present throughout history.[171] We unthinkingly categorise Islam, Christianity, Buddhism, Judaism, Hinduism,

[167] ibid

[168] Milbank, *TST* (n 10) 19.

[169] The phrase belongs to John Bossy, *Christianity in the West 1400-1700* (OUP 1985) 153-71 and has been adopted by Cavanaugh. See William T Cavanaugh, *Migrations of the Holy: God, State, and the Political Meaning of the Church* (William B Eerdmans 2011).

[170] See Introduction n 95 and accompanying text.

and so on as religions.[172] The Egyptians, Greeks, Romans, and Aztecs, we popularly think, had a religion.[173] Underlying these common assumptions is the idea that each of these religions contain a certain essential feature or adopt a certain quality of purpose or action that is different from the 'not-religious'. Largely, our understanding turns on types of belief. So, for example, religion has been said to involve 'matters of the spirit' as opposed to ideologies.[174] And Marxism is regarded as political, not religious, because it is 'rational'.[175] Through these demarcations, we begin to see, as French puts it, 'an image of the space that religion may occupy in the secular public sphere'.[176] Fundamentally then, the common understanding of religion attempts to isolate it from a distinguishable sphere of politics, managing questions of economic and social order.[177] Thus religion is said by UK and European courts to concern primarily 'the subjective belief of an individual' or 'personal beliefs',[178] and it has been described as 'subjective opinion … incommunicable by any kind of proof or evidence'.[179] Cavanaugh, discussing characterisations similar to these, argues they reflect a view of religion as a 'system of propositions or beliefs' or an 'interior impulse

---

[171] See, e.g., Jesse Choper, 'Defining "Religion" in the First Amendment' [1982] U Ill L Rev 579, 580 (searching for a definition that 'comprehend[s] those experiences and aspirations of mankind that have been generally thought of as "religious"'.)

[172] On Hinduism's development as a religion after the British arrival in India, see William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP 2009) 87-91.

[173] See Wilfred Cantwell Smith, *The Meaning and End of Religion* (Macmillan 1962) 54-55 (arguing the ancient Egyptians, Greeks, Aztecs, Indians, Chinese, and Japanese did not have any equivalent term for 'religion').

[174] Michael McConnell, 'The Problem of Singling Out Religion' (2000) 50 DePaul L Rev 1, 18.

[175] See, e.g. Choper (n 171) 596-97 n 104.

[176] Rebecca R French, 'From *Yoder* to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law' (1999) 41 Ariz L Rev 49, 73.

[177] See, e.g., Choper (n 171) 580 (distinguishing based on 'secular' governance).

[178] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [22] (Lord Nicholls of Birkenhead) and *C v United Kingdom* (1983) 37 D&R 142 (Commission Decision) 144.

[179] *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872 [21].

secreted away in the human soul.'[180] But RO writers contend that just as an autonomous secular space had to be invented or imagined, so too did this more private understanding of religion.

Both Cavanaugh and Ward argue that our term 'religion' derives from the Latin *religio*, but the terms are not synonymous.[181] In ancient Rome *religio* signified one of many terms surrounding social obligations. It was concerned with cultic observances (leading to the description of different *religio* – sets of observances – at different shrines), but also 'civic oaths and family rituals, things that modern Westerners normally consider to be secular.'[182] Ward points to *relegere* and *legere*, which respectively mean 'to reread' and 'to gather', as associated with *religio*.[183] Similarly, he notes the third-century Christian Lactantius related *religio* to *religare* which means 'to bind up' or 'to bind together'.[184] *Religio* consequently evoked social obligations within a tradition involving liturgical and communal practices.

The term *religio* and its cognates continued to be used by Augustine and Aquinas, again with a fundamentally different emphasis to modern religion. For Augustine, religion concerned worship.[185] In *De Vera Religione* he wrote of true religion in contrast to both pagan worship and the worship of vice.[186] But this was not worship in a disembodied or secluded sense. Rather, worship was characterised as an orientation of one's being, directed

[180] Cavanaugh, *The Myth* (n 172) 66.

[181] Graham Ward, *True Religion* (Blackwell 2003) 2 and Cavanaugh, *The Myth* (n 172) 62.

[182] ibid

[183] Ward, *True Religion* (n 181) 2.

[184] ibid

[185] Augustine, 'Of True Religion' in JHS Burleigh (ed), *Augustine: Earlier Writings* (SCM Press 1953) 218, 225.

[186] ibid 225-26, 260.

by an ultimate love towards God or the empty 'nothing' of mere transitory creation.[187] Indeed Augustine considered 'true religion' entailed catholic and orthodox Christians acting as the 'guardians of truth and followers of *right*'.[188] As he would make clear in *City of God*, following 'right' was the prerequisite of justice, the right ordering of the city.[189]

Aquinas, Cavanaugh argues, continued in similar vein.[190] In the *Summa Theologica*, Aquinas discusses religion as a virtue: rendering due reverence to God, specifically through 'sacrifices, oblations, and so forth'.[191] Again, this was not a carved-off or 'private' concept. Rather, Aquinas considered religion 'commands all other virtues'.[192] Hittinger notes that, like Augustine, Aquinas considered reverence for God to be the 'summit of justice itself'.[193] Cavanaugh argues that for Aquinas religion as a virtue consisted in the cultivation of *habitus*, specific disciplines of the body – prayer, song, silence, and practices of confession and repentance, for example – repeated in order to dispose a person toward moral excellence and participation in the life of the triune God.[194]

---

[187] ibid 236.

[188] ibid 231 (emphasis added).

[189] Augustine, *Concerning the City of God Against the Pagans* (Henry Bettenson tr, Penguin 2003) Book XIX, ch 21. See further Chapter Five, Part IV.

[190] Cavanaugh, *The Myth* (n 172) 64.

[191] ST II-II.81.8.

[192] ST II-II.81.4. See also Russell Hittinger, *A Critique of the New Natural Law Theory* (University of Notre Dame Press 1987) 170.

[193] ibid 171.

[194] Cavanaugh, *The Myth* (n 172) 66. See also Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (John Hopkins University Press 1993) 134.

Religion was consequently, in an architectonic way, woven into society, forming the theopolitical whole of medieval Christendom. Social and economic life was 'inside' liturgical life. Milbank argues that

> to speak of 'secular' and 'sacred' concerns in this period can be to overlook the fact that monasteries were also farms, that the Church saw to the upkeep of bridges which were at once crossing places and shrines to the Virgin and that the laity often exercised economic, charitable and festive functions in confraternities that were themselves units of the Church as much as parishes, and therefore occupied no unambiguously 'secular' space.[195]

(a) *Religion in Modernity*

Cavanaugh argues, however, that with the rise of the modern state this sense of 'religion' as related to a theopolitical whole was substituted for an understanding of religion as a genus concerning, for example, 'the supernatural' and 'personal belief'.

We could trace this back at least as far as Marsilius of Padua in the early fourteenth century. Marsilius articulated a proto-contractual understanding of political authority.[196] He considered that the church was concerned only with what it 'is necessary to believe, do, and omit in order to attain eternal salvation and avoid misery.'[197] This was in contrast to the civil ruler, who had authority over 'the body of faithful'.[198] This stark differentiation is echoed in

---

[195] John Milbank, 'The Gift of Ruling: Secularization and Political Authority' (2004) 85 New Blackfriars 212, 216.

[196] See Marsilius of Padua, 'Defensor Pacis (1324)' in O'Donovan and Lockwood O'Donovan (n 25) 427, 432 (arguing political authority was a post-lapsarian institution established by the 'weightier part' of individual wills).

[197] ibid 430.

[198] See O'Donovan and Lockwood O'Donovan (n 25) 426.

the Protestant Reformation, to which Cavanaugh gives more attention. Writing in the 1520s, Martin Luther drew from the patristic idea of two societies, and the claim of freedom from legislative authority for the righteous. However, he blurred this category of the two by arguing that because each person is both righteous believer and sinner, the distinction of the two is an ideal one.[199] In his commentary on Psalm 82 he identified the universal church (that is the claimed, ideal shape for institutional churches)[200] with the limited office of the preaching of the Word.[201] This contrasted an enlarged role for the prince, who was to secure public virtue – the help of the poor, the widow, the orphan – and settle disputes within the church.[202] Civil authorities were, he argued, ordained by God to hold a monopoly on juridical power, applicable against all persons and offices within Christendom.[203] What we have in Luther then is a theological justification for a new configuration of power in Christian societies – away from a theopolitical whole in which the institutional church directed temporal authority to eternal ends towards a concept of the unitary nation state as the sole and sovereign authority.

The identification of the church with the limited function of preaching and exhorting, as in Luther's writing, facilitated the absorption of the church into the body of the state. Historian John Bossy refers to this as the 'migration of the holy'.[204] Others have referred to

---

[199] See O'Donovan, *The Desire* (n 65) 209.

[200] This reflects the second meaning of 'the church', as discussed in Introduction, Part II (e).

[201] Martin Luther, 'Psalm 82' in Jaroslav Pelikan (ed), *Luther's Works*, vol 13 (CM Jacobs tr, Concordia Publishing House 1956) 39, 48-51.

[202] ibid 53-58, 61-63. Luther furthered the Reform and discipline agenda discussed in Part I. Civil authority, he wrote, had the power to punish heresies (as *also* seditions). ibid.

[203] See William T Cavanaugh, *Theopolitical Imagination: Discovering the Liturgy as Political Act in an Age of Global Capitalism* (T&T Clark 2002) 23-24 discussing Martin Luther, 'To the Christian Nobility of the German Nation' in CM Jacobs (ed), *Three Treatises* (CM Jacobs tr, Fortress Press 1966) 15.

[204] Bossy (n 169) 153-71 discussed in Cavanaugh, *The Myth* (n 172) 174.

the 'confessionalisation' of the state.[205] Rather than understanding the political body as the *corpus mysticum*, cohering around the Eucharist and other practices of the church, individuals were increasingly disciplined into becoming citizens or subjects of a state. Religious uniformity was seen as central to citizenship or subjecthood, and such uniformity was facilitated by two developments. First, liturgical practices were crafted by the state and for state purposes. For example, Ward points to the Book of Homilies, a requirement of every parish in England following the Act of Uniformity of 1559.[206] In the 'Homily Against Contention and Brawling' the people were admonished to avoid all manner of civil disorder, including the 'most hurtful', 'contention in matters of religion'. Second, religion was increasingly characterised as a set of beliefs. Cavanaugh points to numerous attempts to encapsulate the essence of belief as a series of propositional statements, for example, Lord Herbert of Cherbury's identification of five 'Common Notions' underlying all religion.[207] This reflected what Talal Asad refers to as a distinctly modern Christian pre-occupation – 'identifying, cultivating and testing belief as a verbalizable inner condition of true religion'.[208] Further, these doctrinal and liturgical shifts, a 'seizing' of the church's functions, occurred while the emerging territorial state seized land, property, and tithes from churches within their reach.[209]

The absorption of the church into the disciplinary structure of the state and the development of Christianity as a body of beliefs were dual branches in the same process: the

[205] See Philip S Gorski, 'Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, CA. 1300-1700 (2000)' in Bryan S Turner (ed), *Secularization: Defining Secularization, The Secular in Historical and Comparative Perspective*, vol 1 (Sage 2010) 117, 136-41.

[206] Ward, *True Religion* (n 181) 18.

[207] Cavanaugh, *The Myth* (n 172) 75.

[208] Asad (n 194) 48. Prominent examples of propositional documents include the Thirty-Nine Articles (1563), the Lambeth Articles (1595), and the Westminster Confession (1643).

[209] Cavanaugh, *The Myth* (n 172) 169 and Ward, *True Religion* (n 181) 42.

growth of the nation state and the privatisation of the church.[210] RO writers generally point in this respect to Hobbes and Locke as the logical outcome, where the two figures are treated as continuous (or Locke's 'liberal tolerance' is characterised as Hobbes in sheep's clothing).[211] Hobbes advocated religious uniformity through absorption of the institutional church into the state, which was now seen as exhausting the kingdom of God.[212] On his nominalist perspective, originally competing individuals are bound together arbitrarily by cohering to the single sovereign, which ensures civil peace by, for example, determining public religious practice and matters of doctrine.[213] Locke equally considered that the state must be free to patrol the boundaries of permissible public action, likewise regulating individuals granted, like Adam, an original *dominium*. Cavanaugh argues that although Locke did not advocate the absorption of the church into the state, he nevertheless solved the problem of civil peace by similarly diminishing the church's public nature (as a distinct society or site of social cohering).[214] This Locke did by characterising religion as, in essence, private belief. Cavanaugh, aligning Hobbes and Locke, consequently argues, 'once Christians are made to chant "We have no king but Caesar,"' meaning once public authority is conceded, 'it is really a matter of indifference to the sovereign whether there be one religion or many.'[215]

[210] See also José Casanova, *Public Religions in the Modern World* (University of Chicago Press, Chicago 1994) 34, 53.

[211] See also above n 134 and accompanying text.

[212] See Cavanaugh, *Theopolitical Imagination* (n 203) 36.

[213] See Milbank, *TST* (n 10) 19-20 discussing Hobbes (n 135) Part IV, ch 47, 710-11.

[214] Cavanaugh, *Theopolitical Imagination* (n 203) 40.

[215] ibid

Locke's identification of the essence of belief, as I will discuss in Chapter Four, continues to influence our framing of religious liberty. In his 1689 *A Letter Concerning Toleration*, Locke wrote:

> I esteem it above all things necessary to distinguish exactly the Business of Civil Government from that of Religion, and to settle the just Bounds that lie between one and the other. If this be not done, there can be no end put to the Controversies that will be always arising between those that have, or at least pretend to have, on the one side, a Concernment for the Interest of Men's souls, and, on the other side, a Care of the Commonwealth.[216]

The 'exact business' was identified through an internal-external binary. For Locke, the essence of religion was inward performance of faith directed towards one's aspiration for salvation.[217] The civil magistrate could not be tasked with the compulsion of belief because the magistrate cannot penetrate into the inner reaches of conscience, the sanctum of true religion. The divine 'Supreme Judge of all men' had authority over 'the Care of Souls' – the inward life of the individual – and it was up to every man to search out and discover for himself what Cavanaugh calls the 'private matter of … saving knowledge' (in the Christian construal in which Locke operated, the way to heaven).[218] Such knowledge did not belong to any one person, and was unassailable by the magistrate. The business of the commonwealth, however, concerned civil interests, identified as 'Life, Liberty, Health, and Indolency of the Body; and the Possession of outward things, such as Money, Lands, Houses, Furniture, and the like.'[219] The 'Religious Society', Locke detailed, could not concern itself with 'the Possession of Civil and Worldly Goods', nor could it make use of force in any way, for

---

[216] John Locke, 'A Letter Concerning Toleration' in JH Tully (ed), *A Letter Concerning Toleration* (Hackett Publishing 1983) 23, 26.

[217] ibid 26-27.

[218] ibid 26-27, 32; Cavanaugh, *The Myth* (n 172) 79.

[219] Locke, 'A Letter' (n 216) 26.

'Force belongs wholly to the Civil Magistrate, and the Possession of all outward Goods is subject to his Jurisdiction.'[220] There is, consequently, a comparative exercise – analysing the burden placed on the religious believer of curtailing public acts of worship as against the burden placed on the health (or wealth) of the commonwealth if the believer were permitted to adopt actions considered prejudicial to the commonwealth. His view, that such a curtailment would be comparatively slight as compared to the harm to society, is premised upon the identification of religion as essentially an interior belief.[221]

This internal-external binary consequently sets up the boundaries of tolerance, as well as leading Locke into an *aporia*, as Stanley Fish suggests.[222] Locke begins by stating that 'every Church is orthodox to it self' and that there is no supreme Judge, no tribunal that can determine truth and falsity as between these divergent perspectives.[223] He goes on, however, to state that 'No Opinions contrary to human Society … as manifestly undermine the Foundations of Society, and are therefore condemned by the Judgment of all Mankind' should be tolerated.[224] As Fish argues, this is peculiar. The judgment of all mankind is appealed to as a benchmark for tolerance, but against a backdrop of plural, irreconcilable orthodoxies.[225] This posits a supposedly neutral, universal ground for adjudication when one has already been ruled out at the start of the inquiry. But for Locke, the neutrality is internal to his own prior division between civil government and the business of religion.[226] Religion

[220] ibid 30.

[221] ibid 42.

[222] Stanley Fish, 'Mission Impossible: Settling the Just Bounds Between Church and State' (1997) 97 Colum L Rev 2255, 2266-67.

[223] Locke, 'A Letter' (n 216) 32.

[224] ibid 49.

[225] Fish (n 222) 2262.

that challenges this division is contrary to the 'foundations of society', remembering that Locke conceived of his division as simply describing a universal truth. On this basis, Catholics are excluded from the benevolence of toleration – they would claim civil power 'upon pretense of religion.'[227] In this Locke was following a common view: belief itself was unproblematic; belief which entailed claims of public authority was construed as positively dangerous for the state.[228]

(b) *Conclusion: The State as Salvation*

The idea that a 'religious society' has no input into civil or worldly goods would have been unheard of in a pre-modern society where 'monasteries were also farms' and craft guilds revolved their work around the liturgy.[229] The consequences of this shift included the reduced presence for the church as the primary community, constituted through rites of public worship,[230] and an increased emphasis upon the individual cohering to a now expanded state power. The church body is identified as, at best, instrumental to the individual's pursuit of faith, leaving the public space of 'life, liberty, health … money, land … and the like' free for civil authority. In the contemporary setting of religious liberty jurisprudence, this privatisation of religion has led to a continual quest to identify the essence of religion, usually associated with 'belief' distinct from public or political expressions of religion, which are often treated with scepticism.

---

[226] ibid 2265.

[227] Locke, 'A Letter' (n 216) 52. See further Cavanaugh, *The Myth* (n 172) 84.

[228] See Cavanaugh, *Theopolitical Imagination* (n 203) 41-42.

[229] See above n 195 and accompanying text.

[230] In the sense discussed by Hauerwas (see Chapter Two, Part III (a)).

These shifts can be placed within a standard secularisation narrative: the differentiation of religious and political, economic, that is, secular value spheres and the possibility of the decline of religion itself. But, as this chapter has discussed, the RO argument is that the desacralisation or stripping away narrative is inadequate. Just as 'the secular' had to be positively instituted through changes in the social imaginary and, importantly, theological thought, so too 'religion'. Cavanaugh furthers this argument, contending that rather than desacralisation what has happened (and continues to happen) is a 'migration of the holy' through new forms of public devotion. He writes, '[T]he kinds of public devotion formerly associated with Christianity in the West never did go away, but largely migrated to a new realm defined by the nation-state.'[231] Cavanaugh elaborates this claim by discussing the development of secular authority within modernity in theological terms, contending that the modern nation state project affects an alternative soteriology.[232]

Soteriology concerns the understanding of salvation in the Christian narrative.[233] This is the story of 'the loss and regaining of primal unity'.[234] Humanity, created in the image of God, participates in the communal life of the triune God through community with one another. But the narrative of the Fall concerns the entry of wilful disobedience, which is manifested first in division between persons: Adam blames Eve, Cain murders Abel. Redemption is participation in Christ's own body, which is a body of diverse members sharing each other's burdens as they manifest the *imago dei* to one another. There is, within

[231] Cavanaugh, *Migrations* (n 169) 1.

[232] See Cavanaugh, 'The City' (n 165).

[233] See Alister E McGrath, 'Soteriology' in Alister E McGrath (ed), *The Blackwell Encyclopedia of Modern Christian Thought* (Blackwell 1993) 616.

[234] Cavanaugh, 'The City' (n 165) 183.

this body, no single central power. As Taylor argues, it is a form of network, establishing *agape* in multiple contexts.[235]

In contrast, Cavanaugh argues the story of the modern moral order is a story of salvation for humanity 'from the pernicious effects of disunity through the mechanism of the state.'[236] Hobbes, Rousseau, and Locke are in essential agreement, Cavanaugh contends: the state of nature consists in an equality of individual beings, which compels the need for a sovereign *central* power to defend property and personal rights as against other individuals.[237] The enactment of a new social body, Hobbes' artificial man, ensures salvation from violence. Moreover, Cavanaugh continues, this threat of violence is now perceived as primarily emanating from religion, which must accordingly be cast as private. Echoing Milbank, Cavanaugh calls this act of salvation by state power 'formal'.[238] It is not a genuine social process because it only concerns preventing interference with each other's subjective rights.

RO writers argue that the secular and the religious had to be positively invented. Rather than a process of stripping away, the revealing of natural spheres of secular politics and religion, RO argues that what has developed is a competing construal of social and political life – how we relate to each other and how we relate to the divine. Central to this new vision is an understanding of secular power regulating competing individual interests. Religion within this vision is both a private interest to be secured (as belief) and to be resisted (as public authority). But this construal of religion raises a new problem. If religion is

[235] See above n 159 and accompanying text.

[236] Cavanaugh, 'The City' (n 165) 183.

[237] ibid

[238] ibid 192-93.

primarily understood as individual belief, then arguably this precipitates a relativizing trajectory. A person must now search within him or herself for religion, but what they identify is an open question. In the final part of this chapter, I explore this relativizing trajectory through what Ward calls the 'spiritualizing of human subjectivity'.[239]

III The Spiritualising of Subjectivity

In 2009, Daniel Jones, the co-founder of the 'First Church of Jediism', accused the supermarket chain Tesco of religious discrimination after he was told to remove his hood or leave a branch in north Wales.[240] The Church apparently has 500,000 followers worldwide. And when the census rolls around every 10 years, identification of 'Jedi' as a religion is seemingly destined to reach the headlines.[241] The anxiety over this identification is largely based on a claim of 'seriousness'.[242] In other words, this is a 'religion' that originates from a series of films begun in the 1970s and woven into popular culture. But seriousness seems to be the only possible basis for critique. This is because religion is associated with the bathing of personal choice in a 'transcendent' aura: be it 'depth'; 'ultimate meaning'; or the transporting effects of technology, a spectacle, or consumption. Jedi, on this account, is arguably not a marginal phenomenon, but rather a more explicit instance of the interweaving of an ambiguous transcendence (the transporting effects of a fictionalised universe),

[239] Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009) 157.

[240] See Helen Carter, 'Jedi Religion Founder Accuses Tesco of Discrimination over Rules on Hoods' *The Guardian* (London, 18 September 2009) <www.guardian.co.uk/world/2009/sep/18/jedi-religion-tesco-hood-jones> accessed 3 December 2010. Tesco responded: 'Jedis are very welcome to shop in our stores although we would ask them to remove their hoods. Obi-Wan Kenobi, Yoda and Luke Skywalker all appeared hoodless without ever going over to the Dark Side and we are only aware of the Emperor as one who never removed his hood. If Jedi walk around our stores with their hoods on, they'll miss lots of special offers.'

[241] See, e.g., BBC, 'Jedi Makes the Census List' *BBC* (London, 9 October 2001) <http://news.bbc.co.uk/1/hi/uk/1589133.stm> accessed 3 December 2010.

[242] See further Chapter Four, n 176 and accompanying text.

borrowed capital (a syncretism of multiple religious traditions), and aesthetics (a heavily designed and marketed franchise characterised by the consumption of products) that is characteristic of contemporary religion.

Spirituality turned inward towards personal construal of belief, set loose from a particular tradition, proliferates into ever-widening options. Charles Taylor calls this the 'Age of Authenticity'.[243] Spirituality is now associated with what is authentic to the individual – the discovery of our own way of living as against conformity to, for example, the past or a religious or political authority.[244] Taylor himself points to the rise of 'privacy' in legal discourse as part of this development.[245] And we could consider O'Connor J's declaration of autonomy, that it is the right of Americans to 'define one's own concept of existence, of meaning, of the universe, and of the mystery of human life', as a high-water mark in the age of authenticity.[246] But this declaration, as Taylor's work suggests, reflects developments in contemporary spirituality. Unsurprisingly, therefore, it also finds its analogues in religious freedom jurisprudence.[247] In that setting, there has developed a focus upon authenticity as the hallmark of personal autonomy, the major rationale for religious freedom. This has precipitated the possibility of numerous claims, each based on different personal spiritualities. Thus the question, 'Is "Jedi" a religion?' And if this is answered in the affirmative, a new problem arises: what weight should be given to these spiritualities when considered against competing concerns? Or, perhaps more significantly: if we are simply concerned with authenticity and autonomy, why talk about religion at all?

---

[243] Taylor, *A Secular Age* (n 8) ch 13.

[244] ibid 475.

[245] ibid 485.

[246] *Planned Parenthood v Casey* 505 US 833, 851 (1992).

[247] See Chapter Four, Part III.

In several works, Ward traces what he calls 'religion as special effect' or the 'commodification of religion' as one dominant trend in contemporary religion.[248] Religion as 'special effect' concerns the individual seeking out, or having marketed to him or her, an experience of immersion, depth, transcendence, or stepping beyond a limit. In this sense, it is consistent with Taylor's age of authenticity. But, although this is a resurgent form of religion, it deepens the privatisation of religion discussed in the previous part of this chapter. Religious language and symbols, narratives of discipline and sacrifice, and the development of virtue are largely divorced from the communities that sustained them. Examining contemporary spirituality in this light is consequently important because it highlights the focus upon authenticity and autonomy which holds prime concern in religious freedom jurisprudence and, through this, we are brought to reconsider what should be the ends and scope of 'religion'.

Ward argues that the contemporary iteration of religion – fluid, pastiche-based, marketed, and individualised – follows in the genealogy discussed in Parts I and II of this chapter. Consistent with Taylor's thesis, he points to new understandings of the person as ordering, disciplining, and controlling creation.[249] This, he continues, engendered a new humanism which focused on accounts of right reasoning, rather than theological conceptions of the person.[250] Paramount to this was identifying religion with the individual's knowledge of certain propositions, as discussed above.

---

[248] See Ward, *True Religion* (n 181) ch 4; Graham Ward, 'The Commodification of Religion, or the Consummation of Capitalism' in Creston Davis, John Milbank and Slavoj Žižek (eds), *Theology and the Political: The New Debate* (Duke University Press 2005) 327; and Ward, *Politics* (n 239) 147.

[249] ibid 163.

[250] ibid 89.

Ward continues the genealogy, arguing that this form of humanism led to a complex reaction from Romantic writers.[251] On the one hand, the Romantics resisted the rationalisation of religion. But, on the other hand, this resistance was couched in terms of an on-going individualisation of belief,[252] and the emerging consumer culture brought about by the drive to control and extract from creation. The Romantic Novalis construed religion as 'trembling with sweet anguish into the dark … a sucking whirlpool in the vast ocean.'[253] Ward argues that this language, pointing to 'galaxies, constellations and the primordial chaos', reflected a desire to go beyond rational order.[254] But, it also reflected a focus on consumption – the desire to be consumed reflected a discourse in which consumption, the controlling of creation through new markets, was associated with emulating 'God'.[255]

Ward argues that this conception of reaching beyond the world to a hidden 'oneness' punctuates subsequent understanding of religion. He calls it a 'haunting by the infinite'.[256] It is manifested in various forms: the deity who dominates, cosmotheism, metaphysics of absolute spirit, and aesthetics of the sublime.[257] Ward traces this through increasing levels of abstraction.[258] Specific traditions, he argues, were increasingly re-conceived as pursuits of some hidden, or greater, 'infinite' or 'ultimate', rendering their specificity irrelevant. Thus,

---

[251] Ward, *True Religion* (n 181) ch 3. Ward discusses Schlegel, Novalis, and Schleiermacher. He argues Schleiermacher is distinguishable as holding to 'a specific religious revelation, practice and tradition' (91).

[252] See also Courtney Bender, *The New Metaphysicals: Spirituality and the American Religious Imagination* (Chicago University Press 2010) 8 (arguing the Romantics moved towards experience, located in the emotions and affect, as the unique marker of religious truth).

[253] Ward, *True Religion* (n 181) 74 (quoting *The Apprentices of Sais*).

[254] ibid 75.

[255] ibid 112.

[256] ibid 75.

[257] ibid 112.

[258] ibid 117.

reaching into the twentieth century, Paul Tillich would write of religion as the individual's experience of a 'depth' of 'ultimate concern'.[259]

Ward argues that this 'evacuation of expression' heightened Pascal's fear: 'engulfed in the infinite immensity of spaces whereof I know nothing'.[260] Depth or the ultimate, a hidden infinite, may simply be words for 'nothing'. But, Ward continues, this feeling of possible terror is masked by an increasing focus on aesthetics: metaphoric depictions of the cosmos, art, and then ultimately the kitsch and commodities come to fill the void left by this evacuation of expression.[261] The absolute or the infinite, Ward argues, is now experienced as acts of consumption, 'fashion-led and therefore arbitrary' instances of a personal depth, authenticity, or self-meaning.[262]

D. Stephen Long describes this genealogy as 'non-confessional theology' contributing to the 'contentless character of global capitalism'.[263] Within capitalist culture, Long contends, experiences of 'value' are recognised as pursuits of individual meaning or the continuation of consumption, rather than 'substantive and particular goods.'[264] Ward continues this argument, contending that the motifs and symbols of religious traditions are marshalled to lend a transcendent aura to the consumption of everyday products.[265] For example, Ward quotes a former marketing director for Starbucks who identified the

[259] ibid 115, 119.

[260] ibid 74 (quoting Pascal's *Pensées*).

[261] ibid 114.

[262] ibid 117.

[263] D Stephen Long, *Divine Economy: Theology and the Market* (Routledge 2000) 55.

[264] ibid

[265] Ward, *Politics* (n 239) 153.

company's goal as 'to align ourselves with one of the greatest movements towards trying to find a connection with your soul'.[266] Numerous other examples exist. GHD, a hair styler, used as slogans in its 2007 advertising campaign, 'Thou shalt be saved' and 'Thou shalt convert'; 'True Religion' is the brand of an American premium clothing line; Magnum ice-creams ran for a time a limited edition seven deadly sins product line; Faithless, a British electronica band, sang in their popular song 'God is a DJ', 'This is my church; this is where I go to heal my hurts'. Religious symbols and language provide, Ward contends, 'symbolic capital with a certain charismatic past' to lend places, goods, and people a sense of depth or transcendence.[267] But Ward argues that this contemporary religiosity is not only cultivated by a re-deployment of symbols. Rather, he continues, the very act of consumption reflects a 'religious' logic. For example, to purchase a pair of Nike shoes is not merely a material act, but a participation in the consumption of a logo, which 'float[s] free and ethereally on electronic waves of advertising'.[268] A person consumes an experience, framed in terms of 'pure ideas about athleticism as transcendence and perseverance' and 'the spiritual transformation of Man over nature'.[269] The consumption of goods is consequently construed as particular expressions of a more general quest, for the individual to experience the 'depth' of the inner person.

Ward notes that this quest for new experiences is paralleled by other developments in contemporary religion. He raises: an increasing re-enchantment of reality through technology – a desire, often noted in technology writing, for self-immersion or being consumed by the

[266] ibid 105.

[267] Ward, *True Religion* (n 181) 132.

[268] Ward, *Politics* (n 239) 98.

[269] Naomi Klein, *No Logo* (Flamingo 2000) 51-56 quoted in Ward, *Politics* (n 239) 98.

whole or singularity;[270] an increasing interest in the supernatural – the gothic, for example;[271] and the proliferation of various spiritualities in commercialised forms.[272]

These developments point to the potential for an endless series or pastiche of goods as individual spirituality. This precipitates a sense of competition. Religion is as easily found in the consumption of products as it is in the church, mosque, or synagogue.[273] Indeed, religious groups often adopt the logic of consumer experience, adding to the spirituality market. Milbank, for example, is critical of the recent 'Fresh Expressions' development in the Church of England on this basis.[274] This is a movement within the Church of England which, he argues, favours marketing niche expressions of church-life – a church for skateboarders, for example.[275] This conceives of church, Milbank continues, as a malleable product, peddling other-worldly salvation, rather than understanding the Christian life as necessarily bound to the creation of a new, differentiated community cultivating particular habits.[276]

And if church participation and formation is simply one product amongst many going to make up individual identity, then the consumption of multiple, previously considered

---

[270] Ward, *True Religion* (n 181) 129.

[271] ibid 130.

[272] Ward, *Politics* (n 239) 105.

[273] See also Rebecca R French, 'Shopping for Religion: The Change in Everyday Practice and its Importance to the Law' (2003) 51 Buff L Rev 127, 149.

[274] See Mission-Shaped Church Working Group, *Mission-Shaped Church* (Church Publishing House 2004) <www.chpublishing.co.uk/uploads/documents/0715140132.pdf> accessed 11 July 2011.

[275] See John Milbank, 'Stale Expressions: The Management-Shaped Church' in *The Future of Love: Essays in Political Theology* (SCM Press 2009) 264. On the existence of 'church for skateboarders', see, e.g., '(CEN) Skateboards, BMX and the Gospel in Benfleet' *Fresh Expressions* (24 December 2010) <www.freshexpressions.org.uk/news/cen/201012> accessed 23 February 2013.

[276] Milbank, 'Stale Expressions' (n 275).

irreconcilable, goods is unproblematic. The phenomenon of 'New Age' spiritualities exhibits just these tendencies, engaging in the manipulation of existing symbolic systems – Eastern traditions, Christianity, self-help therapy, and often the insights of physics – to create ever-new syntheses.[277] Danièle Hervieu-Léger puts the point succinctly: 'Today, individuals write their own little belief narratives using words and symbols that have "escaped" the constellations of meaning in which a given tradition had set them over the centuries.'[278]

Ward identifies this as one form of the 'resurgence' of religion. 'God is back' arguments, debunking the decline component of the secularisation thesis, tend to focus on continued observance or the growth of particular faith groups (usually Pentecostals and Muslims).[279] But the religion as special effect form of resurgence, on the RO genealogy, is constituted by the central shifts of secularisation. Fundamentally, it concerns the cultivation of personal belief narratives based on a lineage that identifies religion with inward expressions of faith. On Ward's argument, once this turn is made and religion develops into a conception of individualised 'ultimate concerns', religion 'implodes'.[280] Its boundaries, as discussed, become increasingly porous. This is what Wards calls the spiritualising of human subjectivity.[281] Importantly, this kind of spirituality need not take place within a community, which, if assistance at all, is assistance towards discovering individual spirituality.

---

[277] See Wouter J Hanegraaff, 'New Age Spiritualities as Secular Religion: A Historian's Perspective (1999)' in Bryan S Turner (ed), *Secularization: The Comparative Sociology of De-Secularization*, vol 4 (Sage 2010) 121, 128.

[278] Danièle Hervieu-Léger, 'In Search of Certainties: The Paradoxes of Religiosity in Societies of High Modernity' in Bryan S Turner (ed), *Secularization: The Comparative Sociology of De-Secularization*, vol 4 (Sage 2010) 259, 259-60.

[279] See, e.g., Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 1-2, discussing the work of Peter Berger.

[280] Ward, *True Religion* (n 181) 117.

[281] Ward, *Politics* (n 239) 157. As Ward notes, this is in continuity with Thomas Luckmann's examination of 'invisible religion' – sacred lifestyles built on a personal ethos of autonomy, self-expression, self-realisation, familism, and sexuality. See Thomas Luckmann, *Invisible Religion* (Macmillan 1967).

These developments could be valorised as the outworking of an emancipation story – individuals able to pursue their own autonomous choices. But such a conclusion is questionable. While contemporary spirituality is couched in terms of individual experience, it is also cultivated by a consumer culture in which people are marshalled by corporations into what Taylor calls 'mutual displays' of identity.[282] There are two related points here. First, a focus upon individual expression points to a plethora of equally arbitrary identities. Second, these identities are marketed as lifestyles.

Ward argues that amidst the expanding range of viewpoints and expressive identities, attention is often drawn to a suspicion of their vacuity – each identity or choice is equally valid, equally arbitrary, and equally changeable. What matters, he continues, is the 'persuasive rhetorics in which opinion is couched and canvassed. … Values are inseparable from lifestyles and all lifestyles today are designed, marketed and sold to us.'[283] Rather than an exercise in individual autonomy, therefore, what we have is the cultivation of identity in service of the market. French philosopher Alain Badiou summarises the point:

> [E]ach identification (the creation or cobbling together of identity) creates a figure that provides a material for its investment by the market. … Each time, a social image authorizes new products, specialized magazines, improved shopping malls, "free" radio stations, targeted advertising networks, and finally, heady "public debates" at peak viewing times.[284]

[282] Taylor, *A Secular Age* (n 8) 483.

[283] Ward, *True Religion* (n 181) 128.

[284] Alain Badiou, *Saint Paul: The Foundation of Universalism* (Ray Brassier tr, Stanford University Press 2003) 10.

Indeed, what matters for individual autonomy is a range of choices, but, as Cavanaugh argues, this is consistent with a consumerism based on the displacement of desire – deferring satisfaction in favour of continual shopping.[285]

IV Conclusion

In this chapter, I have raised RO's challenge to the 'desacralisation' or 'stripping away' narrative. On RO's argument, rather than the secular sphere of politics becoming increasingly refined or stripped bare of unnecessary religion, both secular and religion, as they are now understood, had to be invented or imagined. This leads RO writers to juxtapose two social imaginaries or visions of society engaging deep practice and theory.

The Christian tradition, they contend, historically pointed to a life of charity – networks of *agape* or love established in different contexts to raise the people to a common end, love of God and of neighbour for the sake of God. This, RO writers argue, reflects a Christian ontology in which creation is fundamentally harmonious or good, as participating continually in the life of God. Different roles can coordinate for the common end of communion, and the church, in its institutional forms and as an ideal body, is understood as working towards this end. Competition and ego are, on this account, simply an intrusion against the fundamental reality of peace.

This ontology was challenged by, RO writers contend, the univocity of being. Here, individuals are construed as self-contained instances of 'being'. God, as Taylor argues, gives the initial act of creation, but then leaves us to discipline ourselves and the created world in

[285] William T Cavanaugh, *Being Consumed: Economics and Christian Desire* (William B Eerdmans 2008) 47.

accordance with his commands. But RO writers contend that this conception of individual beings separated from a now distant God precipitated a new vision of social order. Now reality is construed as originally chaotic – bare individual wills who equally possess their own independent 'being' confront each other in a founding state of nature. The secular state, on this view, saves us from competition, ensuring our liberty by regulating individual passions or fanaticism. Importantly, on the RO account, this entailed a flattening impulse: the elimination of competing sites of authority, notably the church, by their absorption into the state or a new understanding of private religion.

RO writers argue that this new social imaginary logically slides into nihilism. For political authority, 'order' outside of any shared social end, a *telos*, can now be construed as the checking of the disorder of individuals' wills through the supremacy of one single will. And in parallel, religion, now construed as private belief and increasingly as 'authenticity', potentially collapses into the pursuit of goods. We could further understand this in terms of what Taylor calls the 'malaises of modernity'.[286] He notes that the individual's 'quest' for wholeness and depth can reach beyond solipsism or arbitrary meaning and end in a belief in a transformative transcendent reality, sustained by a particular community.[287] But he also argues that a focus upon subjectivity and autonomy gives rise to the sense that all answers to the question of how one should orientate one's life are fragile. The questioning of meaning means that no particular path can be justified and this precipitates, Taylor contends, a general unease: the world is flat and there is no means to solemnise it anymore. Framed in religious liberty terms, we can ask: What is 'religion' now? What weight should be given to contemporary 'religion'? And, if it is simply subjectivity or autonomy, then why concern

[286] Taylor, *A Secular Age* (n 8) ch 8.

[287] ibid ch 14.

ourselves with 'religion' at all? Religion as a term is arguably losing any sense of its own intrinsic significance.

Ward argues that this malaise should concern us. Religion is now focused on cultivating an individual's inner personal satisfaction. This, Ward contends, is socially atomistic – there are no necessary communal ends to religion and no necessary turning outwards towards engagement in public fora.[288] As Luckmann argued, religion within this understanding reinforces the autonomy of the state as the primary political actor.[289] Indeed, it is striking to see an almost perennial sense of loss amongst sociologists of religion: the undermining of tradition and social institutions; the decline of a value-orientation upon which human society depends; and the drop in church belonging paralleled by a drop in union and political party membership, understood as the seedbeds of political engagement and sacrifice.[290]

Within this genealogy and characterisation of two social imaginaries, there remains a lurking question, however. For RO writers, the movement towards secular autonomy, the new science of politics or the modern moral order, and the spiritualising of human subjectivity are reflected in the development of human rights discourse. Milbank's main contribution to legal scholarship on this question is entitled 'Against Human Rights'.[291] Similarly, Ward points to the development of rights discourse as part of the new humanism

---

[288] See Graham Ward, 'The Future of Religion' in Bryan S Turner (ed), *Secularization: The Comparative Sociology of De-Secularization*, vol 4 (Sage 2010) 303, 308.

[289] Discussed in Casanova (n 210) 37.

[290] See, e.g., Bryan R Wilson, 'Aspects of Secularization in the West (1976)' in Bryan S Turner (ed) *Secularization: The Sociology of Secularization*, vol 2 (Sage 2010) 88, 99; Steve Bruce, 'Secularization and the Impotence of Individualized Religion (2006)' in ibid 295, 302-03; and Grace Davie, 'Religion in Europe in the 21st Century: The Factors to Take into Account (2006)' in ibid 307, 311.

[291] Milbank, 'Against' (n 77).

that, in his genealogy, gives rise to religion as private special effect or commodity and a rising 'social atomism'.[292] For this thesis, this raises the following question: from the RO perspective, is religious liberty jurisprudence and discourse characterised by *the* problematic doctrine of rights, such that any advocated changes to how we understand religious liberty would entail eschewing rights discourse? My purpose in this thesis is to explore a conversation between RO thought and religious liberty discourse, both as critique and resource. In this way, I consider it more fruitful to view the 'against human rights' claim as an argument as to how rights should be understood. In unpacking this characterisation, albeit briefly, it is helpful to recapitulate the claimed contrast between a 'subjective' notion of rights and an 'objective' understanding of rights before then considering why this debate is capable of being housed *within* legal rights discourse.

Nicholas Wolterstorff describes 'subjective' rights as rights that 'inhere' to the person not on the basis of any social conferral or distribution but on the basis of 'possessing certain properties'.[293] On Milbank's account, this characterisation is at the heart of a fundamental difference in how rights are understood. Wolterstorff's characterisation, Milbank argues, contributes to an understanding of rights as a grounded in a person's 'self-ownership' (or else property ownership). This is contrasted with rights understood as socially conferred in aid of exercising a more fundamental duty or pursuing a relational end.[294] Applying the claimed contrast in the context of religious liberty, the former understanding, removed from a teleological discourse of ends, is said to point towards religious liberty as falling under the person's natural capacity for autonomous moral choice, reflecting a power to dispose of

[292] Ward, *True Religion* (n 181) 42, 127.

[293] Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press 2008) 36.

[294] Milbank, 'Against' (n 77) 221. See similarly Oliver O'Donovan, *The Desire* (n 65) 262.

oneself that emphasises a zone of non-interference limited only by other's equal claims.[295] The latter understanding, focused on a duty or ends, would understand religious liberty as a duty to seek God as one's own end (conferring a right to be free from coercion), living with others in the manner required by this pursuit, and according persons or groups certain rights (a social conferral) understood as facilitating and recognising this end. Importantly, for RO and right order theorists, this contrast is characterised as a debate between a deviant strain in Christian thought (a focus on the autonomous power of the person) and a properly teleological and eudaimonistic understanding of the person and society developed especially by patristic and medieval Christians.[296] And it is the former view, Milbank considers, that has the most contemporary adherents, including within the courts.[297]

There are at least three possible responses to this debate.[298] First, RO and right order theorists are wrong, Christian thought supports and beneficially gave rise to a discourse of human rights, including a subjective right of religious liberty, now reflected in legal instruments.[299] Second, RO is correct and this means any alignment of Christianity and human rights is a 'fatal capitulation of theology to an alien and foreign logic'.[300] Third, RO is at least partly right and its thought offers an opportunity to consider a continued appeal to

[295] See above n 152 and accompanying text.

[296] Milbank, 'Against' (n 77) 216-7.

[297] See John Milbank, 'Dignity Rather than Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) (forthcoming). In a lecture reflecting on 'Against Human Rights', Milbank linked his claims to the existence of rights courts, in particular the European Court of Human Rights. John Milbank, 'Lecture: Against Human Rights' (Law, Religion and Liberty: Legal and Theological Perspectives lecture series, Regent's Park College, Oxford, April 2012).

[298] Paralleling Zachary R Calo, 'Religion, Human Rights, and Post-Secular Legal Theory' (2011) 85 St John's Law Review 495.

[299] See, e.g., Michael Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (CUP 2007) and Wolterstorff (n 293).

[300] Calo (n 298) 502.

theories of right order, potentially using the vehicle of contemporary legal instruments that may be more complicated in their application than the contrasting theories suggest.

In Chapter Two, I noted that there are Christian voices that adopt the view that a Rawlsian or Dworkinian conception of religious liberty, entailing the subjective capacity to determine one's own conception of the good, is consistent with Christianity.[301] But one could pursue the first response, above, in more depth. For example, Nicholas Wolterstorff has more recently claimed that subjective rights are embedded in the Christian (even biblical) tradition, although what this means for religious liberty is less clear (arguably, no change from the individual capacity conception).[302] Fundamentally, I would suggest his characterisation of rights as claims to a good of human worth that others must respond to does not overcome the right order theorists' argument that subjective rights are wedded to 'possessive individualism'.[303] His characterisation is only social or relational, and only entails the pursuit of a common end, to the extent all individuals are viewed as entitled to respect for certain claims of rights or liberty.[304] But, despite these concerns of theory, I do not suggest in this

[301] See Chapter Two, n 71.

[302] Wolterstorff (n 293). For a challenge to his biblical interpretations, see Bernd Wannenwetsch, 'But to *Do* Right … Why the Language of "Rights" Does Not Do Justice to Justice' (2010) 23 Studies in Christian Ethics 138.

[303] See above n 161 and accompanying text.

[304] Wolterstorff contends that rights, at least how he conceives of them, are not 'pre-social' or 'asocial' as right order theorists claim. Wolterstorff (n 293) 33, 233. But his framing of the social aspect of rights promotes an entirely different understanding of social. For the right order theorists, 'right' is social because it entails acting in favour of the common good; in essence, to offer one's talents and perform one's roles for the formation of a community striving towards particular ends, which, as above, was identified as charity. Wolterstorff's 'social' conception, however, consists only in the reciprocity of recognising each other's claim to certain rights (mutually respecting privacy, for example). ibid 233, 246. His claim rights theory, as Rivers notes, bears strong affinities with an interest-based theory of rights. But, as Rivers continues, interest-based theories are not relational. Rather, they bring persons into contact only on a causal basis – when a right to a particular interest is infringed by another person. Julian Rivers, 'Three Concepts of Natural Human Rights' (2010) 23 Studies in Christian Ethics 182, 186. Claims of this kind need not relate to an understanding of the ends of the person or community. They may simply refer to respecting a zone of non-interference, privacy, or 'the individual's sovereignty over the moral world', which, as Perry notes, is precisely why they may appeal to polity sceptical of or disagreeing over metaphysics. Perry, 'Two Questions' (n 64) 149-51.

thesis abandoning talk of a specific right of religious liberty. In this sense, I am adopting the third approach, and for good reasons.

A claim 'against human rights' would need to engage fully with the structure of legal rights argument in different contexts. Undoubtedly, RO writers would not disagree with the outcomes of certain rights decisions, but it is not clear, for example, whether the impugning of subjective rights discourse, in the sense articulated above, extends to arguments against how the European Court of Human Rights has developed the right to life or the prohibition against torture. The claims are more abstract. But, further, when the claims are more concrete they can at times mischaracterise how the Convention and legal argument works. For example, alluding to the ECtHR, Milbank has criticised what he perceives to be a kind of absolutism.[305] Reflecting the notion of 'self-possession' discussed above, he has claimed (albeit embryonically) that legal rights discourse is characterised by attempts to balance bare assertions of individual liberty in the absence of any common measure. He suggests a woman's right to an abortion and the unborn child's right to life as one example, but also claims to religious liberty and sexual orientation non-discrimination.[306] This attempt to maximise liberties without reference to any ends may be a valid characterisation in some instances. In Chapter Six, I suggest arguments that would attempt to understand claims of religious liberty and sexual orientation non-discrimination not as a bare clash of liberties.[307] But this characterisation is not inherent to the legal discourse. Indeed, Milbank's alternative – a sense of right distribution or order that different groups may participate in, perhaps in different ways – arguably echoes or could echo proportionality review, with its

[305] Milbank, 'Lecture' (n 297).

[306] ibid

[307] See Chapter Six, Part III.

considerations of what is necessary for the interests of society in opposition to a bare claim of liberty.

McCrudden's exhortation is appropriate: 'It would be a mistake to think that we now have anything close to a settled interpretation of human rights in the legal sphere. Indeed, in some ways, it is difficult to speak of *the* legal understanding of human rights'.[308] There *are* strong themes of self-determination and autonomous will in rights discourse and religious liberty, as this thesis argues, is a prime instance. Rights can, in this sense, give rise to what O'Donovan calls a claim of 'radical ontological distinctness'.[309] But there are also currents of thought more amenable to conceptions of right order. This ranges from the structure of legal argument to how a rights-claim is understood. For example, at least certain rights might be understood as participation in a conditioned role containing certain duties (marriage, for example)[310] or a responsibility recognised for specific ends fused with a protection from interference in the role this entails (parenthood, for example).[311]

These possibilities of on-going echoes or overlaps within legal discourse are further mirrored by Christian discourse on rights. Arguably, as discussed in Chapter Two, more recent Catholic thought has shifted further towards the development of its own distinctive rights discourse.[312] Milbank himself recognises this, suggesting that 'rights' within modern Catholic thought often 'scarcely … mean rights in the modern sense at all.'[313] Rather, '[t]hey

---

[308] Christopher McCrudden, 'Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?' (2012) 1 Ox J L Religion 185, 188.

[309] O'Donovan, 'The Language of Rights' (n 138) 195.

[310] See Rivers, 'Three Concepts' (n 304) 189-90.

[311] Waldron (n 126) 1115-16.

[312] See Chapter Two, Part II (b).

are deemed to correlate with the equally foundational duties of others, or else to coincide with equally foundational obligations of the rights-holders.'[314] Milbank contends that Catholic thought thus continues to 'smuggle' in 'ancient objective *ius*'.[315] And he argues this has largely continued through the language of personalism, which views the person as exercising a role as an irreplaceable gift within a community.[316]

Understandably, this unsettled state of affairs is reflected in religious liberty jurisprudence. In Chapters Five and Six, I note how courts often do appeal to a more associational account of religious liberty. This could be more consistent with an understanding of rights as pointing to right order – a focus on the formation of a community aimed at shared or common ends. However, before discussing this possibility and exploring the shape of an RO-infused understanding of religious liberty, I first turn to consider the ways in which religious liberty jurisprudence *does* reflect the modern moral order and contribute to secularisation as discussed in this chapter. Courts, I will argue, do largely understand religious liberty as a subjective right to autonomous moral choice. Religion, within this view is sometimes protected, while it becomes increasingly associated with a diffuse 'authenticity'. But it must also be contained, treated as private value and increasingly equally subject to a single uniform law. This is necessary for the upkeep of a secular order based not on any shared end but rather the instrumental protection of persons pursuing different conceptions of the good, a vision of value pluralism.

---

[313] Milbank, 'Dignity Rather than Rights' (n 297) (forthcoming).

[314] ibid

[315] ibid

[316] See ibid and Milbank, 'Against' (n 77) 218.

4

Containment and Privatisation

The Radical Orthodoxy narrative provides a broad view of history, examining intellectual and practical currents through to contemporary practices of 'religion' and 'secular' order. There are caveats: RO writers do also contend that we inhabit a time that still echoes, perhaps dimly, Patristic and Medieval thought, and that, further, there remain strong institutional or communal forms of religion existing in part as resistance to the 'resurgence' of religion in its new consumer-based form.[1] But this chapter explores ways in which religious liberty jurisprudence reflects the rise and support of secular order at the expense of religion's containment or privatisation, themes from Chapter Three.

I argue that religious liberty jurisprudence contributes to a secularisation-as-differentiation narrative. Sometimes, this occurs as an explicit rationale: religion must be contained away from political authority to protect other's freedom *not* to believe or, in a more expanded version, not to be confronted with dignitarian 'status' harms caused by a religion's claims. In this we see an aspect of what McCrea argues (in his case positively) is the main purpose of the European public order concerning religion: 'to secure the autonomy of the public sphere from domination'.[2] But the containment, I suggest, also arises through how courts structurally understand freedom of religion as principally concerning a form of belief, an understanding exacerbated by the personal autonomy rationale for religious liberty.

[1] See Graham Ward, *True Religion* (Blackwell 2003) 133-53.

[2] Ronan McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 6.

Parts I and II discuss 'belief', in different ways. Paul Taylor asserts that the 'architecture of all core freedom of religion Articles makes the same inescapable and immutable distinction between the unrestricted *forum internum* and the right to external manifestation'.[3] This is a half-truth. The dichotomy *is* a real and dominant feature of human rights texts and case law. Article 9 of the European Convention on Human Rights (ECHR) expressly separates the realm of internal belief (commonly referred to as the *forum internum*) from the manifestation of religion. Article 9(1) refers to 'freedom of thought, conscience and religion', which is said to 'include' the right to 'manifest his religion or belief, in worship, teaching, practice, and observance', implying a greater realm of belief beyond that of manifestation. Article 9(2) then expressly states that only the freedom to manifest religion or belief can be subject to limitations by state authorities, on particular grounds, leaving 'belief' 'unrestricted'. But Taylor's claim that the division is 'inescapable and immutable' masks an ambiguity.

What does it mean to identify a separate 'freedom of thought, conscience and religion'? What is belief as separate from manifestation? Arguably, European and UK case law has developed this division in two ways: a concern for conscience as against coercion of religion and a framing of religion as primarily identifiable with a realm of 'belief'. Part I of the chapter examines tensions within the first belief argument – the concern for conscience and the *forum internum.* I discuss how this has broadened into an ambiguous discourse of 'neutrality'. Neutrality, I argue, points towards a secular space, in which the political task of government is to negotiate and promote value pluralism as against the potential incursion of religion into public or political life. Part II of the chapter will look at how the *forum*

[3] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005) 19.

internum, entailing a focus on belief, has problematically been incorporated into the judicial understanding of religion as such. I argue the court furthers sphere differentiation by emphasising a dichotomy between belief and manifestation. In contrast to Paul Taylor's claim of immutability, I frame this dichotomy as Lockean in outlook (reflecting the interpretation discussed in Chapter Three).[4] It supports a characterisation of religious manifestation as penetrating into a secular sphere, contrasted with the impenetrable reserve of internal belief characteristic of the private religious sphere.

Part III continues the theme of privatisation, examining the court's potential engagement with and advancing of the contemporary form of 'religion' discussed in Chapter Three. I focus on personal autonomy as a rationale for religious liberty. Although this rationale is frequently relied upon in the literature, I argue that it points towards the diffuse contemporary understanding of religion as individual 'ultimate concern', spiritual 'depth', or personal 'transcendence'. I contend that this further contains religion within a private sphere. Religion is construed as personal belief narratives, but it is difficult to see how this can or should stand against any asserted state interest. Religion on this view is removed from any necessary communal ends that might point to a vision beyond state politics – it potentially dissolves into private meaning, equally valid but equally trivial.

[4] See Chapter Three, Part II (a).

I The *Forum Internum*, Neutrality, and Pluralism

In Chapter Two, I noted Catholic arguments pointing towards a principle of voluntariness or consent to belief.[5] In *Dignitatis Humanae*, the Second Vatican Council emphasised the importance of conscience, freely formed so that a person 'may come to God, the end and purpose of life'.[6] On this argument, coercion of conscience is understood to be contrary to the nature of truth. A person, to experience God as his or her true end, as the subject of one's own love, must do so freely. Political authority, on this view, should not be used coercively to bring a person to the faith or to prevent him or her from leaving.

Article 9 of the ECHR is at least consistent with these arguments against coercion. Fundamentally, Article 9 protects the ability of a person to 'change his religion or belief'.[7] The ECtHR takes this particularly seriously, undoubtedly reflecting the origins of the Convention itself in the shadow of totalitarian regimes. For example, the Court has described a decision to dismiss a member of staff at a state school if she did not cease membership of an evangelical church as 'a flagrant violation of her right to freedom of religion guaranteed under Art. 9 of the Convention'.[8] More broadly, the Strasbourg institutions have construed Article 9 as primarily concerned with the protection of the *forum internum*, an internal forum concerning one's consent to (non)belief.[9] This protection is invoked 'against indoctrination

[5] See Chapter Two, Part II (b).

[6] Pope Paul VI, Dignitatis Humanae: *On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious* (*The Vatican*, 7 December 1965) <www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html> accessed 10 May 2012, [3].

[7] Article 9(1), ECHR.

[8] *Ivanova v Bulgaria* (2008) 47 EHRR 54 [84].

[9] See, e.g., *C v United Kingdom* (1983) 37 D&R 142 (Commission Decision) 147; *Kokkinakis v Greece* (1994) 17 EHRR 397 [31].

of religion by the State' and against 'being compelled to be involved directly in religious activities' against one's will.[10]

Article 9(1), therefore, ensures a limitation on how the state 'uses' religion. If one is concerned with freedom of religion, then this implies a concern for what is labelled 'freedom from religion'.[11] The central issue is then this: what constitutes illicit 'use' of or 'involvement' in religion by the state? Protecting the ability to change one's religion, or to conserve it in the face of aggressive state attempts to precipitate apostasy, could be understood in terms similar to those developed in *Dignitatis*: resisting coercion of conscience. However, *forum internum*-type arguments have the potential to become more far-reaching. What has arguably developed in European jurisprudence is a permissive approach to states characterising religion as a threat to public order – defined by value pluralism, equal concern and respect, and the dignity interests of others. Further, this characterisation has been applied to both state involvement with religion and to the religious manifestation of non-state actors. In this way, religion is construed as necessarily subject to 'neutral' law and political authority, defining a secular space.

In this part of the chapter, I explore this expanding sense of *forum internum* (and related arguments) in two steps: first, the development of neutrality rhetoric in the ECtHR's jurisprudence; and second, domestic UK analogues of this rhetoric that point to neutrality being driven downwards towards non-state actors. Drawing from themes discussed in this thesis to date, I characterise neutrality in terms of secular order and the containment of religion.

---

[10] *Angelini v Sweden* (1988) 10 EHRR 123 (Commission Decision) 48; *Darby v Sweden* (1991) 13 EHRR 774 [45].

[11] See Paul Rishworth, 'The Religion Clause of the New Zealand Bill of Rights' [2007] NZ L Rev 631, 640-42.

(a) Neutrality in European Jurisprudence

The ECtHR has 'frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.[12] The state has a duty of 'neutrality and impartiality' that is 'incompatible with any power on the State's part to assess the legitimacy of religious beliefs'.[13] But, as noted in Chapter One, how 'neutrality' is understood is an open question.[14]

The Court's earlier jurisprudence appealed to a duty of neutrality in the context of state attempts to interfere with the leadership of a religious group or prevent the registration of places of worship. In *Manoussakis v Greece*, the Court considered the state's failure to authorise a place of worship for Jehovah's Witnesses breached Article 9.[15] The Court did not explicitly use the term 'neutrality', but it did consider that the state had a duty of impartiality – not to assess the legitimacy or otherwise of religious beliefs – especially where, as in this case, the Orthodox Church appeared to have considerable influence over the authorisation process.[16] In *Hasan and Chaush v Bulgaria*, the Court did explicitly refer to a state duty to remain 'neutral'.[17] There, the state had interfered with the appointment of the Chief Mufti to the Muslim community, against the wishes of the community. Neutrality, in the context of these cases, could consequently be understood as respecting institutional

[12] See, e.g., *Şahin v Turkey* (2007) 44 EHRR 5 (Grand Chamber) [107].

[13] ibid

[14] See Chapter One, Part II (a).

[15] (1997) 23 EHRR 387 [47].

[16] ibid [47].

[17] (2002) 34 EHRR 55 [78].

autonomy and ensuring different, peaceful groups have access to facilities. This is consistent with the state adopting a confessional identity, so long as the state does not coerce a change in leadership or deny access to facilities on the basis that the group in question is not related to the central public confession.

But, arguably, this duty of neutrality has expanded to identifying a problem with thick confessional identities as such. A concern not to coerce the group or arbitrarily rob it of the means of collective existence mutates into a duty on the state's part not to affirm qualitatively any particular identity and, potentially further, a permissive approach to prohibiting non-state actors' manifestation of religion. The arguable (and I would say contingent) shift arose when the Court started deciding cases concerning Islam in public spaces. On several occasions, the Strasbourg institutions have shown a willingness to accept the contention that expressions of Islam constitute a threat to individuals and political authority. This is evident both in respect of headscarves and the exercise of political power as such. As we shall see, this raises a question whether 'neutrality' is limited to these types of cases.

The Court has accepted arguments from Turkey, France, and Switzerland that the wearing of headscarves in educational contexts is a symbol of coercive gender inequality.[18] Veiling is construed as oppressive against the woman who is veiled, both because of its message – the differentiation and concealing of women as compared to men – and because it is understood as imposed by decree, ordinarily at the behest of men.[19] As a public

[18] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001), followed by *Karaduman v Turkey* (1993) 1 EHRR 711 (Commission Decision); *Şahin* (n 12); *Dogru v France* (2009) 49 EHRR 8; and *Kervanci v France* App no 31645/04 (ECtHR, 4 December 2008).

[19] See *Dahlab* (n 18) 463; *Şahin* (n 12) [111]; and (within the UK) *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [95]-[98] (Baroness Hale of Richmond) (*Begum* (HL)).

manifestation of religion, the Court has accepted that veiling can infringe the 'rights and freedoms of others', and therefore be limited under Article 9(2).[20]

This is a *forum internum* argument, albeit applied against non-state actors. The Court has accepted the judgement of these states that wearing a headscarf, in certain educational or public occupation contexts at least, will create a coercive environment impinging on the right of others *not* to wear the headscarf.[21] But the *forum internum*-based concern goes further. The concern is that the headscarf, if permitted, will increase in 'popularity' (or rather, imposition) and that such popularity represents the rise of a more muscular political Islam which does not accept a sacred-secular, private-public divide.[22]

Defending against this coercive environment and potential rise of political Islam requires, it is contended, a state which is 'the neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.[23] Rather than neutrality concerning access to public facilities and institutional autonomy (as above), neutrality is now associated with the 'secular' state.[24] To transcend the conflicts of private sectarian interests – conflict which may rise to threaten the state itself – the state enacts a general law prohibiting confessional identities in certain spaces. This, it is said, ensures 'peaceful co-existence between … various faiths', 'protecting public order and the beliefs of others'.[25]

---

[20] See, e.g., *Şahin* (n 12) [99].

[21] ibid [117].

[22] See ibid [35]-[37], [117] and *Dogru* (n 18) [21] (discussing the Stasi Report's emphasis on the threat to the secular state) and [66] (discussing the failure to respect secularism).

[23] *Şahin* (n 12) [107].

[24] ibid [116].

[25] ibid [111].

The headscarf cases are, in this respect, continuous with the Grand Chamber's decision in *Refah Partisi*.[26] That case concerned the dissolution of Turkey's leading political party on the grounds that it had indicated an intention to introduce parallel religious law (shari'a) and remove the ban on headscarves in education and public office. The Grand Chamber considered that a plurality of legal systems would introduce into legal relationships a distinction grounded on religion. Such a model could not, it contended, be compatible with the ECHR:

> It would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its abovementioned functions, but static rules of law imposed by the religion concerned.[27]

Central to the Court's decision was a contrast between religion and political authority. The Court rehearsed the often repeated contention that Article 9 primarily concerns the individual's conscience.[28] Shari'a, from this perspective, is a problematic form of religion because it 'faithfully reflects … dogmas and divine rules … [and] is stable and invariable'.[29] In contrast to religion, law, including in this instance family law, 'concerns the organisation and functioning of society as a whole'.[30] Most importantly, the exercise of political authority

[26] *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1 (Grand Chamber).

[27] ibid [119].

[28] ibid [128].

[29] ibid [119].

[30] ibid [128].

through law concerns the maintenance of 'pluralism' or 'the constant evolution of public freedoms'.[31]

This characterisation of the state as exercising a duty of impartiality and neutrality, ensuring the protection of evolving freedoms against the claims of a threatening religion, has left the ECtHR with a difficult question: how far does the duty extend? Arguably, the Court was concerned with the more limited and immediate question of shari'a, its potential imposition and relationship to democracy. One could read these decisions as an exercise in the 'margin of appreciation'.[32] On this basis, it could be claimed that the Court's characterisation of political authority as neutral and secular, in contrast to the threat posed by 'political religion', reflects according the French, Turkish, and Swiss authorities a degree of deference in how to manage 'the significance of religion in society'.[33] *Laïcité*, in other words, is accorded a margin of appreciation as one possible and permissible response to religious difference, but it is not normative for ECHR purposes. There is something right in this argument. For example, the Court was certainly not dictating to other states that they must adopt similar policies as regards the headscarf. However, I will suggest that the rhetoric of neutrality points to a conception of equal concern and respect or protecting value pluralism, typically against religion. This has meant the potential application of neutrality rhetoric in new contexts, including, in the domestic context, against non-state actors. Before discussing this, I turn first to the ECtHR's more recent struggles with the expansiveness of neutrality.

[31] ibid [119].

[32] See, e.g., *Şahin* (n 12) [109].

[33] ibid

The ECtHR has grappled with the development of the duty of neutrality in respect of education.[34] The Court has held that states may provide education on matters considered religious or philosophical, but that this must be done in an 'objective, critical and pluralistic' manner.[35] To do otherwise is construed as 'indoctrination'.[36] Underlying this requirement is a principle of neutrality. A particular community's predominant religion may *quantitatively* feature in an education curriculum more than other religions, but it cannot be presented as *qualitatively* different to other religions – not, that is, as confessionally true.[37] The Court, in this way, is requiring states in the field of education to be an impartial promoter of a specific kind of pluralism, if they include religious education in the curriculum at all. A state might, for example, have a curriculum that points to a particular religious tradition as reflecting the identity of that community, a tradition that says something true, while respectfully engaging with other traditions.[38] But the practical outcome of the neutrality requirement is that states are pushed towards teaching *about* religions, if religious education is to feature at all. That is, if the state chooses to include a religious education component, classes should be an historical or sociological reflection upon religion's place in a particular culture, much like an artefact for examination.

[34] The Court applies Article 2 of Optional Protocol 1, ECHR (right to education in conformity with religious and philosophical convictions), which is to be interpreted consistent with Article 9. See *Kjeldsen v Denmark* (1979-80) 1 EHRR 711 [52].

[35] ibid [53].

[36] ibid

[37] See *Folgerø v Norway* (2008) 46 EHRR 47 (Grand Chamber) [92]-[93] and *Zengin v Turkey* (2008) 46 EHRR 44 [60]. This is so regardless of any exemption arrangement; indeed, even where there is 'neutral' education any exemption arrangement arguably cannot include a requirement to indicate why one is seeking exemption. See *Folgerø* (n 37) [98] and *Zengin* (n 37) [68].

[38] The dissenting judges in *Folgerø* (n 37) [O-II7] considered that pluralism 'should not prevent a democratically elected political majority from giving official recognition to a particular religious denomination'.

The neutrality duty applies to curriculum. But combined with the Court's decisions concerning political Islam and secularism, one could have formed the view that the Court was moving towards 'a strong duty of state neutrality-through-separatism'.[39] Indeed, a Chamber of the Court arguably reached this position in *Lautsi v Italy*, only to be overturned, with ambiguities, by the Grand Chamber.[40]

In *Lautsi*, the Chamber held that the display of crucifixes in Italian state classrooms was a *per se* infringement of '[n]egative freedom', the freedom *from* religion.[41] What exactly this negative freedom consisted in was unclear. Borrowing from the headscarf decisions, the Chamber contended that the cross was a 'powerful external symbol'.[42] This evoked a *forum internum*-based argument, but its parameters were ambiguously stated. Display of the cross, the Chamber considered, '*may* constitute *pressure* on students who do not practice that religion'.[43] In addition to this, however, the Chamber also contrasted the state's Catholic identity and its duty to remain neutral, with the latter ensuring 'educational pluralism' and inculcating the 'habits of critical thought'.[44]

Joseph Weiler called the decision an 'Americanization of Europe'.[45] Its language pointed towards the consummation of a new principle of separation in the name of neutrality and impartiality, running counter to the existence within Europe of states affirming

[39] Ian Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) Ecc LJ 266, 272.

[40] (2010) 50 EHRR 42 (Chamber); (2012) 54 EHRR 3 (Grand Chamber).

[41] *Lautsi* (Chamber) (n 40) [55].

[42] ibid [54] (quoting *Dahlab* (n 18)).

[43] *Lautsi* (Chamber) (n 40) [50] (emphasis added).

[44] ibid [56].

[45] Joseph Weiler, 'State and Nation: Church, Mosque and Synagogue – the Trailer' (2010) 8 ICON 157, 163.

confessional traditions by means of constitutional arrangement or practices. Given the widespread hostility to the decision in Italy and elsewhere,[46] the Grand Chamber's reversal of the decision was perhaps unsurprising.

Nevertheless, the Grand Chamber's decision, I suggest, is characterised by a not altogether successful attempt to reconcile the ability of a state to adopt a confessional identity with claims of neutrality and impartiality. The Court's holding, read narrowly, was that before concluding rights to religious freedom and education in conformity with one's beliefs were infringed by a religious symbol, evidence that the symbol held an 'influence' over pupils is required.[47] What exactly was meant by 'influence' was not entirely clear, although the decision (and concurring opinions) point towards 'coercion' and 'indoctrination'.[48] But the Court was clear that the symbol alone could not meet this threshold. It was described as a 'passive symbol'.[49] 'Passivity' was, in the context, a claim as to the symbols non-qualitative use. The Court drew a distinction, in keeping with its previous education cases. The display of the cross was construed almost in materialist terms, as though it is like other symbols in the classroom but simply (and unproblematically) of greater quantitative presence.[50] In itself, a significant amount of crosses was not a problem. What would be a problem was 'didactic speech or participation in religious activities'.[51] As a qualitative act, this would be prohibited as indoctrination. This distinction frames the Court's attempt to walk a fine line.

---

[46] See, e.g., BBC, 'Italy School Crucifixes "Barred"' *BBC* (London, 3 November 2009) <http://news.bbc.co.uk/1/hi/world/europe/8340411.stm> accessed 13 July 2011.

[47] *Lautsi* (Grand Chamber) (n 40) [66].

[48] ibid [66], [71] (majority opinion), [O-III5] (Judge Power, concurring). 'Proselytism' is also referred to (ibid [62]), which raises a question of whether the standard requires some kind of intention on the part of the state actor.

[49] ibid [72].

[50] ibid [71].

On the one hand, the Court affirmed that the decision whether or not to perpetuate a tradition is for the state, falling within the margin of appreciation.[52] On the other hand, the Court recapitulated that Article 9 imposes a 'duty of neutrality and impartiality' on states.[53] The two principles are, I suggest, in tension. But the Court, on the facts, attempts to strike a path between them by suggesting that the cross does not have, or was not shown to have, a qualitative import. This means the Court can maintain the characterisation summarised by Judge Power: 'Neutrality requires a pluralist approach on the part of the State … . It encourages respect for all world views rather than preference for one.'[54] In short then, the Court leaves something of an unresolved tension: affirmation of a tradition, which would include a confessional identity, is permitted, so long as this is not a 'preference'.

(b) Domestic Analogues

Does this rhetoric of neutrality and impartiality have UK domestic analogues? UK case law certainly does not rise to the heights of *Refah Partisi*, nor have the courts had to consider any neutrality or pluralism requirement in school curriculum or state symbols. Nevertheless, there has developed an arguable tendency to drive *forum internum* arguments or similar concerns for individual liberty downwards, towards the level of individuals engaging with one another, for example in the workplace or when engaging in public care services. This drive downwards is a reflection of neutrality. As Rivers argues, the requirement not to assess

---

[51] ibid [72].

[52] ibid [68].

[53] ibid [60].

[54] ibid [O-III3] (Judge Power, concurring).

the legitimacy of beliefs and to exhibit neutrality 'also tends towards – or is at least compatible with – the exclusion of religious expression in public contexts.'[55]

Vickers, appealing to the ECtHR's headscarf cases, writes of the legitimate aim of 'providing religiously neutral workplaces' to ensure equal respect for colleagues.[56] A workplace could adopt a 'neutral', facially equal uniform policy that disallowed headscarves or other 'conspicuous' symbols. This could be a proportionate limit on the right of religious manifestation. Workplace colleagues' or customers' *forum internum* right, that is, their freedom from the pressure to conform to a religion expressed by the conspicuous symbol, is protected, as is 'ensuring equality between genders'.[57] Here we have a direct parallel between the ECtHR headscarf decisions and domestic law, where a prohibition on religious manifestation may be possible in order to protect the rights and freedoms of others. This may be considered appropriate. For example, one could imagine a context in which a school responds to actual external coercion of religious dress by imposing a uniform policy.[58] However, the drive to neutrality in the name of rights and freedoms of others has, I suggest, an expansive potential, reaching beyond such questions of coercion.

As I discuss further below, conscientious objections to the facilitation of same-sex relationships have been rejected on the basis that such differential treatment would infringe

[55] Julian Rivers, *The Law of Organized Religions* (OUP 2010) 340.

[56] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 159, discussing *Azmi v Kirkless MBC* [2007] ICR 1154 (EAT).

[57] Vickers, *Religious Freedom* (n 56) 159.

[58] Arguably, this was part of the issue in *Begum* (n 19) (rejecting the claim that a school uniform policy restricting the jilbab (a long coat-like garment covering the entire body) but allowing a shalwar kameeze (sleeveless smock-like dress and trousers) infringed Article 9). See *R (SB) v Governors of Denbigh* [2005] EWCA Civ 199, [2005] 1 WLR 3372 [54]-[56] (Brooke LJ).

the dignity of co-employees.[59] Similarly, adoption agencies with a religious ethos have been required to adhere to a sexual orientation non-discrimination duty on the basis that an exception would be 'particularly demeaning' to same-sex couples.[60] Here, the Court accepts that a single standard – 'neutral' in orientation – is necessary to ensure a more expanded notion of the rights and freedoms of others. This is beyond a concern for any coercive potential – that a person may be forced to adhere to the religious ethos – and, indeed, beyond any concern for access to goods and services (which remain widely available). Rather, the neutral standard protects against the 'status' harms caused by religion. Knowledge that a practice challenging one's conception of the good or identity exists is taken as harming individuals' dignity.[61] Consequently, in offering this kind of protection, neutrality is understood to promote pluralism as discussed in the ECtHR's cases, albeit in a new and more expanded context. Assuming the religious belief is not modified to fit the neutral standard, a 'religion-free' zone is a permissible means of ensuring equal respect to other inhabitants of the public square. In other words, pluralism in the sense of cultivating respect for each person's conception of the good is paradoxically cultivated by eliminating the religious difference.

Beyond an expanded sense of the 'rights and freedoms of others', UK case law also has indications of a concern to protect a sphere of political authority as against the threat of religion, again echoing perhaps more dramatic ECtHR decisions. Laws LJ has provided the most notable instance of this in *McFarlane v Relate*.[62] Mr McFarlane, a relationship therapist,

[59] *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955 [52]. See further below n 87 and accompanying text.

[60] *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007 26 April 2001 [52] (Charity Tribunal). I discuss this case further in Chapter Six, Part III.

[61] For a discussion of 'status' harms, see, e.g., Vickers, *Religious Freedom* (n 56) 63-64.

[62] [2010] EWCA Civ 880, [2010] IRLR 872.

indicated that he may have a problem if asked to provide sex therapy to same-sex couples. Dismissed by his employer, Relate, he claimed religious discrimination. During the leave to appeal hearing, Lord Carey of Clifton, the former Archbishop of Canterbury, submitted to Laws LJ that judges were showing 'a lack of sensitivity to religious belief'.[63] He went so far as to advocate the establishment of a specially constituted Court of Appeal with proven religious sensitivity.[64] Laws LJ was not sympathetic. He stated, the law does not 'offer any protection whatever of the substance or content of … beliefs on the ground only that they are based on religious precepts.'[65] To do so, he argued, would give legal protection or 'preference' to 'subjective opinion', unascertainable to anyone except the believer, 'incommunicable by any kind of proof or evidence'.[66] He concluded by labelling such protection complicit with theocracy, which is law 'dictated without option to the people'.[67] While the individual conscience is free to accept such dictated law, the State, 'if its people are to be free, has the burdensome duty of thinking for itself.'[68]

Arguably, Laws LJ's comments were limited to a perceived wider threat – that the law should simply adopt religious sensibilities *tout court*, or privilege religion through special tribunals.[69] But his statements were ambiguous. They were also framed in response to a claim of religious accommodation to a general law.[70] In other words, there is at least an implied sense of continuity as between offering protection for conscientious religious

[63] ibid [21].

[64] ibid [16].

[65] ibid [21].

[66] ibid

[67] ibid [24].

[68] ibid

[69] ibid

[70] ibid [21].

objections and allowing a theocratic irrationality into the heart of the law. Certainly, Laws LJ's comments have been explicitly adopted in later cases concerning claims of accommodation.[71] But at a fundamental level, the judge's reasoning seems to draw a seamless thread between the subjectivity of religion and the bare will-based authoritarianism of 'theocracy'.

The characterisation of religion as 'subjective opinion' is not new. Sedley LJ, for example, has questioned the inclusion of religion as a protected characteristic in discrimination law, arguing that it concerns a matter of 'choice' in contrast to 'objective characteristics'.[72] As this statement indicates, there is a tendency to define religion as a *category* by subjective opinion, choice, or personal idiosyncrasy.[73] But this subjective idiosyncrasy is paralleled by Laws LJ's (and *Refah Partisi*'s)[74] entirely voluntarist understanding of religious authority. Religion is the subjective submission of the individual's will to God's arbitrary, but divine will. I suggest that this seamless thread creates at least the hint that, in the minds of some judges and academics,[75] there is continuity between claims of accommodation – the civil registrar who objects to officiating at same sex unions or the Catholic adoption agency that limits provision to married couples – and the threat of arbitrary

[71] See *R (Johns) v Derby City Council* [2011] EWHC 375, [2011] HRLR 20 (Admin) [52]-[53] (emphasising the neutrality of the state) and *Preddy v Bull* [2012] EWCA Civ 83, [2012] 1 WLR 2514 [48] (Law LJ's statements 'fortified' the conclusion against accommodating a religious objection to providing same-sex couples with a single bed at a bed and breakfast). See also *R (National Secular Society) v Bideford Town Council* [2012] EWHC 175, [2012] HRLR 12 [31] (Admin) (citing Laws LJ in support of proposition that local council's powers to carry out its functions do not include instituting an opening prayer).

[72] *Eweida v British Airways plc* [2010] EWCA Civ 80, [2010] ICR 890 [40].

[73] See, e.g., *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [22] (focusing on personal choice) and *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) [42] (Ngcobo J) (stating protection is afforded to beliefs 'bizarre, illogical or irrational').

[74] See above n 26 and accompanying text.

[75] See, e.g., András Sajó, 'Preliminaries to a Concept of Constitutional Secularism' (2008) 6 ICON 605 (arguing for a robust secular state to guard against the threat of 'strong religion', characterised by the imposition of 'divine command').

divine will to political authority.[76] Underlying both is a claim that religion, as a generic category, must be subjected to neutral, secular authority for the purpose of maintaining equal concern and respect or value pluralism.

(c) Conclusion

French political theorist Olivier Roy argues that there is a general perception that the church in its different institutional forms has politically accepted *laïcité*, meaning it is generally not subjected to the same level of suspicion as that which is directed towards Islam.[77] On this view, Islam is like the return of the repressed, the religion that *laïcité* was meant to contain. But this also means that where *religion more generally* begins to challenge a sacred-secular, private-public divide then the reaction follows a pattern similar to that found in *Refah*.[78] The challenge posed may arise from claims to political authority (as with *Refah*) or it may arise from claims to accommodation that would pose a problem for a conception of equal concern and respect or pluralism as to conceptions of the good (as with religious objections to certain non-discrimination duties). Against these challenges, the state has a duty 'of thinking for itself'.[79] And 'thinking for itself', I am arguing, is characterised as neutrality, impartiality, and, consequently, the maintenance of a certain vision of pluralism.

---

[76] One could add to this Lord Walker of Gestingthorpe identifying Christianity as the 'cultural matrix' that historically permitted homophobia. See *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, 122-123 discussed in Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 Ecc LJ 24, 34.

[77] Olivier Roy, *Secularism Confronts Islam* (George Holock tr, Columbia University Press 2007) 22.

[78] See also Rex Ahdar and Nicholas Aroney, 'The Topography of Shari'a in the Western Political Landscape' in Rex Ahdar and Nicholas Aroney (eds) *Shari'a in the West* (OUP 2010) 1, 11 (arguing proposals concerning shari'a expose 'simmering subterranean unease about the identity of the West itself, especially given its mixed inheritance of humanistic, religious, and post-modern elements.')

[79] *McFarlane* (n 62) [24].

From the RO perspective discussed in Chapter Three, this vision of neutrality and pluralism reflects a secular order. The primary goal of political life is securing 'the political conditions that are necessary for the exercise of personal freedom'.[80] Individuals are self-possessing, exercising rights to develop a capacity for autonomous moral choice. Regulating these diverse choices requires the containment of religion; claiming and privileging communal ends and identity, it is a threat to individual liberty. To this end, neutrality is required on two levels. First, the state cannot represent any thick, confessional identity as pointing to something true (that is, as qualitatively endorsed) because this would fail to respect the identities of its constituent members. Difference is transcended by the state, which is tasked simply with securing personal freedoms. Second, securing these freedoms through neutrality is driven downwards. There are always more potential instances, beyond state actions, in which freedoms can be limited by others – including as status harms. Because of this, a 'flattening' takes place:[81] rather than asking whether and how different groups can and do participate in goods in common (adoption, for example), neutrality tends towards eliminating at least the public expression of groups or persons perceived as harming an individual's 'self-respect' for his or her conception of the good (in Rawls' sense).[82]

Neutrality does not mean, however, that the state stands for nothing. Rather, neutrality is understood to be, as with Dworkin, the 'constitutive morality' required by justice.[83] The state must be neutral (and increasingly tends to drive neutrality down) as to

---

[80] See Peter Berkowitz, *Virtue and the Making of Modern Liberalism* (Princeton University Press 1999) 4-5 quoting Judith Shklar, 'The Liberalism of Fear' in *Political Thought and Political Thinkers* (Chicago University Press 1998) 3.

[81] See Chapter Three, n 164 and accompanying text.

[82] John Rawls, *Political Liberalism* (Expanded edn, Columbia University Press 2005) 318. See Chapter One, n 80 and accompanying text.

[83] Ronald Dworkin, *A Matter of Principle* (Clarendon Press1986) 203. See Chapter One, n 62 and accompanying text.

different conceptions of the good – showing equal concern and respect – in order to promote pluralism as to the good. *Refah*, in tones echoing Macklem's value pluralism,[84] thus refers to the state as presiding over a never-ending conversation of evolving freedoms in contrast to the monolithic value of religion.[85] From the RO perspective, there is arguably no sense of a collective good here, no sense of teleological aim for a community, other than the good of ensuring each individual's liberty, their self-respect. Because of this, religion must be contained, sequestered from public life in order to maintain this open-ended development of conceptions of the good.

Religion is contained – subject to neutral laws and separated from political identity – but it is not, the court contends, eliminated. Rather, it endures in its own sphere. Typically, this sphere is identified with 'belief'. This differentiation – pointing to and cultivating an enduring private sphere – is the subject of Part II.

II The Belief-Manifestation Divide

In this part of the chapter, I argue that the division between belief and manifestation in religious freedom jurisprudence is a central trope in the containment of religion outside of public life. Case law, I suggest, reflects the genealogy discussed in Chapter Three. Here, religion is quintessentially concerned with the individual's belief, what Cavanaugh calls a 'private matter of … saving knowledge'.[86] I contend that this division suggests that while

[84] See Chapter One, Part III (a).

[85] See above n 31 and accompanying text.

[86] William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP 2009) 79.

public manifestation (entering the secular sphere) may be curtailed, the realm of belief (the religious sphere) remains impenetrable or unharmed.

Ladele v Islington LBC, the leading case in UK religious discrimination law, clearly sets out the belief-manifestation division.[87] Ms Ladele, a Christian, was a registrar for births, deaths, and marriages. With the introduction of civil partnerships for gay and lesbian couples in the UK, Islington Borough Council required all registrars to officiate over civil partnership ceremonies. Ms Ladele held 'the orthodox Christian view that marriage is the union of one man and one woman for life'.[88] Keeping to this, she at first made informal arrangements to swap with other registrars, but, following complaints from colleagues and a series of difficult encounters with management, it was made clear to her that she was required to officiate. Leaving the job, she made several claims – most importantly, that she was forced to quit on account of religiously-based discrimination. In the Court of Appeal, her appeal was dismissed.

First, the Court considered whether she had suffered direct discrimination, that is, whether the Council had treated her differently from others on the grounds of her religious belief. Lord Neuberger MR, writing for the Court, rejected this argument on the grounds that the Council was not opposed to Ms Ladele's belief, but rather 'to the manifestation of that belief, namely her refusal to conduct such partnership duties.'[89] In other words, the policy of the Council, ensuring all registrars respected an equality objective, was blind to the religious objection – any objection would have fallen foul of the policy.

[87] *Ladele* (n 59). Leave to appeal to the Supreme Court was denied, and Ms Ladele's case (under Articles 14 and 9) was dismissed by the ECtHR. See *Eweida v United Kingdom* App no 48420/10 (ECtHR, 15 January 2013).

[88] *Ladele* (n 59) [7].

[89] ibid [35].

Second, the Court rejected Ms Ladele's argument that she had suffered indirect discrimination. Although the universal policy meant that Ms Ladele's belief put her at a disadvantage compared with other persons who did not share this belief, the policy nevertheless achieved a legitimate aim in a proportional manner (to use the language of the Regulations under consideration).[90] The Council's aim was to be an employer *wholly committed* to equal opportunity. The Court consequently considered the policy, requiring all employees to participate in civil partnership ceremonies, was a proportional (indeed, the only available) means of achieving such a universal aim.[91]

In reaching this conclusion, the Court contrasted Ms Ladele's religious discrimination claim with the equality objectives of the Council. The Council's policy was characterised as securing 'fundamental human rights, equality and diversity' in accord with 'current legislation and mainstream thinking'.[92] While the Court did not want to preclude a local council from accommodating religious objections, it noted ECtHR case law points to the need for 'particularly convincing and weighty reasons' for any differential treatment on the grounds of sexual orientation.[93] In contrast, Ms Ladele was not prevented from holding her beliefs and she remained free to worship as she wished.[94] She was undertaking 'a public job … for a public authority', a 'purely secular task', and her actions were causing offence to at least two employees of the Council.[95]

---

[90] ibid [46]-[52] (Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660 reg 3(1) (now replaced by the Equality Act 2010, s 19)).

[91] ibid

[92] ibid [46], [51].

[93] ibid [59] discussing *EB v France* (2008) 47 EHRR 509 [90].

[94] *Ladele* (n 59) [51].

Ladele's core reasoning has been applied in a number of subsequent cases.[96] As well as the belief-manifestation divide, this reasoning has two features of interest. First, the Court adopted Article 9 jurisprudence as relevant to interpreting non-discrimination on the grounds of religion. This adoption, entailing an arguable blurring of the regimes, can be questioned. I offer thoughts in this direction in Chapter Six.[97] Second, the Court's decision reflected the universal cast of neutrality discussed above. Ms Ladele's request for accommodation was rejected on the basis that accommodation would harm the dignity of co-employees and potential users of the local council's services. A flat, universal policy was accordingly seen as necessary to ensure an expanded form of equal concern and respect. The Council called this 'Dignity for All', and the Court accepted this as the legitimate aim of the policy. The Council's position is certainly understandable. It is required to promote, and has an interest in promoting, the provision of civil partnerships and equal access to services regardless of sexual orientation. But I suggest the Court nevertheless too readily accepted the Council's universal casting of its legitimate aim. By accepting this broad aim, the Court implicitly approved the Council's adopted means (that all cohere to a single standard) as the only possible option.[98] This settles any possible proportionality analysis. But should the aim have been so universal in scope? Arguably, as a public authority, the Council is also committed to religious liberty. (And, we could add, especially where the policy in question was adopted during Ms Ladele's employment.) In light of this, we can ask whether the Court should not

---

[95] ibid [52].

[96] *McFarlane* (n 62) [10]-[15]; *Johns* (n 71) [73] (Admin); *Preddy* (n 71) [47] (CA); *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520, [2010] PTSR 1074 [75] (Ch); and *Catholic Care* (n 60) (Tribunal) [14].

[97] See also *Grainger v Nicholson* [2010] ICR 360 (EAT), discussed below at n 160 and accompanying text.

[98] This can be general problem of proportionality review. See Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174, 188.

have been more willing to entertain a more complex or multi-layered set of aims, within which accommodating Ms Ladele may have been entirely possible.[99]

But adopting this kind of analysis was hindered by the belief-manifestation divide. The goal of reconciling multiple aims may entail, in McLachlin CJ's words, ensuring 'that each group is given as much recognition as it can consistently demand while giving the same recognition to others.'[100] But what happens is that this balance of recognition is pre-emptively weighted. Recognition of religion is structured by the idea that manifestation penetrates into a secular realm, in contrast to maintaining a core realm of belief. This means that although religion is not recognised in the secular arena, it nevertheless maintains recognition as belief.

For Lord Neuberger MR, Ms Ladele's inability to maintain her job as a registrar while excluding herself from civil partnership ceremonies did not impact on her religious belief. Ms Ladele was performing 'a purely secular task' and her objection was 'based on her view of marriage, which was not a core part of her religion.'[101] She remained free to hold her beliefs and to worship as she wished.[102] In a certain sense, this is true. Ms Ladele does remain able to worship within her church and she maintains her views on marriage (others might not have of course). I do not want to overstate the impact that this particular case (and those like it) might have on all aspects of Ms Ladele's Christian life. Further, it could be argued that Article 9 pushes towards this kind of division. The Convention protects, 'either

[99] In Chapter Six, Part III, I attempt to map out the possibility of reconciling these multi-layered aims, examining one decision that adopted *Ladele*'s reasoning, *Catholic Care* (n 60).

[100] *Chamberlain v Surrey School District* [2002] 4 SCR 710 [19].

[101] *Ladele* (n 59) [52].

[102] ibid [51].

alone or in community with others and in public or private', 'worship, teaching, practice and observance.' The last two, 'practice and observance', could be read in light of the first two, 'worship and teaching', meaning that although they seem broad (especially when placed alongside the 'public' reference) they point more towards a notion of 'rites'. In this way, the ECtHR has tended to emphasise a core of internal belief, echoing *forum internum* language, that then radiates outward to 'worship and devotion'.[103] In *Pichon*, for example, the Court upheld France's prohibition against pharmacists conscientiously objecting on religious grounds to the sale of contraceptives. The pharmacists, the Court insisted, could 'manifest [their] beliefs in many ways outside the professional sphere.'[104]

However, how one conceptualises this is important. Worship and rites are of utmost importance, not because they concern a realm of private, or more private, belief, but because these are acts that form and sustain a community. From the RO perspective, the importance of worship and rites is that they entail receiving from God in worship, a logic of gift that overflows into all of social, public, and civic life.[105] Instead of this, case law adopts the following view: first, that religion is primarily a private realm of belief, with possible attendant public consequences that inject themselves into a secular sphere; and second, that curtailing acts of manifestation, accordingly, leaves an untouched reserve.

On the first aspect, this was evident in the case of Catholic adoption agencies. Catholic Care for the Diocese of Leeds was unsuccessful in its bid to maintain its ethos – providing adoption services to married couples – as against a sexual orientation non-discrimination duty in part because of the primary identification of religion with 'belief'.

[103] *C v United Kingdom* (n 9).

[104] *Pichon and Sajous v France* App No 49853/99 (ECtHR, 4 October 2001).

[105] See further Chapter Five, Part IV (b).

Briggs J, considering the principles that applied to the issue, adopted *Ladele*'s belief-manifestation divide.[106] This led him to conclude, 'The more public and secular the sphere in which the conduct takes place, the less protection is afforded by article 9.'[107] Providing charitable care, an adoption service, is consequently construed as an injection into the secular or public sphere, in distinction from the realm of belief.

Further attention could be given to what is meant by 'more public' in contrast to private belief. Although the court writes of conduct increasingly entering the public sphere, therefore implying a gradation, its reference to secular spheres and tasks could be taken as pointing to a more dichotomous understanding – for example, that conduct is identifiably secular and therefore public. Such a simple dichotomy between private and public (with the parallel of identifiably religious and identifiably secular) is misleading on two counts. First, the basis for identifying the role of a registrar and the provision of adoption services as secular (and therefore public) is unclear. In respect of Ms Ladele, if we applied the view raised above, namely, that the local council should account for multiple aims, then her workplace is arguably better characterised as accommodating her sense of vocation, which reflects the desire to combine a religious identity with her work. For the Catholic adoption agency, providing adoption services is a religious mission, one most likely understood by them as participating in God's call for restoration by restoring children to a loving familial context. In each instance, the task undertaken is not self-evidently 'secular'. Instead, by characterising each with reference to Ms Ladele's or the agency's aims, we develop a more complex notion of public space as entailing multiple groups, often with religious identities, pursuing goods in common in a manner that does not exclude others who disagree with their religious claims.

[106] *Catholic Care* (HC) (n 96) [75].

[107] ibid [60].

Second, appeals to public and private spheres as the basis for legally delineating permissible religious expression would require unpacking and deciding which of the multiple meanings of public and private to adopt. Public could potentially mean (i) in a public place, visible to others; (ii) engaged in services to the public; or (iii) official. Private would then have parallel meanings: (i) in a private space, hidden away from others in the home, for example; (ii) engaged in services to a select group only; or (iii) not official.

The first two understandings of public could apply to a range of activities. Charitable care fits, and, as seen in *Catholic Care*, the identification of adoption as a public act contributed to the rejection of an exception to the non-discrimination duty. But this understanding of public could also include actions typically considered personal (like religious dress in the workplace) or entailing acts of worship (like the operation of a church). Indeed, the analogy to operating a church is fruitful, assuming identifying adoption services as 'secular' is untenable. Being ordinarily orientated towards the general community in offering their services and corporate life, churches similarly come into contact with those who disagree, those who might claim that restrictive employment or leadership practices (for example) are contrary to a dignity interest.[108] It is not, therefore, that the church or the adoption agency or the person in the workplace 'enters into' the public sphere, if we adopt the first or second meanings. Rather, they are engaged in shaping what the public sphere means or consists in. Once again, a more complex notion of public space would envisage multiple groups engaged in public life – work, chartable care, services, and open doors to the community – that may at times encounter disagreement as to their beliefs. Indeed, this

[108] See further Chapter Six, Part III(c) (criticising Lucy Vickers's 'islands of exclusivity' trope, differentiating a church from public life).

arguably fits better with the language of Article 9 itself, which protects religious manifestation 'in community with others' and in 'public'.

There may, however, be a second and more fruitful way of understanding the appeal to 'public' as a basis for delineating protection for religious manifestation: a distinction between official and not-official. Understanding 'official' may be as fraught as understanding 'public'. For example, was Catholic Care's provision of adoption services, done under contract with the local authority, an 'official' act? As I discuss in Chapter Six, the decision not to allow Catholic Care to continue in its policy excluding same-sex couples did not turn on any public contracting.[109] What is more, the characterisation of the agency's actions as 'official' would arguably contribute to a problematic thread in the decision: that the local authority has a monopoly on provision and other groups' provision exists by its grace.[110] Understanding what 'official' might mean is, I suggest, better served with reference to a central case. The judiciary offers a clear example. The judicial oath requires a judge, as an office-holder, to 'do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill will'.[111] For the judiciary, then, there is a specific oath of office requiring the individual judge to administer the law to whomever appears before him or her. Such an undertaking would presumably not leave room for the legal accommodation of religious conscience under anti-discrimination law or Article 9. The Employment Appeal Tribunal has recognised this, in *obiter dicta*.[112] *McClintock* considered a Justice of the Peace seeking an exemption from sitting on Family Panel decisions where a child would be placed with same-sex parents. Given the Justice of the Peace was bound by

[109] See Chapter Six, Part III (a).

[110] ibid

[111] Promissory Oaths Act 1868, s 4.

[112] *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (EAT).

the same judicial oath, the Court stated, 'He is then expected to put his personal views to one side – which judges frequently do'.[113] In contrast, although Ms Ladele was ambiguously described as holding a public job, she was a contractual employee of the Council.[114] There was, accordingly, no sense in which accommodating a registrar in her circumstances would be contrary to holding an office; indeed, the Court recognised that other councils may choose to act differently to Islington and accommodate persons objecting on the basis of religious conscience.[115]

On the second dynamic, case law intimates that enduring belief ameliorates the curtailment of religious manifestation. The claim is that belief is an impenetrable reservoir, unaffected by the curtailment of manifestation. As one US judge put it, 'the mind and spirit of man remain forever free'.[116] But this is difficult to maintain. For example, consider *R (E) v The Governing Body of JFS*.[117] In that case, the Orthodox Jewish school JFS was found to have discriminated against M, a Masorti Jew, on the grounds of race when it denied him entry because he was not (on Orthodox grounds) a Jew. Sedley LJ, for the Court of Appeal upholding M's complaint, considered, 'We are in no way concerned with the beliefs which underpin these categories [of who is a Jew] except to recognise that … those who hold them have every right to do so.'[118] The curtailment of an understanding of what it means to be

[113] ibid [53]. The case was complicated by the primary issue before the Court: whether Mr McClintock was basing his claim for exemption on a religious or philosophical belief. See below n 175. On religious-based exemptions for judges, Judge Christmas Humphreys, a Buddhist, was apparently exempted from hearing cases where he might have had to impose the death penalty. This was, however, a seemingly one-off grant given prior to Judge Humphreys assumed office. See ibid [10].

[114] See the Statistics and Registration Services Act 2007; *Ladele* (n 59) [5].

[115] ibid [74]-[75].

[116] *Jones v Opelika* 316 US 584, 594 (1942).

[117] [2009] EWCA Civ 626, [2009] PTSR 1442.

[118] ibid [29].

Jewish, central to a way of life, on the basis that it is considered racially discriminatory, is ameliorated by the apparently enduring existence of private belief.

This is a curiously dualist view of the person, prioritising thought over practice as distinct categories.[119] The view can be problematised. Charles Taylor, in his discussion of the 'social imaginary', plausibly argues that our practices 'carry' an implicit 'understanding' of 'how things usually go'.[120] For example, Taylor points to striking up a polite but uninvolved conversation in a reception hall: such an action carries an implicit understanding of social interaction, common to a group of people, that does not require – and need not arise from – the benefit of 'theoretical overview'.[121] There is something of a dialogue – we can reflect upon practices and shape them.[122] But, fundamentally, Taylor contends, '"[i]deas" always come in history wrapped up in certain practices.'[123] The central contention could be encapsulated in the word *formation*. People, the argument goes, are creatures of habit that are always enmeshed in a web of cultural and social practices that 'carry' an understanding of the way things are or a world view.

James K Smith, reflecting a view shared amongst RO writers, frames this in a Christian context: 'Before we articulate a worldview, we worship. … Before we theorize the nature of God, we sing his praises.'[124] There is, in other words, no pure belief outside of the

[119] Parallels are found elsewhere. See, e.g., the discussion of New Natural Law's more cognitive understanding of religion in Chapter Two, Part II (a).

[120] Charles Taylor, *A Secular Age* (Belknap Press 2007) 172-73.

[121] ibid. Of course, Taylor also recognises that theory can 'infiltrate' a social imaginary – this is his argument concerning the influence of Locke and Grotius upon the modern social imaginary.

[122] ibid

[123] ibid 213.

formation of social bodies engaged in distinct practices. To isolate belief, on this view, is to problematically point to an artificial sphere of cognitive schemes, the 'thinking thing',[125] or, as Hauerwas puts it, 'an interior, asocial sphere'.[126] If practices carry one's understanding of the world (determining one's identity) and if it is only through reflection upon practice that one can cultivate beliefs as (to take Taylor's term) 'theoretical overview', then the curtailment of manifestation is not ameliorated by an enduring belief. Indeed, if it successfully changes a set of practices, belief is altered.

From the RO perspective, it would be better to acknowledge the re-shaping of a religion in light of a higher good. Ironically, despite Sedley LJ's comments in *JFS*, he implicitly recognises this point elsewhere. Writing extra-judicially, he claims that discrimination law 'does not simply forbid: it teaches. Every bit as important as the rights [discrimination law] creates and the costs it imposes on discriminators is the cultural change it has helped to bring about.'[127] But, perhaps more importantly, acknowledging the importance of formation as a public act means we might be less willing to curtail a community's practice where (and this is the central debate) the community or representative person is understood as contributing to the common good, albeit perhaps differently. This accommodation of different public acts, an account of pluralism, is taken up in Chapter Six.

In Part I, I suggested that part of the containment of religion away from secular spheres occurs by identifying religion as private. In this construal, the private is associated

---

[124] James K Smith, *Desiring the Kingdom: Worship, Worldview, and Cultural Formation* (Baker Academic 2009) 33-34.

[125] ibid 32 (characterising Descarte's account of the person).

[126] See Stanley Hauerwas and Michael Baxter, 'The Kingship of Christ: Why Freedom of "Belief" is Not Enough' (1992) 42 DePaul L Rev 107, 119.

[127] Stephen Sedley, 'Forward' in Aileen McColgan (ed), *Discrimination Law Handbook* (2nd edn, Legal Action Group 2007) v.

with subjective belief and therefore partial or monolithic, while the public sphere is characterised by value pluralism. But this identification, I have argued in Part II also promotes deference to state control of religious action, thus furthering *containment*. The case law is, I suggest, deeply Lockean, on the interpretation discussed in Chapter Three.[128] Religion primarily concerns an internal space of saving knowledge or belief. This may radiate outwards to acts of worship or rites, but it is fundamentally contrasted with the realm of 'civil goods' controlled by secular government. In Lockean terms, curtailment of religious manifestation on the basis of secular law is consequently supported by the comparative burdens between the believer, who maintains an essentially interior belief, and the impact on the health, stability, or wealth of the commonwealth (which, in a contemporary turn, may entail protecting against status harms). In Part III, I suggest this containment through identification of religion as private belief, or religion's occupation of a sphere differentiated from the secular, is heightened by the dominant rationale offered for religious freedom: the personal autonomy of the individual.

III Autonomy and the Religious Market

Scholars often appeal to the autonomy of the individual as the primary rationale for religious liberty.[129] From the RO perspective developed in Chapter Three, this rationale is underpinned by a conception of rights as a subjective power to pursue one's own conception of the good. And, in the context of religion, this pursuit is now often understood as the development of individual belief or experiences. In Chapter Three, I discussed the RO argument that religion, construed along these lines, is imploding as a category of meaning; it

[128] See Chapter Three, Part II (a).

[129] See Chapter One, Part III.

continues to be used, but what it refers to is continually expanding. Ward identifies this as the spiritualising of subjectivity – the consumption of a competition of consumer goods, experiences, and traditional symbols of religion in order to cultivate an individual sense of depth or transcendence.[130] As we have seen, Charles Taylor refers to the 'Age of Authenticity', in which individuals discover their own way of living as against conformity to, for example, the past or a religious authority.[131] Are these developments reflected in religious jurisprudence?

In this part of the chapter, I argue that the judicial focus on personal autonomy in religious liberty cases is the legal mirror-image of Taylor's 'Age of Authenticity'. The case law does not entirely point towards a diffuse notion of religion. One will not find explicit discussion of a free market of individual religious goods (or marketed identities), consistent with the resurgence of religion identified by Ward. Nevertheless, the focus on individual autonomy is, I argue, increasingly pointing in this direction. I suggest this poses a problem for religious liberty. The personal autonomy rationale, I contend, is one thread in the privatisation of religion. It frames religion as individual value rather than social endeavour and, in the proliferation of spiritualities it engenders, leads to a decreased willingness to afford religion significant protection.

(a) Individual Autonomy in the Age of Authenticity

In the first Article 9 case to reach the House of Lords, *Williamson*, the Court considered a claim made by private Christian schools that their religious freedom had been infringed by

[130] See, e.g., Ward, *True Religion* (n 1) ch 4. See Chapter Three, Part III.

[131] See Charles Taylor (n 120) ch 13. See Chapter Three, Part III.

the general ban on corporal punishment in schools.[132] Much of the judgment responds to an argument raised in the Court of Appeal, namely whether corporal punishment was in fact a doctrine and practice of Christianity and then, if so, whether it was a core practice.[133] In itself, this raises a difficult question: whether anything other than an individualised assessment of belief would see the court engaged as an arbiter of religious dogma. I discuss this question in Chapter Six. Underlying the House of Lords' conclusion on this issue – that the court is limited to determining whether the claimant's assertion of religious belief is made in good faith – was a central commitment: 'Freedom of religion protects the subjective belief of an individual.'[134]

In support, Lord Nicholls cited an important case from the Supreme Court of Canada, *Syndicat Northcrest v Amselem.*[135] In *Amselem*, the Supreme Court was faced with a similar issue: the relevance of authority within a tradition (rabbinical evidence) to a claim for accommodating a personal practice (erecting an individual succah during the festival of Succot) against a building agreement that appeared to prohibit it.[136] Iacobucci J for the majority stated religious freedom 'revolves around the notion of personal choice and individual autonomy and freedom'.[137] He defined religion as follows:

---

[132] *Williamson* (HL) (n 73).

[133] See *R (Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, [2003] QB 1300 [65]. The Government was strangely not called upon to justify any potential infringement of religious freedom (as per Article 9(2)); argument centred on whether the claim fell within Article 9 at all.

[134] *Williamson* (HL) (n 73) [22] (Lord Nicholson of Birkenhead).

[135] ibid citing *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.

[136] A succah is 'a small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas, and open to the heavens, in which … Jews are commanded to "dwell" temporarily during the festival of Succot'. Succot commemorates the 40 years the Israelites wandered in the dessert. Rabbinical evidence stated a communal succah in the building's shared grounds would be sufficient. *Amselem* (n 135) [5] and [22] (Iacobucci J).

[137] ibid [40].

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[138]

Religion, under this definition, is located in the individual, who is both the definer of the object of spiritual pursuit and the practices related to that pursuit. It is not particularly clear what is meant by 'spiritual'. One could argue that it refers back to 'divine, superhuman or controlling power' (the latter in particular not being exactly clear in import), but Iacobucci J's articulation frames this as simply an example. Indeed, the reference to 'spiritual' appears to be consumed by the capaciousness of individual 'self-definition'.

By focusing on personal autonomy in this manner, the court arguably is sceptical of the constraining possibility of religious dogma or communal authority. In *Amselem*, the majority, in characterising religion as a species of personal freedom, labelled religion 'fluid', 'rarely static' and 'of a vacillating nature'.[139] These labels may, to a degree, resonate – views on gender in at least certain churches have certainly not been 'static'. But combined with the focus on personal autonomy, the court reflects what Hervieu-Léger describes as a contemporary development: 'the rejection in strictly spiritual terms (in the name of faith itself) of an institutional means of authenticating religious truth'.[140] While an individual *may* view himself or herself as part of a group, the importance of freedom means that the individual

[138] ibid [39].

[139] ibid [53].

[140] Danièle Hervieu-Léger, 'In Search of Certainties: The Paradoxes of Religiosity in Societies of High Modernity' in Bryan S Turner (ed), *Secularization: The Comparative Sociology of De-Secularization*, vol 4 (Sage 2010) 259, 261.

cannot be taken to be bound by any religious precepts or demands of the community because this would negate the respect accorded to free choice. As discussed in Chapter Three, religion within the Age of Authenticity is characterised by 'privacy': the autonomous individual can seek self-fulfilment, 'define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'[141]

Consequently, in *Williamson*, the claimant's sincere view was enough to identify corporal punishment as a Christian practice. In fact, the focus on good faith and sincerity alone makes it clear that the 'Christian' designation in the case is beside the point. Under the autonomy conception what matters is individual construal of belief; the claimants in *Williamson* could have adopted any designation.

(b) Religious Freedom as a Market: Goods and Symbolic Capital

As noted, a number of scholars appeal to the personal autonomy rationale as underpinning religious liberty, but some have raised critical questions. Rex Ahdar and Ian Leigh, for example, argue that if what is important is the capacity for choice then joining a church is indistinguishable from joining a football team; wearing a cowboy hat is potentially as worthy of respect as wearing a yarmulke.[142] Fish contends that as religion collapses into the wider species of individual preference it loses relevance, becoming as significant 'as a preference for a certain hair style or flavor of ice cream'.[143] In other words, the priority given to the

[141] See Chapter Three, n 246 and accompanying text. See *Planned Parenthood v Casey* 505 US 833, 851 (1992) (O'Connor J) and *Lawrence v Texas* 539 US 558, 573-74 (2003) (Kennedy J). See also *Sherbert v Verner* 374 US 398, 412 (1963) (Douglas J, concurring) (arguing free exercise protects against '[t]he harm [of] interference with the individual's scruples or conscience – an important area of privacy which the First Amendment fences off from government.')

[142] Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 61.

capacity for choice does not entail any necessary connection to the particular ends (a particular religion) an individual may choose; rather, he or she may pursue a capacious 'spiritual'.

From the RO perspective, this understanding of religious liberty reflects the logical outworking of a discourse of subjective rights.[144] As discussed in Chapter Three, RO writers argue that the modern discourse of rights tends towards 'possessive individualism'.[145] This is the idea that each individual is endowed with a set of pre-political rights, underpinned fundamentally by their own self-ownership – a power to dispose of oneself however one likes, albeit within the limit of not infringing on another's rights. Read in this light, conceiving of religious liberty as simply one species of a more general genus of choice or personal autonomy points principally towards a zone of non-interference – the right to be left alone to cultivate or choose one's own conception of the good.

On the RO narrative, the individualistic construal of religious liberty, part of a general discourse of subjective rights, was magnified by a turn inward in the understanding of religion. A 'shift in the spiritual center of gravity', to borrow from Steven Smith.[146] Religion continued down a trajectory of individualised belief, from knowledge of particular propositions, through to an experience of the infinite or 'ultimate concern', and then, finally, in the contemporary expression, as consumption of an experience. Charles Taylor has identified a 'nova-effect' – an 'ever-widening variety of moral/spiritual options' spawned by

---

[143] Stanley Fish, 'Mission Impossible: Settling the Just Bounds Between Church and State' (1997) 97 Colum L Rev 2255, 2268.

[144] See Chapter Three, Part I (b).

[145] John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 Ox J Law Religion 203.

[146] Steven S Smith, 'Discourse in the Dusk: The Twilight of Religious Freedom?' (2009) 122 Harv L Rev 1869, 1878.

modernity.[147] Unsurprisingly, the language of personal autonomy fits (and advances) this ever-widening variety of options: yarmulkes or cowboy hats, churches or football teams. Nevertheless, we can ask whether religious liberty jurisprudence reflects all the iterations of this narrative. In particular, does religious liberty jurisprudence exhibit what Ward identifies as the 'spiritualizing of human subjectivity'?[148] We have seen that there is certainly a turn inward, both towards subjective and personal construal of religion and towards an internal belief. But does religious liberty jurisprudence show signs of religion as the consumption of goods, experiences, and the symbols of traditional faiths, potentially as pastiche, masquerading as an individual's experience of depth or transcendence? Is it dealing in what Rebecca French calls 'shopping cart religion'?[149]

To be clear: you are unlikely to find in religious freedom jurisprudence a discussion of the religious nature of the market or numerous references to new forms of commercialised religiosity such as Starbucks' desire to connect with your soul.[150] United States religious liberty discourse *does* contain a strong current of market-based thinking, construing the court as presiding over a 'competitive disorder [of] denominations'.[151] But European and UK discourse does not (yet) tend in this direction explicitly or consistently. In fact, courts have at times implicitly pushed against it. For example, Scientology has faced scepticism as to its 'religious' status, although this might be changing.[152] The scepticism arguably reflects

[147] Charles Taylor (n 120) 299.

[148] Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009) 157.

[149] Rebecca R French, 'Shopping for Religion: The Change in Everyday Practice and its Importance to the Law' (2003) 51 Buff L Rev 127 (discussing the absence of hybrid syncretism – consumerism, New Age spirituality, self-help, and traditional forms of religion – in religious freedom literature, despite its prevalence in society).

[150] See Chapter Three, n 266 and accompanying text.

[151] *Lynch v Donnelly* 465 US 668, 723 (1984) (Brennan J, dissenting).

Scientology's character, which French describes as 'pure postmodern religion'.[153] It is hyper-syncretistic, promoting a therapeutic culture through a mixture of technology, science, science fiction, consumer exchange, and the concepts and language of a variety of traditions (for example, Buddhist, Christian, Gnostic).[154] More generally, as I note in Chapter Five, the ECtHR has at times adopted a more institutional focus for religious liberty.[155] Arguably then, new forms of commercialised and hybridised religion are not yet making their mark on the courts.

I emphasise, however, the 'not yet'. The identification of religion as spiritual subjectivity and a species of personal autonomy will put increasing pressure upon the concept of religion. I suggest this understanding of religion is tracking the genealogy put forward by Ward. Recall his argument. He contends that as religion became increasingly internalised as a matter of individual belief or experience it also was identified in increasingly abstract terms. Paul Tillich's 'ultimate concern' is noted as an example of something of a turning point.[156] Tillich's writing is familiar to religious liberty discourse through its adoption by the United States Supreme Court when considering what amounts to a belief in a 'Supreme Being' for conscientious exemption purposes.[157] He wrote, 'And if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being,

---

[152] See, e.g., *X & Church of Scientology v Sweden* (1976) 16 DR 68 (Commission Decision) (characterising Scientology's use of the e-meter as commercial and therefore outside of Article 9) and *South Place Ethical Society* [1980] 1 WLR 1565 (Ch) (rejecting Scientology as a charity 'for the advancement of religion'). But see more recently *Church of Scientology Moscow v Russia* (2008) 46 EHRR 16 (holding the refusal to re-register the Church of Scientology was a breach of Article 11 read in light of Article 9).

[153] Rebecca R French, 'From *Yoder* to Yoda: Models of Traditional, Modern, and Postmodern Religion in US Constitutional Law' (1999) 41 Ariz L Rev 49, 81.

[154] See Paul Horwitz, 'Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion' (1997) 47 De Paul L Rev 85, 93-94.

[155] Chapter Five, Part I.

[156] Ward, *True Religion* (n 1) 115, 119.

[157] *United States v Seeger* 380 US 163, 187 (1965) (Clark J).

or your ultimate concern, of what you take seriously without reservation.'[158] *Williamson* and *Amselem*'s construal of religion, focused on personal choice and subjective belief, is one short step beyond Tillich's ultimate concern. Whereas Tillich still spoke of the ultimate, the later framing deepens an inward turn towards self-definition. It still evokes 'depth' and hints at 'spiritual', but its boundaries are porous. Arguably, as Ward suggests, this new iteration of religion, facilitated by Tillich-like turns, is one which 'consumes itself, for it consumes all religious specificities. … As a concept religion implodes.'[159]

This argument is not, however, simply theoretical. Recent religion or belief discrimination cases have arguably pushed religion further down this imploding path. In *Grainger v Nicholson*, Burton J considered that a belief in anthropogenic climate change could amount to a philosophical belief for the purposes of discrimination on the grounds of religion or belief.[160] Applying this decision, Judge Guyer considered that a fervent anti fox-hunting belief, arising from a general sense of the 'sanctity of life', could also be a philosophical belief for the same purposes.[161] And, rounding off this triumvirate, a Birmingham Tribunal was reported as upholding a view of the BBC as serving the 'higher purpose' of 'promoting cultural interchange and social cohesion' as similarly a 'belief'.[162]

A closer look at *Grainger* shows how religion is becoming synonymous with a diffuse understanding of belief as individual experience of depth, transcendence or ultimate concerns.

---

[158] ibid, quoting Paul Tillich, *The Shaking of the Foundations* (C Scribner's Sons 1948) 57.

[159] Ward, *True Religion* (n 1) 117.

[160] *Grainger* (n 97).

[161] *Hashman v Milton Park, Dorset Ltd* No 3105555/2009 (ET, 4 March 2011) [3].

[162] See Laura Roberts, 'BBC Producer's Public Service Views 'On Par with Religion', *The Telegraph* (London, 9 May 2011) <www.telegraph.co.uk/culture/tvandradio/bbc/8501819/BBC-producers-public-service-views-on-par-with-religion.html> accessed 20 March 2013.

Mr Nicholson was the head of sustainability at the property firm Grainger. He claimed his redundancy was on the basis of management's antagonism towards his belief in anthropogenic climate change. This was, he argued, discrimination on the grounds of philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (now replaced by the Equality Act 2010).

Immediately, it might be thought that the case raises a different question: the nature of philosophical belief for the purposes of discrimination law. Burton J considered Lord Nicholls's words in *Williamson*, namely the latter's warning against courts questioning the validity of a religious practice rather than focusing on the sincerity of the individual.[163] Philosophical belief was, in Burton J's opinion, possibly different in one respect. Whereas the religious claimant simply has to show he or she is an adherent of a particular religion (a sincere articulation), claiming a philosophical belief may require, the judge contended, the establishment of the fact of the belief and its attendant practices, through a process of examination and cross-examination. It is uncertain how different this is to the *Williamson* position in reality. If it entails simply establishing a causal nexus between the asserted belief and the practices associated with that belief, this does not seem particularly different from the treatment of religious belief, assuming that what governs the question of asserted belief is the sincerity of the claimant.[164] More pertinent for this discussion, however, was how 'philosophical belief' as a category was understood.

The Equality Act 2006 provided that a philosophical belief, to be considered for protection, must be 'similar' to religious belief.[165] Vickers notes that the express removal of

[163] *Grainger* (n 97) [6].

[164] This was precisely how examination and cross-examination proceeded in *Hashman* (n 161) [9]-[35].

'similar' from the regulations (and subsequently in the Equality Act 2010) was to assuage the offense felt by some humanists and atheists.[166] Nevertheless, Burton J considered, notwithstanding the removal of 'similar', 'it is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief.'[167] In reaching this conclusion, Burton J considered ECHR jurisprudence to be relevant. The Council Directive establishing a general framework for equal treatment in employment and occupation refers to religion and belief as grounds for protection and cites the ECHR in support in its recitals.[168] And it is clear from ECHR jurisprudence that religion and belief are treated synonymously. The Strasbourg institutions have included Islam, Krishna Consciousness, Jehovah's Witnesses, Pentecostals, Orthodox, the Salvation Army, and the Divine Light Zentrum within the bounds of Article 9, as well as pacifism and veganism.[169] Thus, in *Williamson*, Lord Nicholls considered that for a 'non-religious belief' to acquire protection under Article 9, it must 'relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs.'[170] Following the aligning of religion and belief within ECHR jurisprudence, therefore, Burton J quite understandably adopted a similar pattern for equality law: any 'belief' must be 'similar to' 'religion'. But religion, as we have seen, is the capacious conception of self-definition articulated in *Amselem* and elsewhere.

---

[165] Equality Act 2006, s 77(1).

[166] Vickers, *Religious Freedom* (n 56) 23. See Equality Act 2010, s 10.

[167] *Grainger* (n 97) [26].

[168] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework of equal treatment in employment and occupation, Recitals 1 and 4. See *Grainger* (n 97) [15]. See also Explanatory Notes to the Equality Act 2010, para 52 (construing belief in terms of ECHR jurisprudence).

[169] See respectively *Şahin* (n 12); *ISKCON v United Kingdom* (1994) 18 EHRR CD133 (Commission Decision); *Kokkinakis* (n 9); *Kalaç v Turkey* (1997) 27 EHRR 552; *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13; *The Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46; *Divine Light Zentrum v Sweden* (1981) 25 DR 105 (Commission Decision); *Arrowsmith v United Kingdom* (1981) 3 EHRR 218 (Commission Decision); and *H v United Kingdom* (1993) 16 EHRR CD44 (Commission Decision).

[170] *Williamson* (HL) (n 73) [23] (Lord Nicholls of Birkenhead).

Unsurprisingly, Burton J considered that a belief in anthropogenic climate change could be a 'belief' for the purposes of discrimination law.

Mr Nicholson spoke of the need to avoid global catastrophe for the human race; the effect this belief has on his daily life (including 'my hopes and my fears'); and his attempts to persuade others of the need to adopt a similar lifestyle.[171] The words are redolent of apocalypse, discipline, sacrifice, awe and fear, and a global brotherhood. The connection between environmentalism and religious tradition is not new. The German Romantic philosophy of the late eighteenth century connected nature to 'the creative force of the universe'.[172] More recently, James Lovelock, for example, promoted the Gaia model of nature, a metaphorical conception of the earth as a complete living entity that plays off what Lovelock saw as the ancient depiction of the earth as 'a sentient Goddess with a purpose and foresight'.[173] The form of environmentalism envisaged by Mr Nicholson figures, I suggest, aspects of both of these understandings (a Romantic religious understanding and a model-based conception). The redeployment of concepts of sacrifice, hope, fear, globalism, and apocalypse into a different context constitutes what Ward describes as the marshalling of religious symbolic capital, not as pure metaphor but as the pursuit of an individual's personal belief.

Still, Mr Nicholson's belief arguably remained within a Tillichian paradigm of ultimate concerns. Is this is limiting feature, or will ultimate concerns collapse into the expansiveness of individual experience of an inward depth? The borders of depth as a

[171] See *Grainger* (n 97) [3], [12].

[172] See Alister McGrath, *The Re-Enchantment of Nature: Science, Religion and the Human Sense of Wonder* (Hodder & Stoughton 2002) 121.

[173] ibid 121-22.

limiting feature are hazy. I argued in Chapter One that focusing on 'ultimate' meanings or concerns faces the difficulty of perspective.[174] There exists a tension between locating the search for the ultimate within the individual, a focus on his or her capacity to develop meaning, and attempting to distinguish this from the trivial or frivolous. If the distinction is made, an implicit judgement appears to be incorporated, one that potentially reaches beyond the individual's own articulation. If this judgement is not taken, and we follow through on the capacity approach, then we step further towards the implosion of religion-belief. Given the substantial value that is placed on individual choice and autonomy, and the subsequently diffuse nature of contemporary religion and spirituality, it is difficult not to conclude that any choice is potentially indicative of the depths of the individual. Arguably, the existence of depth turns on semantic presentation.[175]

The ECtHR has intimated an awareness of these dangers. It has adopted seriousness, cogency, cohesion and importance, and consistency with human dignity as 'threshold requirements' that must be satisfied before any claim appealing to religion or belief will be considered.[176] None of these criteria, however, have ever been applied to exclude a claim. The demand for cogency has been dismissed because religion is 'not always susceptible to lucid exposition or, still less, rational justification' and the demand for consistency with human dignity and respect for a democratic society has been equated with only extending

[174] See Chapter One, Part IV.

[175] The court has applied at least one limiting feature to dismiss at least one case. In *McClintock* (n 112), a Christian who had served as a Justice of the Peace dealing with adoptions considered that he was unable, consistent with his conscience, to place children with same-sex couples. However, this failed to qualify as a religion or belief because Mr McClintock's views were formed on a possibly revisable interpretation of the current data. There was not, he claimed, sufficient evidence to warrant such placements, meaning the children were being used as 'an experiment in social science'. ibid [9], [45]. Whether this decision will have a lasting impact is debatable. Cases that at least involve the interpretation of data – for example, the present knowledge on climate change – are clearly, given *Grainger*, possible. It could be argued that the revisability of Mr McClintock's 'belief' was considered problematic. That, however, would be surprising given the centrality of personal autonomy.

[176] See *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 [36].

'liberal tolerance to tolerant liberals.'[177] Generally, seriousness is assumed – religion concerns the importance of 'freely and deeply held personal convictions or beliefs'.[178]

Curiously, however, seriousness has been alluded to in reference to one example of a limit. Baroness Scotland, introducing the Equality Bill in 2005, stated 'a belief in the supreme nature of the Jedi Knights' as an example of a belief that might not meet the description of seriousness.[179] But in Chapter Three, I raised the possibility that Jedi is a paradigm case of contemporary spirituality.[180] I discussed Mr Jones, who voiced the possibility of a religious discrimination claim when the supermarket Tesco refused him entry while hooded. Assuming Mr Jones is sincere in the view that, for example, there is a 'force' which surrounds and permeates all reality and commits one to a life blending stoicism and concepts of guardianship, then it is difficult to conceive how Jedi would not be, in the contemporary and jurisprudential sense, a religion. Indeed, I would go so far as to suggest that even if he was engaging in a form of parody this may nevertheless be taken as fulfilling a sense of individual depth. We can imagine that the parody – ridiculing traditional religious adherents by claiming an equivalence between, for example, Christianity and Jedi – is still pointing at an individual's sense of meaning, purpose, and the ends of life. The parodic adherent is making a claim as to what *should* be (and *is* for them) the objects of devotion – quite likely, the material or the self. They are, in other words, still within Tillich's ultimate frame, or the capacious spiritual understood as individual depth. Examples of such parody, engaging in a pastiche which through its criticism of institutional religion pursues spirituality,

[177] See *Williamson* (HL) (n 73) [23] (Lord Nicholls of Birkenhead) and [60] (Lord Walker of Gestingthorpe).

[178] *Amselem* (n 135) [39]. In *Williamson* (HL) (n 73) [23], Lord Nicholls considered that 'with religion [seriousness] is readily satisfied.'

[179] HL Deb 13 July 2005, col 109 quoted in *Grainger* (n 97) [10].

[180] See Chapter Three, Part III.

are clearly available. Melissa Wilcox discusses the Sisters of Perpetual Indulgence, a lesbian, gay, bisexual, and transgender organisation which dresses as 'twenty-first century nuns'.[181] Its members pursue various spiritualities and acts of community organising, but, in keeping with the appropriation of Catholic attire, will stage a 'die-in' where several Sisters collapse in the street every time a quote from Pope Benedict is read.

Lord Walker has suggested that the expansive framing of Article 9 ('freedom of thought, conscience and religion'; freedom to manifest 'religion or belief') has provided a reason not to explicitly define religion.[182] This is true, but I suggest largely because 'religion' itself is already dissolved into the more expansive category of belief or ultimate and deep concerns. Burton J's opinion – that 'philosophical belief' will take its meaning from being 'similar' to religion – is consequently only half-true. The categories of religion, belief, and philosophical belief are themselves synonyms for a form of spiritual subjectivity, different hues in an age of authenticity.

IV Conclusion

I have been considering how religion as a concept is becoming increasingly diffuse. But this does not mean an expansion in religious liberty; indeed, quite the opposite. The association of religion with personal autonomy and the consequent spiritualising of subjectivity results in a deepening privatisation of religion. When the question of the justifiability of curtailing religious manifestation (or engaging in indirect discrimination) is considered, it is difficult to

[181] See Melissa Wilcox, 'Parodic Politics' (*The Immanent Frame*, 6 August 2010) <http://blogs.ssrc.org/tif/2010/08/06/parodic-politics/> accessed 24 September 2011.

[182] *Williamson* (HL) (n 73) [55]-[56].

see how the individual's sincere understanding of their own spiritual depth or experience will bear much weight against competing state interests.[183] Ogilvie labels this a 'lonely' position.[184] The state appeals to rational concerns – health, wealth, safety, and so on. It is difficult to see why these state concerns would give way to myriad forms of individual sincerity; indeed, the state's actions are likely to be undertaken for the purpose of maximising such diverse interests or settling their differences.

This more diffuse understanding of religion or belief has also raised an unresolved tension. On the one hand there is an expansion of belief to any form of deep concern, indicating the loss of any specificity to the terms belief and religion. But, on the other hand, as Part I discussed, protection against religion is the primary concern of the *forum internum*. We could bring these two together. If a view on anthropogenic climate change (for example) can be considered a belief, then it is at least possible to imagine a government policy targeting climate change being objected to on the basis of freedom of religion or belief. The controversy of the crucifix in *Lautsi* could be replaced by the climate change poster in the classroom.[185] This is perhaps logical, but unlikely. Rather, what is more likely is the development of two understandings of religion. In the context of *forum internum* arguments, the primary concern of the court is likely to remain the confessional actions of government authorities: Christian education, crucifixes, taxes paid to church institutions, for example. However, in the context of religious manifestation and religious discrimination claims, the potential range of claims is much more open.

---

[183] For a similar argument, see Benjamin Berger, 'Law's Religion: Rendering Culture' (2007) 45 Osgoode Hall LJ 277, 307-10.

[184] Margaret Ogilvie, 'And Then There was One: Freedom of Religion in Canada – the Incredible Shrinking Concept' (2008) 10 Ecc LJ 197, 204.

[185] See Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc LJ 280, 283.

In itself, this raises another tension. Climate change, fox hunting, valorising the BBC, and Christian practice all mix together as religion or belief. There is a certain irony in this. Traditionally, religious liberty discourse has attempted to inscribe a reason-religion dichotomy, and we might consider climate change would fall on the former side.[186] But appeals to individual election of depth or a sense of the ultimate arguably reflect a more postmodern condition. Here, the hallmark of believability is not rationality, or tradition, or both, but rather individual sincerity. And this means that various individual belief narratives – potential hybrids of 'reason' and 'religion' – are treated as equally valid and fungible, for the purposes of personal claims.

Such relativising is unlikely, however, to be a victory for religion. Lucy Vickers has suggested that religion should arguably receive less protection than other grounds of discrimination. Reflecting on *Grainger*, she contends religion is ambiguous in scope, meaning protection could be extended to an indefinite amount of cases.[187] I have argued that such expansiveness would, in practice, be defeated by focusing upon state (or potentially employer) interest. Further, I discussed in Part II how any claims face the hurdle of the belief-manifestation divide, through which religion is confined to a private sphere of belief. But underlying Vickers' concern, and the focus on individual sincerity itself, is an assumed equivalence. Once it is accepted that religion reduces down to individual experience of something like 'depth', any thought of privileging a particular religious tradition is viewed as arbitrary. And if all beliefs should be treated equivalently, then this furthers a discourse of neutrality – all beliefs should be subject to the same universal law.

---

[186] See Chapter One, Part II.

[187] See Vickers, 'Emerging Hierarchy' (n 185) 301-02.

What should be done? I am clearly not recommending a dichotomy between reason and religion. Rather, I suggest the real difficulty is the focus on a capacities-type approach – that religion is understood as a search for individual meaning, however defined. It is this that precipitates the relativizing trajectory which Vickers accepts. Posing an alternative, however, is not straight-forward. The RO narrative, which I have argued is reflected in threads found in case law, offers an account of both the subjectivity of the capacities approach (a construal of 'rights') and of what religion has come to mean and why. But while this helps explain how a case like *Grainger* can arise, it does not in itself present a straight forward alternative approach. Would an RO-inspired approach reach a different outcome? Perhaps not. The account of religious liberty's purpose I develop in Chapters Five and Six points towards a more communitarian understanding of religion as seeking a common, desirable end. Arguably, this fits more with discrimination law's traditional focus on particular groups' access to and participation in goods in common (education, employment, and social care, for example).[188] In this light, Mr Grainger's case would arguably be evaluated still in terms of analogy ('similar' to 'religion'), but the comparison point would be different.

What is needed, I suggest, is a thicker account of why religion matters. Such an account, however, is unlikely to appeal to a chimeric notion of religion as such. The attempt to identify religion's 'essence' has been intimately part of the process of secularisation as differentiation. In this chapter, I have related this process to the law by discussing instances of *containment*: the expanding sense of *forum internum*; the belief-manifestation divide; and the privatisation of religion as individual experiences of depth or ultimate meaning. In contrast to this attempt at a universal category, Taylor writes of a doubt that any general

[188] See Chapter Six, Part III (d).

theory of religion can be established: 'The phenomena are much too varied'.[189] And, drawing from the narrative in Chapter Three, we can add the phenomena are shaped by particular social imaginaries, accounting for the relationship between humans, creation, the cosmos, and God. Consequently, I do not see how religion can be discussed without appealing to some kind of central or focal case, pointing to a desirable vision of what religion is. On the account I am presenting, we should move away from the vision of religion as individuals searching for meaning, spirituality, or depth. This vision tends towards a relativizing trajectory. And it is potentially an atomising vision: religion is private consumption or experience; it may be expressed with others, but it is not intrinsically relational and social. RO writing suggests a counter-vision, thickly housed in the Christian tradition. This is a vision which construes religion as a communal endeavour to seek particular ends. But I suggest that while presenting a central or focal case, this vision does allow for analogy – other groups can be understood as participating in the desirable ends most clearly articulated in the thick, particularist understanding of 'religion'. Exploring this counter-vision is the subject of Chapters Five and Six.

[189] Charles Taylor (n 120) 679.

5

Group Rights

Throughout this thesis, I have been contrasting two political imaginaries. The first is a vision of secularised space negotiating and protecting individual autonomy. This is the dominant vision of current religious liberty discourse. The question of why we should exhibit concern for religious liberty is answered, on this vision, in terms of an appeal to liberty – we value individual's developing their own conceptions of the good, important or ultimate choices or convictions, or 'style'. This establishes a political imagination based on spatial boundaries. Individual belief is differentiated from the secular space of politics. Indeed, there is a need for this new secular space because we must negotiate these competing beliefs and identities, from a new vantage point over and above such difference. Radical Orthodoxy, which I have placed in conversation with an examination of the state of religious liberty jurisprudence and discourse, raises critical questions over this vision of political-religious space. In contrast, the RO account develops an alternative political imaginary. Rather than spatial divisions between religion and secular, belief and politics, or church and state, the RO vision conceives of all of life being reconstituted in light of what Augustine called the city of God. Ecclesiology – the development and understanding of the church as a universal body – becomes social theory.

In this chapter, I will elaborate further on this vision with the purpose of synthesising, from within the RO account, an argument as to why religious liberty matters. In short,

religious liberty becomes an institutional manifestation of the commitment to the flourishing of new bodies appealing to a life of 'charity'. Religious liberty is, under this direction, central to a quest for an order in which persons are understood as existing as gifts offered in exchanges that form different associations. Such bodies, the account continues, are autonomous in the sense of not merely authorised by the state. They would therefore qualify any claims of temporal authority, which is re-conceived as existing to coordinate different groups towards the ends of supernatural peace or charity. In Chapter One, I discussed the following argument from Rivers: 'It needs to be accepted that organized religions represent locations of authority in civil society which in some way stand over against Government and must be reconciled with Government.'[1] I suggested that this contention has two implications. First, standing over and against the government or the state requires some form of institutional autonomy for organised religion. Second, standing over and against government (but potentially for it, being 'reconciled with Government') requires accepting that the group in question enacts, appeals to, and constitutes a higher good or higher judgement beyond the political order. The RO vision, I suggest, fits well with these contentions.

This chapter is consequently aimed at articulating the theoretical shape of an RO-inspired vision of religious liberty. In Chapter Six, I deepen this project by examining three important questions the RO vision raises: What of the individual, given the fundamentally social or group orientation of RO? What of religious pluralism, especially in light of the 'Christendom' overtones of the RO account? How can we understand a significant 'conflict' of rights, like that between sexual orientation non-discrimination and religious liberty, within this vision? Before fleshing out the theoretical shape of the vision, and then the applied

[1] Julian Rivers, *The Law of Organized Religions* (OUP 2010) 295. See Chapter One, Part V (b).

questions, I begin in this chapter by noting an uptake in focus on the importance of the group to religious liberty, and the questions this has raised.

I The Group in Religious Liberty Jurisprudence

Although interpretations of Article 9 and arguments for religious liberty have often appealed to individual autonomy and value pluralism, the law also contains significant recognition of religious groups. In so doing, it arguably points inchoately towards a vision of group or social pluralism as fundamental to civil society. Here, I will provide a brief account of some of the central features of this recognition. Others have offered more extensive analysis.[2] My purpose, therefore, is to give a context for the central question of this chapter: how to articulate a rationale for religious liberty focused on group or social pluralism.

Rivers has discussed a typology of rights belonging to religious associations, animated by a 'general right of autonomy of religious communities'.[3] Organisations have a right to legal status (for example, holding property or establishing educational institutions) available on a non-discriminatory basis;[4] a right to internal structural autonomy, including the right to select, train, appoint, and dismiss leaders;[5] a right to establish places of worship and meeting;[6] a right to raise funds;[7] a right to community life (for example, to assembly);[8] a right

[2] See ibid and Jane Norton, 'Law and Religious Organizations: Exceptions, Non-Interference and Justification' (DPhil Thesis, University of Oxford 2012).

[3] Rivers, *Law of Organized Religions* (n 1) 56-70.

[4] *Religionsgemeinschaft Der Zeugen Jehovas v Austria* (2009) 48 EHRR 17 [96].

[5] See, e.g., *Knudsen v Norway* (1986) 8 EHRR 45 (Commission Decision) (minister holds a duty of loyalty to the church) and *Rommelfanger v Federal Republic of Germany* (1989) 62 DR 151 (Commission Decision) (doctor at a Catholic hospital holds a duty of loyalty).

[6] See *Fener Rum Erkek Lisesi Vakfi v Turkey* App no 34478/97 (ECtHR, 9 January 2007).

of pastoral access in restricted institutions (prisons, for example);[9] a right to provide educational, charitable, and humanitarian services;[10] and a right to protection from hostile or violent acts.[11]

Domestically, the growth and facilitation of these rights, recognising the autonomy of religious organisations, occurs in numerous ways through the common law as well as rights adjudication, albeit with significant caveats. Courts are, for example, generally willing to recognise the authority of religious organisations to settle disputes through their own internal rules. In disputes over membership, courts generally do not interfere in the adjudication of the group, understanding membership as a matter of consensual compact to the group's norms.[12] Property disputes arising from schism are another significant area where recognition of the group is at issue. There, one important question is whether the court should defer to the polity (the decision-making body of the church) or whether it should investigate which side within the schism continues to adhere to the original purposes for which the property was held. As Rivers and Norton note, the court has at times adopted a hybrid approach.[13]

---

[7] See Rivers, *Law of Organized Religions* (n 1) 61.

[8] See, e.g., *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46.

[9] See Rivers, *Law of Organized Religions* (n 1) 65.

[10] See ibid 66. Article 6(b) of the United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief includes maintaining charitable and humanitarian institutions within the right to religious liberty.

[11] See *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 30.

[12] See Norton (n 2) 127-28 and Ian Leigh, 'Balancing Religious Autonomy and other Human Rights under the European Convention' (2012) 1 Ox J Law Religion 109, 112.

[13] See Rivers, *Law of Organized Religions* (n 1) 96-100 and Norton (n 2) ch 6 discussing especially *Free Church of Scotland v Overtoun* [1904] AC 515 (HL).

Finally, religious organisations are given several, arguably narrow, exceptions from discrimination law norms. These apply in respect of services. For example, a faith school may in certain circumstances admit only students of a shared religious ethos.[14] A church can refuse to rent out its hall for a Gay Pride celebration or refuse to admit as church members those in same-sex partnerships.[15] And they apply in respect of employment. For example, a church group can require that a youth leader abstain from same-sex romantic relationships in order to comply with the doctrines of the religion or, because of the nature of the employment, 'to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.'[16] The law, in other words, embeds to a limited degree an understanding that non-discrimination on various grounds must walk hand-in-hand with recognising the group's religious liberty.

These forms of recognition, and the typology of rights noted above, could be framed as supporting the vitality of civil society. At the level of the European Union, there is a strong theme of co-operation and dialogue with churches and religious organisations. Religious organisations have been viewed as fundamental to European integration and civil society's development.[17] Article 17 of the Treaty on the Functioning of the European Union provides that the Union 'respects and does not prejudice the status under national law of churches and religious associations or communities', and that the Union 'shall maintain an open, transparent and regular dialogue with these churches and organisations.'[18] This is

[14] See Equality Act 2010, Sch 3, Part 2, para 11; Sch 11, Part 2, para 5.

[15] See Equality Act 2010, Sch 23 para 2.

[16] See Equality Act 2010, Sch 9, Part 1, para 2(1) and Sch 9, Part 1, para 6. See, e.g., *Reaney v Hereford Diocesan Board of Finance* Case 1602844/2006 (ET, 17 July 2007) <http://thinkinganglicans.org.uk/uploads/herefordtribunaljudgment.html> accessed 5 April 2013.

[17] See Ronan McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 65.

mirrored both domestically and through ECtHR jurisprudence. Norman Doe, for example, has argued that recognising religious organisation's legal personality and the co-operation that occurs between these organisations and the state permeates the law and practice of European states, as well as ECHR jurisprudence.[19]

In *Moscow Branch of the Salvation Army v Russia*, the ECtHR stated, 'It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.'[20] '[T]he autonomous existence of religious communities', the Court reiterated, 'is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.'[21] *Moscow Branch* concerned the Russian Government rejecting the Salvation Army's registration, ensuring that the group's communal life was severely curtailed. The Court's decision – that this was a breach of Article 9, especially when interpreted with Article 11's freedom of association – followed in a line of cases holding that where the group's autonomy is at issue, the margin of appreciation afforded to states will be reduced.[22] Generally, this heightened scrutiny has applied to cases where a religious group is denied registration (usually entailing public law rights or the ability to own property) or state interference in the appointment of a religious group's leaders.[23]

---

[18] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49, Article 17. See further McCrea (n 17) 67.

[19] Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011) ch 4.

[20] *Moscow Branch of the Salvation Army* (n 8) [61].

[21] ibid [58].

[22] See, e.g., *Manoussakis v Greece* (1997) 23 EHRR 387 [44].

Domestically, one could imagine s 13 of the Human Rights Act (HRA) as reflecting and perhaps extending this protection of the group's integrity. Section 13 provides that where the 'court's determination of any question' under the HRA 'might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.' The then-Home Secretary, Jack Straw, described this section as directing the court to an interest 'in protecting the integrity of the common faith of [a church's] members against attack, whether by outsiders or by individual dissidents.'[24] However, although one might find it curious that a legislative provision within the Human Rights Act is read as having no discernible impact on religious liberty adjudication, the court has largely treated s 13 in this way.[25]

Nevertheless, the statements from the ECtHR are strong, seeming to point to a focus on the right positioning of groups in society contributing towards 'common objectives'.[26] But how the Court understands this, in light of its further commitments to value pluralism and individual autonomy is an open question. The Court has accepted that a religious organisation may exercise Article 9 rights. A church body is 'capable of possessing and exercising the rights … in its own capacity as a representative of its members'.[27] Arguably, the Court has a distinct line of jurisprudence pointing towards the vital role of religious

---

[23] See, e.g., *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55.

[24] See Rex J Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2005) 328, citing HC Deb 20 May 1998, vol 312, col 1023.

[25] See *R (Amicus) v Secretary of State for Trade and Industry* [2007] 1 ICR 1176 (Admin) [41]. In one case, *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893 [77], Thomas LJ cited s 13 as part of the proposition that one must give the community's belief 'considerable weight'.

[26] *Moscow Branch of the Salvation Army* (n 8) [61].

[27] *X & Church of Scientology v Sweden* (1976) 16 DR 68 (Commission Decision).

communities in society as a rationale for religious freedom. But, as Rivers notes, how the group is understood is ambiguous.[28] Is the group recognised merely to facilitate the articulation of individual rights? Is it recognised in its own right, as an entity of some kind? In other words, is the group recognised for its contribution to individual autonomy and value pluralism, or is it recognised as contributing to a more communitarian understanding of group or social pluralism?

This is the subject of the current chapter. The questions addressed here (and in Chapter Six) are: Why focus on the religious group? What is its importance to civil society? Is this a 'religious' vision? And what is the relationship, then, between group and individual person? To begin, I turn to recent discussions on the importance of the group in religious liberty discourse.

II Group Rights Discourse

Commentators widely recognise the importance of religion's collective aspect. Ahdar and Leigh write, 'Religion is seldom if ever solely an individual matter'.[29] Vickers contends that religion is usually found in an identifiable group.[30] Rivers notes that it is relatively novel to locate the relationship between law and religion in individual conscience; traditionally, we have been more concerned with religious groups and collective action.[31] Waldron argues

[28] Rivers, *Law of Organized Religions* (n 1) 54.

[29] Ahdar and Leigh (n 24) 325.

[30] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008) 22.

[31] Rivers, *Law of Organied Religions* (n 1) 32.

that, for some persons, groups can exercise a 'pull' of obligation, reflecting an understanding of the religious group as alternative normative order to state-law.[32]

But while commentators agree that there is a collective dimension to religious liberty, how this is framed and understood is contested. Several debates are apparent: the meaning and desirability of multiculturalism; the existence or appropriateness of legal pluralism; whether the group is a threat to or protector of liberty; whether the group is a 'real' entity of some kind or the aggregation of individual interests; and whether the group can exercise rights. Reflecting fully on each of these, and their interconnectedness, is beyond this thesis. Here, my purpose is limited. While I will note some of the broad contours of these debates, I do so for two reasons: first, to highlight a growing focus on groups and organisations in religious liberty discourse; and second, to raise some of the difficulties with this literature, difficulties which the RO account may offer resources to address.

(a) Multiculturalism

The importance of groups in the religious liberty setting could be included in multiculturalism discourse. Put broadly, multiculturalism concerns a body of political philosophy, as well as public policy and practice, marked by responding to cultural and religious diversity through 'recognition and positive accommodation of group differences' and 'group-differentiated rights'.[33] As McCrudden notes, British multiculturalism discourse has moved from a focus on 'race', to 'ethnicity', and now 'religion'.[34] Thus, faith-based

[32] Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) 59 Wash & Lee L Rev 3, 15.

[33] Sarah Song, 'Multiculturalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2010) <http://plato.stanford.edu/archives/win2010/entries/multiculturalism/> accessed 4 February 2013.

organisations are involved in the provision of, for example, education and charitable care, as well as conversations concerning social cohesion, radicalisation, and security.[35] And notable claims of cultural accommodation (in respect of education, communal life, and funeral practices, for example) have recently been framed as religious liberty issues.[36] This might be conceived of as simply good community organising: engaging different groups within a shared territory in the pursuit of what Bretherton calls 'goods in common'.[37] However, the multiculturalist argument might go further.

Taylor notes that multiculturalism may entail a claim of recognition for the equal worth of a culture.[38] Rather than the universal application of a set of egalitarian rights, Taylor argues that the multiculturalist claim aims for the 'survival' of 'distinct societies'.[39] This is familiar to religious liberty discourse in recent debates surrounding legal pluralism. To what extent can a polity recognise plural legal systems, for example shari'a law as a basis for adjudicating family disputes? Why should state-law govern what is recognised and what is not when these systems may pre-date the state? The heat generated by questions of this kind was evident after Rowan Williams' so-called 'shari'a lecture'.[40] There, the Archbishop raised the question of 'plural jurisdictions' within the UK, considering whether and on what

---

[34] Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the *JFS* case considered' (2011) 9 ICON 200, 202-03.

[35] See ibid and Luke Bretherton, *Christianity and Contemporary Politics* (Wiley-Blackwell 2010) ch 1.

[36] See *R (Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin); *Swami Suryananda* (n 25); and *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin).

[37] Bretherton (n 35) 15.

[38] Charles Taylor, 'The Politics of Recognition' in Charles Taylor and Amy Gutmann (eds), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 25, 64.

[39] ibid 60-61.

[40] Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 Ecc LJ 262.

terms a person may consent to a 'communal jurisdiction'.[41] The reactions to this lecture were overwrought, often neglecting to note that Williams was explicitly not advocating parallel and equal jurisdictions.[42] Nevertheless, strong claims to recognition, at times manifested in terms of legal pluralism, raise two related concerns. We could call these the *agonistic concern* and the *agnostic concern*.

The *agonistic concern* refers to the potential for multicultural pluralism to turn into a series of atomised groups in need of regulation for the purposes of civil peace. Multiculturalism, we can say, concerns the recognition of identity or distinct societies. This recognition could be regardless of the normative goals or substance of the group. Indeed, given the absence of a shared end, given plural identities or societies, recognition should be granted lest we ask the answerable, 'whose normativity counts?' But, arguably, this form of recognition could paradoxically require or result in a strong state. The plurality of distinct societies gives rise to the ever-present possibility that they will infringe on each other's autonomy (not to mention the autonomy of individuals). The single sovereign state then is bestowed with the power to ensure order against such infringements. And, outside of any sense of shared or implicit ends, arguably this could devolve into a discourse of raw power. This was, I suggest, Robert Cover's conclusion.

Cover, in his well-known writing on religious communities and the law, was deeply sympathetic to the flourishing of plural groups. He argued that each group develops its own *nomos*, a normative universe of 'right and wrong, of lawful and unlawful, of valid and

[41] ibid 273.

[42] ibid 278.

void.'[43] But this very flourishing gave rise, he argued, to a discourse of power. He considered the law must exercise a necessarily violent role of '*effective domination*' to ensure civil peace against the perpetual conflict of different groups.[44] In this, Cover remained haunted by the thought that the settling of the *agon* can easily take on the hue of an imperial character, securing civil peace through increasingly draconian means.[45]

The related *agnostic concern* entails a failure to be critical of, as well as engage with, different cultural or religious expressions. Claiming recognition of a religion or a culture *as such* could tend towards viewing religions as substantially equivalent. In religious liberty discourse, the group could be understood as an interchangeable means for the individual to cultivate an authentic belief. The problem with this, however, is that it could tend towards what Pope Benedict calls 'indiscriminate acceptance' and 'no authentic dialogue'.[46] If recognising identity is the concern, rather than the ends pursued by the group, then multiculturalism is agnostic. This would potentially give license to harmful practices (indiscriminate acceptance). But, further, the absence of any judgement as to actual worth presents a failure to engage with the particularity of a religion or culture, its practices and ends (no authentic dialogue). Paradoxically, such failure is a form of disrespect.[47]

(b) Facilitating Individual Rights?

[43] Robert Cover, 'Nomos and Narrative' in Martha Minow, Michael Ryan, Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (University of Michigan Press 1992) 95.

[44] Robert Cover, 'Violence and the Word' in ibid 203, 222 (emphasis in original).

[45] See Austin Sarat, 'Robert Cover on Law and Violence' in ibid 255, 257-58.

[46] Pope Benedict XVI, Caritas in Veritate*: On Integral Human Development in Charity and Truth* (*The Vatican*, 29 June 2009) <www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html> accessed 25 November 2012, [26].

[47] See also Kristen Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Difference* (CUP 2007) 79.

For some, there *is* an exercise of judgement when responding to multicultural calls for recognition. This takes the form of judging worth by the protection the group offers to individual liberty. A notable and controversial example is whether Muslim headscarves curtail the autonomy of women, especially as regards their equality with men.[48] But the concern for individual liberty can also be applied more widely. Group recognition is challenged on the basis of limiting individual's liberty of sexual orientation,[49] or, more generally, individual self-determination.[50]

Privileging individual autonomy in this way highlights another central debate: how a 'collective right' to religious liberty should be framed. Vickers, for example, argues that a collective right to religious liberty can only exist as a collection of individual interests.[51] She follows Raz, who, endorsing multiculturalism, considers the recognition of a collective right arises when the cumulative interest of group members imposes a duty on another person or persons.[52] Multiculturalism, on this understanding, remains methodologically focused on the individual,[53] with the group understood as an important structure for individual autonomy.[54] To adopt Kymlicka's characterisation, the group provides a 'context of individual choice', one option in a 'range of options passed down to us by our culture.'[55] While this means that

[48] See, e.g., *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 [94] (Baroness Hale of Richmond) and Frances Raday, 'Culture, Religion and Gender' (2003) 1 ICON 663.

[49] See Chapter Six, Part III.

[50] See below Part III.

[51] Lucy Vickers, 'Twin Approaches to Secularism: Organized Religion and Society' (2012) 32 OJLS 197, 201.

[52] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 209.

[53] See Victor M Muñiz-Fraticelli, 'The Distinctiveness of Religious Liberty' (2011) McGill University 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921646> accessed 14 May 2012.

[54] See Raz (n 52) 251, 423.

groups are desirable as facilitating individual interests, it also means they pose a threat. The group can be conceived of as limiting individual autonomy, whether through practices contrary to egalitarian norms or through a failure to recognise self-determination. Raz, recall, considered that it was consequently the state's role to encourage options facilitating individual autonomy and to discourage options that diminish it.[56]

(c) Group Rights?

In religious liberty discourse, however, there is a growth in the recovery of what Victor Muñiz-Fraticelli calls 'group rights proper'.[57] Whereas 'group-differentiated rights' generally frame the group as a vehicle for individual autonomy, Muñiz-Fraticelli argues 'group rights proper' entail a claim of self-governance for the religious body or community.[58] The pluralist theme is strong, as the self-governance claim entails a focus on authority that can stand against or in distinction to state power.

Often this growth in 'group rights proper', with its focus on authority, is as an attempt to re-claim a fundamentally 'jurisdictional' approach from the Western tradition of law and religion. Steven Smith has been notable in arguing that religious liberty discourse has suffered a significant loss.[59] The historical discourse of 'two cities', 'two swords', or 'two kingdoms' which, within the sweep of the Christian political tradition, inspired an understanding of separate, divinely ordained jurisdictions, has, Smith argues, been overtaken

---

[55] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995) 126.

[56] See Raz (n 52) 407-10, 416-18, 424 and the discussion in Chapter One, Part III.

[57] Muñiz-Fraticelli (n 53) 10.

[58] ibid

[59] Steven Smith, 'Discourse in the Dusk: The Twilight of Religious Freedom?' (2009) 122 Harv L Rev 1869.

by an understanding of the state's universal jurisdiction.[60] Smith's arguments have been taken up by scholars similarly interested in a retrieval of more group-based or institutional understandings of religious liberty. From the perspective of this thesis, the intention of these arguments – to articulate a 'thicker' account of religious liberty, in conversation with the historical tradition – is welcomed. That said, there remain several points of contrast. I will briefly discuss two themes, sphere sovereignty and *libertas ecclesia*, as discussed by Paul Horowitz and Richard Garnett respectively. My basic contention is that these accounts remain too wedded to a secular account of divisible 'spheres', or else an agnosticism that frames groups as merely necessary for individual liberty.

'Sphere Sovereignty' is a neo-Calvinist imagining of political and social space, generated largely by the writing of theologian and former Dutch Prime Minister Abraham Kuyper. Its reception in religious liberty discourse has been limited.[61] In short, sphere sovereignty entails the view that there is a 'rich diversity of structures or institutions (schools, churches, families, unions, the state and so on), with each having its own authority and duties' and each working cooperatively within its own authority to create a structural plurality.[62] Fundamental to Kuyper's vision was the idea that each sphere has an independent authority derived directly from God. The family, work (or 'the business'), science, art, the church are, in Kuyper's words, 'innate in nature itself', spheres in which the person already finds him or herself before the state arises.[63] This means that each order's authority is

[60] ibid 1873-76.

[61] Steven Smith refers to a 'smattering of interest'. ibid 1885. I draw from David H Mclroy 'Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape and Scope of Government' (2003) 45 J Church & State 739; Nicholas Wolterstorff, 'Abraham Kuyper on the Limited Authority of Church and State' (2009) 7 Geo J L & Pub Pol'y 105; and Paul Horwitz, 'Churches as First Amendment Institutions: of Sovereignty and Spheres' (2009) 44 Harv CR-CL L Rev 79.

[62] Ahdar and Leigh (n 24) 86.

determined, teleologically, by 'its nature and calling'.[64] The *telos* of the family, for example, is the raising of children.[65] The *telos* of the state is restraining sin in a fallen world, 'compelling order' and 'guaranteeing a safe course of life.'[66]

There are several connections between this neo-Calvinist account and the RO account. Both advance a form of social pluralist thesis, arguing that the individual must be understood within various associations that 'pre-exist' the state.[67] Both accounts can also, in this respect, be related to arguments for subsidiarity, in which governance and political life is undertaken at different and appropriate levels.[68] There are, however, differences.

Most notably, Horwitz, drawing from the Kuyperian account in the context of American religious liberty discourse, argues that sphere sovereignty need not be a distinctly Christian theory.[69] We can see why this might hold. The emphasis within sphere sovereignty is on pockets of autonomy, characterised as spheres. Horwitz argues, for example, that on the Kuyperian account, 'no single church should dominate, and the church is no more free than the state to intrude outside its own proper sphere.'[70] Here a critical question can be posed: is

---

[63] Abraham Kuyper, *Calvinism: Six Lectures Delivered in the Theological Seminary at Princeton* (Revell 1899) 116-18 quoted in Wolterstorff (n 61) 109.

[64] See McIroy (n 61) 758.

[65] ibid 758-59.

[66] Kuyper (n 63) 101 quoted in Wolterstoff (n 61) 113.

[67] Horwitz notes the family resemblance between Kuyper's sphere sovereignty and the social pluralists. See Horwitz (n 61) 104. See below Part IV, (b)(ii) discussing RO's connections to a social pluralist thesis.

[68] Subsidiarity, a doctrine emphasised in Catholic social encyclicals, teaches that authority should be devolved to different, appropriate levels of society, including vocational and natural groups (labour and the family, for example). See Pope Leo XIII, Rerum Novarum: *On Capital and Labor* (*The Vatican*, 15 May 1891) <www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html> accessed 14 July 2012, [51].

[69] Horwitz (n 61) 94.

[70] ibid 97.

Kuyperian sphere sovereignty a theologised form of sphere differentiation, found in secularisation discourse?[71] Such differentiation, as discussed in this thesis, has been characterised by an attempt to identify the 'essence' of religion as distinct from the exchange of goods and services, politics, or law. While RO writers also contend for teleological order, there is no static division between, for example, 'work' or 'economics' and 'church' or 'theology' based on autonomous spheres or logics. The identification of autonomous spheres is, on this view, too static and ahistorical.[72]

Richard Garnett has likewise begun to advance a more 'institutional' or 'infrastructural' approach to religious liberty.[73] His reflections on this are embryonic. Nevertheless, from my reading, he advances two arguments that are potentially in tension: *libertas ecclesiae* and a notion of 'ordered liberty'.

Garnett argues that we should 'agree to consider the possibility' of building upon 'the commitments embodied in the ancient idea of the "freedom of the Church"', *libertas ecclesiae*.[74] He appeals to a series of formative turns in Western history: the Investiture Crisis between Pope Gregory VII and Henry IV in the eleventh century; St Thomas Becket's martyrdom at the hands of Henry II for defending clerical independence; and King John agreeing in 1215 'that the English Church shall be free'. With Harold Berman, he argues that these events stand for the 'principle that royal jurisdiction was not unlimited … and that it

[71] See Chapter Two, Part I.

[72] This is Milbank's criticism of sphere sovereignty: see John Milbank, 'Forward' in James K Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker Academic 2004) 1, 13.

[73] See Richard Garnett, 'Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?' (2007) 22 St John's J Legal Comment 515 and Richard Garnett, 'Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses' (2008) 53 Vill L Rev 273.

[74] Garnett, 'Religion and Group Rights' (n 73) 533.

was not for a secular authority alone to decide where its boundaries should be fixed.'[75] For Berman, *libertas ecclesia*e limited state authority through the sovereignty of an alternative body.[76]

Garnett's attempted updating of *libertas ecclesiae*, however, appears to downplay both the radical import of the idea and its ambiguities in history. The Investiture Crisis, which features often in Garnett and Smith's writing,[77] arguably contributed to the heritage discussed in Chapter Three – a secularised division of spheres and a focus on power in which the church was submerged within the state.[78] But, even so, Pope Gregory VII's articulation of the church's freedom, taken on its own, was still wholly aimed at subordinating temporal authority to St Peter's vicariate.[79] For Gregory, this was Augustinian – the city of God's priority over the earthly city.[80] In other words, *libertas ecclesiae* (to borrow the term) pointed towards a new city, *polis*, or body pursuing right order. Garnett mentions this tradition of the two cities, but he at times appears to elide it with (or perhaps finds it consummated in) the American constitutional tradition of religious liberty and ordered liberty. For example, he frames Thomas Jefferson's articulation of the centrality of individual conscience and the separation of church and state as continuous with Augustine's vision of the two cities.[81] But Augustine, unlike Jefferson and Garnett (living this side of

[75] Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 269 and Garnett, 'Religion and Group Rights' (n 73) 524.

[76] Berman (n 75) 87.

[77] See also Steven Smith (n 59) 1869.

[78] See Chapter Three, Part II (a).

[79] See Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999) 232.

[80] ibid 244.

modernity), was not arguing for the clear differentiation of 'religious' and 'political' authority.[82] Rather, his thesis was more radical: that politics, as well as economic exchanges and the household, is not separated from the Church (as a practice and performance) in the sense of exercising an autonomous authority and logic, but rather should come to be defined by it, indeed should be in some sense within it.[83]

Garnett, in contrast, considers the freedom of individual conscience to be the 'ultimate beneficiary of religious freedom under law.'[84] It is for this ultimate value that institutions should be protected. In this respect, he follows in a line of American Catholic writers, notably Father John Courtney Murray and Father Richard John Neuhaus.[85] For these writers, civil society – including institutional churches and religious organisations – were considered necessary for the protection of individual liberty against state power. Neuhaus, for example, considered the state to be a secular and 'pragmatic broker between countervailing interests'.[86] He worried that if the public square is 'swept clean of divisive sectarianisms' the result would be tyranny, whether of a particular group or of 'statism'.[87]

---

[81] See Richard Garnett, '"Two There Are": Understanding the Separation of Church and State' in Margaret Hogan and Lauretta Conklin Frederking (eds), *The American Experiment in Religious Freedom* (Garaventa Center 2008) 319, 322.

[82] Richard Garnett, 'Religious Freedom, Church Autonomy, and Constitutionalism' (2009) 57 Drake L Rev 901, 904.

[83] See Introduction, Part II (e) on 'the Church' as practice and performance and below Part IV on Augustine's city of God as a practice creating a social order.

[84] Garnett, 'Do Churches Matter?' (n 73) 295.

[85] Garnett, 'Two There Are' (n 81) 320, 326, 328.

[86] Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (2nd ed, William B Eerdmans 1986) 133.

[87] ibid 8-9.

This account of institutions ensuring individual liberty strikes me as too agnostic. 'Politics', in an echo of Weber,[88] is framed as managing a competitive disorder of interests, with the aim of preventing the capture of public power. The thought is that the development of competing sites of interest will of itself act as a check on power and ensure individual liberty. And this means reserving judgement, in order to ensure that factional competition continues. Kathleen Brady reaches this very conclusion, arguing that group freedom must be maintained 'because we do not now and, indeed, never will have a complete understanding of what is socially beneficial and what is harmful (at least this side of the *eschaton*)'.[89] But arguably a mere appeal to group contest (or even simply group formation) in aid of the exercise of liberty is too thin. The appeal to sites of contest is not enough, for these may be sites which offer a palpably malicious alternative. Brady's reason for protecting the group simply does not follow: we understand the social good incompletely (as all major faiths arguably accept), but this does not mean we are unable to claim that we possess a fuller account of social good in contrast to others, let alone that we should not act on it. Further, if the group exists for the purpose of individual liberty, then we once again face the question, as with Cover, of how these potentially conflicting groups should be regulated. Without a sense that these groups might be aimed at a particular social good, in which religion figures, then it is difficult to see why any clash of liberties should not be settled by subjecting all groups (religious or otherwise, each existing only as options for liberty) to the universal standards of state-law.

(d) Conclusion

[88] See Chapter Two, n 27 and accompanying text.

[89] Kathleen Brady, 'Religious Group Autonomy: Further Reflections about What is at Stake' (2007) 22 J Law Religion 153, 161. Brady's eschatology parallels Neuhaus'. Neuhaus considered that God's kingdom must always remain a transcendent promise outside of time, that is, other to the immediate political question of human life – negotiating factional forces. See Neuhaus (n 86) 225.

Each of these threads offers something important, but is also incomplete. The multiculturalism frame recognises that we can value the distinctiveness of particular religious groups, but is unclear on what basis and whether this can be seen as contributing to any shared ends. The 'group rights' claim offered recently by religious liberty scholars moves in the direction of providing an answer, albeit one that is particular to the religious liberty context. We should, the claim is made, value these groups as sites of authority. This has been expressed differently. It might mean, problematically, finding the 'essential' 'sphere' of religion. Or it might refer to an account of ordered liberty, in which it is claimed the agnostic clash of sectarian groups and interests will limit state power.

I think the institutional move, focusing on authority as well as social pluralism, is appropriate. However, it is one that requires an argument that these groups are pointing towards something desirable that can stand over and against 'politics' understood as managing clashing liberties. The alternative to this is potentially a single standard, universally applied by a central sovereign, in order to settle competing liberties – in other words, the total supremacy of state-law. Following Milbank, we can understand this supremacy in terms of simple space. Examining its dynamic, and its relationship to religious liberty, is the subject of the next section.

III Simple Space

In Chapters Three and Four, I discussed an historical movement, echoed in contemporary jurisprudence, towards religion's individualisation. For RO writers, this shifting understanding of religion – framed typically in terms of belief and moving towards a diffuse

spirituality – fits within a wider story of state power. The secular space, on this account, consists in regulating competing individual wills. Historically, this meant an increasingly direct relation between the sovereign state and the sovereign individual, evidenced by the loss of local privileges, and subjecting, notably, the church to a unitary state. In the contemporary setting of religious liberty jurisprudence, I have argued that the focus on belief can be understood as a form of containment. Limitations on religious manifestation and claims to shape the political community are supported by pointing to the primary, unaffected site of religion, individual belief. Understanding religion as primarily individualised then raises a further problem – what weight should be given to such religion when faced with a competing, universal state interest? This section will explore further how the state-individual paradigm problematically treats religious groups. To do so, I will raise Milbank's characterisation of 'simple space' (which contrasts 'complex space', discussed in Part IV) and consider Taylor's argument that egalitarianism of individualised identity can precipitate an insistence on uniform rules. I will then relate this to how the religious group is understood and regulated within a dominant strain of contemporary religious liberty jurisprudence.

'Simple space', according to Milbank, construes political reality as 'suspended between the mass of atomic individuals on the one hand, and an absolutely sovereign centre on the other.'[90] Milbank argues that despite the fictive, contractual origins of the sovereign centre, this vision of political reality develops its own sense of a 'body'. He notes two different ways of construing this: either the body entails the subsuming of individuals 'under the ordered judgment of the sovereign head', or else it entails a providential coordination of individual desires 'in the agonistic harmony of a market economy'.[91] The former, associated

[90] John Milbank, 'On Complex Space' in *The Word Made Strange: Theology, Language, Culture* (Blackwell Publishing 1997) 268, 275.

[91] ibid

with a post-Bodin view of sovereignty,[92] is of particular interest to the religious liberty context. Milbank argues that under this vision of political reality, intermediary bodies, like religious associations, 'suffer reduced autonomy, or else total extirpation.'[93]

Why is this? Charles Taylor, discussing the relationship between a politics of universalism and a politics of difference within the liberal egalitarian tradition, helpfully illuminates how a political society suspended between individuals and the state can lead to a strong centralisation of order in the name of individual liberty.[94] Taylor argues that liberal democracies face a paradox. On the one hand, egalitarian commitments to individualised identity have given rise to 'the politics of equal recognition'.[95] Individuals make claims to respect for their own 'authenticity' – an identity that, as Taylor argues, finds what it means to be human 'for *me*' within the individual person.[96] On the other hand, the egalitarian commitment consists in establishing the dignity of the person in what is 'universally the same, an identical basket of rights and immunities'.[97] For example, as discussed in Chapter One, for Dworkin dignity consists in the capacity of the person to shape what is a successful life for him or her.[98] Taylor argues that this establishes a tension between applying uniform, difference-blind rules defining the boundaries of these rights and fostering the various

[92] John Milbank, 'Shari'a and the True Basis of Group Rights: Islam, the West, and Liberalism' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 135, 142. Writing in the sixteenth century, Jean Bodin considered that sovereignty consisted in 'the most high, absolute, and perpetuall power over the citisens and subjects in a Commonweale'. This was, he argued, a matter of political authority mirroring God's 'infinit power and greatnes'. See Jean Bodin, *De la République* (Chez Jacques du Puys 1583) Book I, ch 8 and 10 quoted and discussed in Jacques Maritain, *Man and State* (Chicago University Press 1951) 31, 33-34.

[93] Milbank, 'Complex Space' (n 92) 275.

[94] Taylor 'Politics of Recognition' (n 38).

[95] ibid 36.

[96] ibid 30 (emphasis in original).

[97] ibid 38.

[98] See Chapter One, n 151 and accompanying text.

identities of 'authenticity'.[99] The tension is experienced as a concern of regulation – how to negotiate potentially conflicting claims to identity, housed often in different groups. And this negotiation has, within the liberal tradition, historically favoured the uniform application of rules through a sovereign centre.[100] Taylor argues the rule, in general terms, is mutual respect for the equal rights of citizenship.[101] This, he continues, is seen as consistent with the individual's interests and dignity, his or her capacity to pursue their own good, because the uniform rule promotes a 'perfectly balanced reciprocity'.[102]

Taylor contends that this uniform application occurs in light of the liberal egalitarian tradition's suspicion of groups and associations outside of the state.[103] Rousseau put the suspicion starkly, considering '[i]t is of necessity that no partial society should exist in the state.'[104] Such groups are perceived as potential restraints on freedom. They may point to specific ends or construal of human nature that enact a collective goal incompatible with the egalitarian notion of dignity.[105] To put this in the language of Rawls, the group may pose a challenge to the primary good of 'self-respect'.[106] This suspicion potentially precipitates a

[99] Taylor, 'Politics of Recognition' (n 38) 43.

[100] ibid 50-51.

[101] ibid 38.

[102] ibid 48.

[103] ibid 50-51, 60-61.

[104] Jean-Jacques Rousseau, *The Social Contract* (Henry J Tozer tr, Allen & Unwin 1920) Book II, chap Iii, quoted in Maritain, *Man and State* (n 92) 47. Maritain's examination of 'sovereignty' parallels Taylor's discussion of Rousseau and the general will. See Taylor, 'Politics of Recognition' (n 38) 45-51.

[105] ibid 60-61.

[106] John Rawls, *Political Liberalism* (Expanded edn, Columbia University Press 2005) 318. See Chapter One, n 80 and accompanying text.

homogenising or 'flattening' dynamic.[107] In the name of individual liberty itself, the threat posed by different groups is solved by subjecting all groups to the same standard.

Milbank argues that the logic of this flattening is rooted in an inability to accord personality to the group.[108] Political reality in the liberal egalitarian tradition is, he argues, premised on individuals and the state as the only real units in society (the latter forgetting its own contractual personality); the group is only accorded personality when the state recognises individuals contractual affiliation.[109] Multiculturalist arguments for a 'collective right' often reflect this paradigm. As discussed above, recognition of the group is accorded on the basis that it facilitates and promotes individual autonomy and choice.[110] Edge reflects this logic perhaps most clearly. He has taken to referring to 'Catholicisms', 'Judaisms', and 'Christianities' in order to privilege 'individual human beings' and even 'errant subjectivity'.[111] On Milbank's argument, the problem is that while these theorists would disclaim individualism, they recognise the group as merely a vehicle for (and subject to) the recognition of abstract identity rights.[112] The group, in other words, becomes a site for maintaining a particular liberal egalitarian 'social imaginary', what Taylor describes as 'society as existing for the (mutual) benefit of individuals, and the defense of their rights'.[113]

---

[107] See also Chapter Three, n 164 and accompanying text.

[108] Milbank, 'Shari'a' (n 92) 142, 144-45. Milbank, in this respect, points to nominalism – that there are no such things as universals like 'society'. Arguably, however, we are not dealing with a *thoroughgoing* nominalism. After all, liberal egalitarian theorists will still discuss 'persons'. Thus the issue is not necessarily nominalism versus realism, but whether groups' purposes can be conceived *intrinsically* (focusing on its purpose or ethos) or are only *instrumental* (as merely the sum of individual group members' preferences).

[109] ibid 142, 144-45.

[110] See above n 51 and accompanying text.

[111] Peter W Edge, 'Determining Religion in English Courts' (2012) 1 Ox J Law and Religion 402, 406, 409, 412, 421.

[112] Milbank, 'Shari'a' (n 92) 142, 144-45.

[113] Charles Taylor, *A Secular Age* (Belknap Press 2007) 160.

Here, the group no longer has a teleological purpose (the pursuit of a shared end of charity, as I argue below) but rather has an instrumental end.

Arguably, this dynamic is evident in current religious liberty controversies. I pointed to this in Chapter Four, discussing how the rhetoric of neutrality has been applied to subject religious groups to a universal law seen as protecting the rights and freedoms of others, including dignitarian interests.[114] But the flattening dynamic can apply to claims of self-determination as such. *Schüth v Germany* provides a recent example.[115]

Mr Schüth, a Catholic parish organist, had left his wife and begun a new family life.[116] For the Diocese, Mr Schüth was involved in the parish church's proclamatory mission, undertaking a role central to the liturgical worship.[117] Accordingly, the Diocese, unable to support what it viewed as a relationship of committed adultery or even bigamy, dismissed him for failure to adhere to the teachings of the Catholic church. The German courts upheld this dismissal. Mr Schüth raised a claim before the ECtHR, appealing to Article 8's right to private and family life. He argued that his 'right to discontinue a particular way of life and to begin a new one' had not been given sufficient weight by the German courts in their assessment of whether he was unfairly dismissed.[118] He intended to remain a Catholic, while arguing that the parish church could not 'force' him to 'observe precepts outside the

[114] See Chapter Four, n 59 and accompanying text.

[115] (2011) 52 EHRR 32. See also Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1 Ox J Law Religion 81 (discussing *Schüth* and *Obst v Germany* App no 425/03 (ECtHR, 23 September 2010).

[116] *Schüth* (n 115) [67].

[117] ibid [52].

[118] ibid [46]. As Evans and Hood argue, the 'horizontality' of the case – considering whether the court had adequately considered the balance of rights in a dispute between non-state parties – meant it was considering substantive norms in the guise of a procedural question. Evans and Hood (n 115) 102.

occupational sphere'.[119] This established a conflict: Mr Schüth, remaining a Catholic, could not find full-time work outside of a Catholic parish; the Catholic Diocese, implementing its disciplinary procedure, could not have a commited adulterer in a liturgical leadership role.[120]

The ECtHR considered that there was a balance to be made. On the one hand, the Catholic Diocese had an Article 9 right to maintain its religious doctrine and associational life. On the other hand, Mr Schüth had an Article 8 right to 'establish and develop relationship with other human beings, the right to "personal development" or the right to self-determination as such.'[121] The ECtHR concluded that the German courts failed to give sufficient weight to the legal protection accorded Mr Schüth's new family life.[122] Addressing whether Mr Schüth owed the Diocese a 'duty of loyalty', evidenced by his contractual undertakings, the Court considered 'the applicant's signature on the contract cannot be interpreted as a personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce.'[123] Mr Schüth could not be taken as having curtailed his own freedom, the 'very heart of the right to respect for the private life of the person concerned.'[124]

The Court's emphasis on balance means that if Mr Schüth had occupied, in its view, a more central position within the parish church's life, the outcome might have been different. In a companion case, *Obst v Germany*, the Court upheld the dismissal of the director of

[119] *Schüth* (n 115) [46].

[120] ibid [48].

[121] ibid [53].

[122] ibid [67].

[123] ibid [71].

[124] ibid

European public relations for the Mormon Church after his own extra-marital relationship.[125] But the entire dynamic of 'balance' here is a problematically instrumental construal of the religious group. *Obst* still frames the group's ethos as subject to individual self-determination. It is just that, in that case, this is outweighed by the collective interests of group members not to be represented by an adulterer. The Court's emphasis in these cases is on whether the religious group sufficiently maintains the liberty of the individual, making the group a vehicle for, in Lord Mance's terminology, balancing and maintaining 'the individuality [of] interests'.[126] On Taylor and Milbank's argument, this precipitates scepticism of the group that enacts collective goals perceived to inhibit individual liberty. The protection of self-determination, as Taylor argues, then tends towards applying a universal abstract right to the group – the reciprocity of respect for liberty. *Schüth* is a dramatic example of this because the abstract right is self-determination as such. This may, paradoxically, eliminate difference (result in flattening). While self-determination is upheld as paramount, the group's account of right ends (fidelity) is treated sceptically as limiting self-determination, meaning different contexts for the exercise of choice are undermined. Some may think this is a positive outcome. Individual autonomy is protected, and groups are re-fashioned in light of this. But there are problems.

Arguably, the focus on abstract liberty or self-determination requires a strong central sovereign.[127] If the goal of public life is the securing of private freedom, then proliferating regulation ensures against the possibility of individuals encroaching on each other's liberty in manifold contexts. On this basis, the state requiring the Catholic Church to ordain women as

[125] *Obst* (n 115).

[126] *R (E) v JFS Governing Body* [2009] UKSC 15, [2010] 2 AC 728.

[127] See John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 Ox J L and Religion 203, 206.

priests is at least a possibility because it would be consistent with maintaining individual liberty. Rivers has suggested the state has not intervened in such a way simply because it lacks the political capital.[128] Within the instrumental framing of the group, this makes sense. According to scholars like Raz and Vickers, the Catholic Church (to continue the example) is only the cumulative interests of its individual members. We therefore reach something of a numbers game. If the cumulative interest of the Catholic Church is diminished enough, or enough cumulative interests place pressure on the liberty-restraining position of the Church, the political capital to intervene against the Church increases in likelihood. Such an intervention might be for a particular end – for example, recognition of women as capable of holding the priestly office. But within the instrumental and liberal egalitarian frame, intervention need not have a specific end in mind other than, as in *Schüth*, ensuring *liberty as such*. And the more religion is understood as either one species of autonomy or as a signifier for the individual's search for authenticity and style, the more likely it is viewed, in its collective mode, as an arbitrary limitation on liberty.

Fundamentally, this misconceives the nature of the group. Rather than being a vehicle for individual interests, the religious group is better understood as a *polis*. As MacIntyre argues, this is a 'form of social order whose shared mode of life already expresses the collective answer or answers of its citizens to the question "What is the best mode of life for human beings?"'[129] The group, in this sense, is characterised by its pursuit of social ends. In *Schüth*, the Catholic parish and Diocese were enacting a social order expressing human life as flourishing when characterised by fidelity to relationships. The Court considered this must be balanced with Mr Schüth's self-determination. On the RO account, such balancing entails an attempted optimisation of interests outside of a discourse of ends. This envisages a kind

[128] Rivers, *Law of Organized Religions* (n 1) 334.

[129] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth 1988) 133.

of market conception, discerning a 'right' balance arising from the natural clash of assertions of liberty, or else, more nakedly, the settling of this clash by opting for one assertion of liberty over the other through the supremacy of law. As such, it always carries the suspicion that it is regulation based on 'the augmentation of arbitrary will', both in the sense of individuals' bare claims to self-determination and the state's potential response.[130] In contrast, Mr Schüth's 'rights' should have been positioned within the order envisaged by the church, a vision of the 'best mode of life for human beings'.

This, on the RO account, is what it means to pursue justice. In Augustinian and Thomist terms, justice entails coordinating the ends of the person with the common good or end of the political community, rendering to each person what is due.[131] This, drawing from RO arguments, begins an account for why religious liberty matters. The 'political' account I have been discussing understands religious liberty as one interest to be regulated, and it construes the religious group's authority as derivative of individual interests and state recognition. In contrast, what is needed is an account which understands the religious group as its own site of authority, characterised by a common life which appeals to and instantiates a vision that transcends the 'political' clash of individual interests. Here we would have a contrasting political imaginary, understanding in different terms the religious group, how groups more generally are arranged, and to what end. An account of this type is provided by what I will characterise as the RO-infused Augustinian vision of society and religious liberty.

[130] Milbank, 'Against' (n 127) 210.

[131] Thomas Aquinas, *The Summa Theologiae of Saint Thomas Aquinas* (NovAntiqua 2008) II-II.58. See Milbank, 'Against' (n 127) 213.

IV The Radical Orthodoxy Alternative: Judgement and Transformation

Written between 411 and 426 AD, Augustine's *City of God* is a defence against pagans attributing Rome's fall to Christianity having replaced Rome's traditional pagan worship.[132] He wrote of two cities – the city of God and the earthly city. Each is characterised by a different love – a desire that propels the city towards an end. The earthly city 'was created by self-love reaching the point of contempt for God, the Heavenly City by the love of God carried as far as contempt of self.'[133]

Augustine's two cities have been interpreted in a number of ways. Broadly, there is a spectrum between two poles: those who read Augustine as developing and endorsing an independent secular space distinguished from an otherworldly city of God and those who understand Augustine as promoting a theocratic state. As we will see, Radical Orthodoxy (and related) writers reject both of these poles.

RA Markus argues for a 'liberal' interpretation of Augustine, casting the bishop as a man before his time whose idea of neutrality in civic life, separated from ultimate questions, was only realised (or initiated) in a post-Christendom modern era.[134] For Markus, Augustine's city of God points to the fallibility of collective endeavours – both state and visible church – and a necessary agnosticism towards any perceived historical progress.[135] The city of God, Markus contends, reflects an eschatological hope; that is, on his

[132] Augustine, *Concerning the City of God Against the Pagans* (Henry Bettenson tr, Penguin 2003).

[133] ibid Book XIV, ch 28, 593.

[134] R A Markus, *Saeculum: History and Society in the Theology of St Augustine* (CUP 1970) 173.

[135] ibid 162-3, 179-80.

interpretation, the hope of eternal life in communion with the saints.[136] It presents a perpetual source of criticism towards the exercise of temporal authority in the *saeculum* (the time before the hope of eternal life is realised).[137] In particular, it claims that no form of order in this world can be ultimate. However, what shape criticism should take, what the city of God says to the *saeculum*, is, Markus argues, left open to pragmatic judgements. There is 'no programme, no ideology, and no strategy'.[138] For Markus, the church itself is not understood as a new, critical polity. Markus acknowledges that Augustine tended towards partially identifying the church with the city of God. Nevertheless, he contends that Augustine characterised the church as equally 'secular', meaning it too was subject to an inability to clearly identify right order or judgement in the time between Christ and his return.[139] On occasion, this leads Markus to a more individualised notion of the city of God, characterising it as the invisible rule by God in the hearts of individuals.[140]

From this interpretation of eschatological hope and historical agnosticism, Markus reaches the conclusion that Augustine represented an early exhortation towards categories of sphere differentiation. Augustine considered that the inhabitants of the city of God and the earthly city are inter-mixed in the present age.[141] Markus understands this as pointing to

---

[136] See also Christopher Kirwan, *Augustine* (Routledge 1989) 220-22 (arguing the City of God refers to the Christian hope of life after death, a communion of saints, and that in the meantime Christians are to be aliens in a foreign land, helping to alleviate miseries, but acting fundamentally as outsiders). Eschatology is the discourse of endings, concerning, in Christian theology, the presence and hoped for imminence of God's kingdom. See Christopher Rowland, 'Eschatology' in Alister E McGrath (ed), *The Blackwell Encyclopedia of Modern Christian Thought* (Blackwell Publishing 1993) 161.

[137] Markus (n 134) 168-9.

[138] ibid 171. Markus' eschatology is, in this way, similar to Neuhaus'. See above n 85 and accompanying text.

[139] ibid 179.

[140] ibid 180.

[141] Augustine (n 132) Book XIX, ch 26, 892.

reserving judgement – we cannot with any certainty identify the city of God.[142] Given this, Markus argues, politics occupies a distinct role differentiated from the 'ultimate questions' posed by the city of God.[143] Rather than any ideal project, Markus contends politics now concerns (along Weberian lines) a technical order.[144] Specialists are tasked with addressing specific problems and provisional, temporal goods without any reference to religious meaning, without, that is, the common love (whether good or bad) that characterises Augustine's city of God and the earthly city.[145] Markus argues Augustine can consequently be understood as advocating a neutral political space, agnostic as to ultimate belief and values and therefore supporting pluralism of belief.[146] Christopher Insole, developing a like-minded interpretation, states the conclusion sweepingly. Augustine's city of God 'has little to do with history' and it cannot be identified with any particular institution, representing instead 'an entirely unworldly, supra-historical affair'.[147] The *saeculum* is 'not changed or manipulated a jot because of the hidden as-yet pilgrim splendour' of the city of God.[148]

There are a number of problems with this interpretation of Augustine. In particular, it presents an under-realised eschatology and it transforms Augustine's critique of the earthly city into an apologetic for secular order.

---

[142] Markus (n 134) 179.

[143] ibid 172.

[144] ibid 172-4. See Chapter Two, Part I on Weber and secularisation. This has further echoes in neo-scholastic interpretations of Augustine's two cities as a differentiation between temporal goods and spiritual goods. See Chapter Two, Part II(a)

[145] ibid

[146] ibid 151, 173.

[147] Christopher J Insole, *The Politics of Frailty: A Theological Defense of Political Liberalism* (University of Notre Dame Press 2004) 92-3.

[148] ibid 136. See similarly Kirwan (n 136) 218 (arguing that 'Augustine has left us no blueprint for human society on earth, the "terrena civitas"' and that he considered 'human institutions must go on much as they always had').

The 'liberal' interpretation of Augustine identifies a real feature in Augustine's writing: that the institutional (and universal, as I have characterised it)[149] church is not fully identifiable with the Kingdom of God or the *Civitas Dei*. There are persons outside of the church who are members of the city of God, and God's kingdom can be manifest beyond its borders.[150] But the interpretation continues to a conclusion not reached by Augustine – that the church, because of its confused membership, is characterised by the ambivalent realm of the *saeculum*.[151] The difficulty is that Augustine *did* increasingly see the church as the kernel or central manifestation of the city of God.[152] There remains a distinction, or a remainder beyond the church. But, as John Neville Figgis argued, it is the church, a 'visible, comprehensible body, hierarchically organised', that is identified with the Kingdom of God.[153]

Markus's and Insole's interpretation, arguing the ambivalent nature of the church and positing the city of God as a hope and criticism beyond time and outside of the *saeculum*, consequently presents an under-realised eschatology. They point to the city of God as manifest only at the end of time, the *eschaton*. But this downplays the tension, found in Augustine and elsewhere, between the not-yet of God's fully present kingdom and the already-present manifestation. Bretherton makes precisely this point in response. He argues Insole fails to give sufficient attention to the description of the church, in both St Paul's

[149] See Introduction, Part II (e).

[150] Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009) 288.

[151] Markus (n 134) 179.

[152] See John Neville Figgis, *The Political Aspects of St. Augustine's City of God* (Longmans 1921) Lecture I (arguing this is apparent from Book XIX onwards). See also William Cavanaugh, 'From One City to Two: Christian Re-Imagining of Political Space' in *Migrations of the Holy: God, State, and the Political Meaning of the Church* (William B Eerdmans 2011) 46, 59 and 66.

[153] Figgis, *The Political Aspects* (n 152) Lecture IV.

writing and later in St Augustine, as itself a *polis*, a *res publica*, or real political society.[154] Insole exhorts the church to humility in its claims as to the good life on the basis of the church's mixed membership (some are not of the city of God) and the impact of sin. But, as Bretherton argues, this is theologically the wrong conclusion. The proper response of the church to its sins, Bretherton writes, is 'repentance and penitence which themselves constitute forms of witness to the future that God is bringing into being.[155] In other words, the church's character as a distinct political society is in part constituted by its response to its failings.

Markus rightly points to Augustine's break with the Christian triumphalism of Eusibius.[156] But he then takes Augustine's argument – that the earthly city is characterised by the *libido dominandi* – to be advocacy for a neutral secular civic space, free from questions of ultimate love or concern.[157] It is not clear, however, that Augustine considered this a possibility. John Rist, for example, notes Augustine's growing pessimism that all human societies are driven by 'an underlying … perverted love of self'.[158] They may obtain some limited virtue. For example, the Romans' desire for freedom was first concerned with liberation from the Tarquins. But even this desire was underpinned by a lust for power – the individual's freedom from all restraint, which Rist adds 'necessarily entail[ed] a lust for power' and we could further add would be a freedom congruent with neutrality as to ultimate

[154] Bretherton (n 35) 66 n 85. See similarly Cavanaugh, 'From One City to Two' (n 152) 60 and Ward, *Politics* (n 150) 170.

[155] Bretherton (n 35) 66 n 85.

[156] Markus (n 134) 147. See also O'Donovan and Lockwood O'Donovan (n 79) 110.

[157] In similar vein, Herbert A Deane reads Augustine's comparison of kingdoms to a band of robbers as an argument pointing to a baseline of authority, agreement, and rules in any society. Herbert A Deane, *The Political and Social Ideas of St. Augustine* (Columbia University Press 1963) 126-28.

[158] John M Rist, *Augustine: Ancient Thought Baptized* (CUP 1994) 210, 217.

loves or concerns.[159] Fundamentally then, for Augustine, human societies are differentiated only by the degree to which they succumb to the will to power, a form of ultimate concern.[160]

This flows from Augustine's understanding of a commonwealth or 'people' as arising when 'united by a common agreement on the objects of their love'.[161] Augustine's argument is that a society cannot be outside of objects of love or a common object of worship, whether ultimately for self or for God.[162] A neutral secular space, in the manner described by Markus, is arguably a fiction within Augustine's dichotomy. Augustine continues by arguing that only the city of God is in fact a *true* commonwealth.[163] A true commonwealth requires pursuing justice, rendering to each person their due, rightly.[164] And 'rightly' entails worshipping the one true God, rendering what is due to him.[165]

This stark difference between the two cities, and the scepticism Augustine held towards the earthly city, has led some commentators to interpret him as arguing for a theocratic state. Charles Howard McIlwain argued that Augustine's claim that only the city of God can be a true commonwealth, pursuing justice rightly, was implemented in the Middle Ages by the development of a single Christian jurisdiction, accountable ultimately to the Pope.[166] McIlwain is not alone in this view. Alasdair MacIntyre characterises Hildebrand's

[159] ibid 222.

[160] ibid 219.

[161] ibid Book XIX, ch 24, 890.

[162] See John Milbank, *Theology and Social Theory: Beyond Secular Reason* (2 edn Blackwell Publishing 2006) 405 (*TST*).

[163] Augustine (n 132) Book XIX, ch 23, 890.

[164] ibid Book XIX, ch 13.

[165] ibid Book XIX, ch 21.

reforms as taking Augustine's theology of justice and rendering it explicit as a theory of politics.[167] All power should now flow through the Pope, who as head of ecclesiastical institutions is superior to the ambiguous realm of secular rule.[168] George Sabine similarly writes, 'Henceforth the unity of the race means the unity of the Christian faith under the leadership of the church.'[169] On this view, as discussed in Chapter Three, the church comes to exercise coercive jurisdiction, legal forms of discipline, either directly or by directing kings.[170]

Here we find a version of Augustine diametrically opposed to Markus and Insole, but still problematic. As noted, Augustine rejected the Christian triumphalism epitomised by Eusebius. But the medieval understanding of Augustine, as detailed by McIlwain and others, tended towards a renewed imperialism. Even Gelasius's more nuanced differentiation of royal and priestly authority serving a single polity, influential in medieval debates, is not present in Augustine.[171] This is because Augustine was far less concerned with establishing the proper boundaries of particular roles or institutions – royal power and priestly power, temporal authority and spiritual authority. As Oliver O'Donovan and Joan Lockwood O'Donovan argue, Augustine shows 'a disinterest, we may say, in the worldly political surface, in autonomous constitutional properties'.[172] Importantly, as Figgis and Rist argued, Augustine did not concern himself with categories of church and state, whether as dual

---

[166] Charles Howard McIlwain, *The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages* (The MacMillan Company 1932) 158-60.

[167] MacIntyre (n 129) 161-62.

[168] ibid

[169] George Sabine, *A History of Political Theory* (3rd edn, Holt, Rinehart and Winston 1961) 191.

[170] See Chapter Three, Part I (a)(ii).

[171] See O'Donovan and Lockwood O'Donovan (n 79) 109. On Gelasius, see Chapter Three, Part I (a)(ii).

[172] O'Donovan and Lockwood O'Donovan (n 79) 104.

coordinate powers or as spatial boundaries.[173] Rather, he set up a debate concerning forms of social life.[174] The two cities co-exist not in terms of a territorial division, but within the same space. They share the same earthly goods, but the city of God pursues them with 'a different faith, a different hope, a different love'.[175] Figgis and Rist consequently argued, against readings such as McIlwain's, that Augustine was concerned with articulating the church as a distinct society, one fundamentally in tension with earthly rule.[176] And it is this idea that RO writers emphasise and extend upon.[177]

Milbank argues that the forms of social life Augustine discusses, the city of God and the earthly city existing in the same space, are fundamentally competing *mythos*, narratives of ultimate desire that construe the nature of reality differently.[178] Augustine argued the earthly city's existence, and what it understood as virtue, was characterised by securing itself against external enemies and the disciplining of internal division.[179] This existence, he continued, was rooted in a particular *mythos* – the chaos of competing wills settled by power.[180] Pagan Rome was founded upon the murder of a fraternal rival.[181] Romulus, having killed his brother, expanded Rome's strength through conquest. And this mirrored Jupiter himself, a

[173] Figgis, *The Political Aspects* (n 152) Lecture III and Rist (n 158) 207.

[174] ibid

[175] Augustine (n 132) Book XVIII, ch 54, 842.

[176] Figgis, *The Political Aspects* (n 152) Lecture IV and Rist (n 158) 254.

[177] Alongside Milbank, discussed below, see Cavanaugh, (n 152) 'From One City to Two'. In William T Cavanaugh, *Theopolitical Imagination: Discovering the Liturgy as a Political Act in an Age of Global Consumerism* (T&T Clark 2002) 84-5, Cavanaugh adopts Milbank's interpretation of Augustine.

[178] Milbank, *TST* (n 162) 392.

[179] Augustine (n 132) Book II, ch 20, 70 (describing the corruption of the Romans) and Book V, ch 12, 197 (discussing the Roman desire for dominion).

[180] ibid Book XIX, ch 24-26.

[181] ibid Book XV, ch 5, 600.

god who came to power following a preceding disorder having usurped Cronos.[182] Augustine argued the earthly city continues in similar vein, depending for its very existence upon external enmity.[183] Protecting one's own against others, whether life or property, is consequently viewed as ultimately self-love, desire for one's own privilege, precedence, or survival. Inhabiting this narrative, Augustine considered, directly affects the people's conception of justice and virtue. The pagan city (and all earthly cities) made justice into the disciplining of unruly social elements, and public virtue, at base, military virtue, what Milbank characterises as 'securing of inner dominance of one class over another, and outer security against enemies'.[184]

The city of God challenges the earthly city with a new *mythos*. Rather than an original state of chaos or violence overcome by a strong hand, this *mythos* points to the one true God who originates all reality and, declaring creation good, wills a fellowship with himself and between all things that he has created. On this basis, Milbank argues the earthly city is a denial of true sociality, which, in line with the *mythos* of peace, is characterised by complete consensus and harmony of desire.[185] Augustine argued justice, rendering to each what is due, depends on common consent to *ius*, that is, right.[186] And 'right flows from the source of rightness'.[187] He has in mind a society, reflecting the life of the triune God, in

[182] Milbank, *TST* (n 162) 393.

[183] Augustine (n 132) Book I, ch 30, 42.

[184] Milbank, *TST* (n 162) 415.

[185] ibid 404-6.

[186] Augustine (n 132) Book XIX, ch 21, 881.

[187] ibid Book XIX, ch 21, 882. The interpretation of *ius de fonte iustitiae manat* is from Oliver O'Donovan, 'The Language of Rights and Conceptual History' (2009) 37 Journal of Religious Ethics 193, 202.

which our roles and talents cohere into a 'cooperative order', 'the disposition of all things, equal and unequal, in their appropriate positions.'[188]

Importantly, achieving this right order requires worshipping the one true God. Christopher Kirwan labels this argument specious, contending that justice is available to a society in the absence of such allegiance.[189] But, for Augustine, justice is reconfigured in the city of God. It is not simply achieving a static order of roles (although it does entail roles). Rather, justice, manifesting a right order, is perfected by a life of charity. Augustine calls this the 'whole-hearted and harmonious obedience of mutual affection'.[190] As Figgis emphasises, worship of God entails love of neighbour as oneself, a new commandment and the summation of the law.[191] Love of God, the source of justice, consequently calls people to a new and contrasting virtue. Milbank summarises this as 'remaining in a state of self-forgetting conviviality.'[192] In other words, rather than *dominium* over others (and also the experience of our own psychic bondage, trapping us in self-love), the city of God is characterised by the offering of mutual forgiveness in community and before God.[193]

Rowan Williams captures the radical nature of Augustine's claim, against the view that he was either advocating a neutral secular space or a new imperial power: '[Augustine] is engaged in a *redefinition of* the public itself, designed to show that it is life outside the

[188] Augustine (n 132) Book XIX, ch 13.

[189] Kirwan (n 136) 219.

[190] Augustine (n 132) Book XV, ch 3, 599.

[191] Figgis, *The Political Aspects* (n 152) Lecture III.

[192] Milbank, *TST* (n 162) 394.

[193] ibid 394-5, 414.

Christian community which fails to be truly public, authentically political.'[194] Augustine did envisage the triumph of the church, visible throughout the nations.[195] For him, secular or temporal authority was an interim measure – it exists provisionally 'while we await the End'.[196] He consequently exhorted temporal authority to make space for the reality of the city of God.[197] And this, he considered, took shape as a new social order, both ideally and in practice. Rist notes that Augustine's ideal society 'would be a community of households, transparent to one another and living without guile, centring their lives on the Christian basilica.'[198] This is the life of the Church, understood not simply in terms of single institutions but as a practice or performance manifest throughout society. Augustine considered each household can be a place of true virtue, a *res publica* expressing communion and love of God, and that multiple cities, in which individuals may cultivate relationships of work and virtue, should be favoured over a single *imperium*.[199] As Figgis considered, 'Here is doctrine, not only social, but eminently political'.[200]

This envisaging of a new social order sets up, in Augustine's writing, a difficult relationship with temporal authority's coercive power. As noted, Augustine's work shows a deeply pessimistic view of human societies as more or less under the throes of the will to

---

[194] Rowan Williams, 'Politics and the Soul: A Reading of the *City of God*' (1987) 19/20 Milltown Studies 55, 58 quoted in Deede Johnson (n 47) 222.

[195] See Figgis, *The Political Aspects* (n 152) Lecture I, quoting Augustine's *Sermon* lxvi (cxi) § 6 where Augustine writes of the 'sight of the Body [the church] throughout all nations'. Figgis argues, 'all his apologetic rests on the idea of Church'. This was sharpened, Figgis continues, through the Donatist controversy (see Lecture IV).

[196] Rist (n 158) 207.

[197] See Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (CUP 1996) 93 and John Milbank, 'An Apologia for Apologetics' in Andrew Davison (ed), *Imaginative Apologetics: Theology, Philosophy and the Catholic Tradition* (SCM Press 2011) xvii.

[198] Rist (n 158) 254.

[199] Augustine (n 132) Book IV, ch 15, 154. See also Milbank, *TST* (n 162) 407-410.

[200] Figgis, *The Political Aspects* (n 152) Lecture III.

power, in distinction from a life of charity and forgiveness.[201] But, with the backdrop of the Donatist controversy, he also increasingly argued that it was permissible for political rulers to coerce heretics and schismatics.[202] This advocacy, he candidly admitted, was a shift from his previous view that heretics and schismatics must be reasoned with.[203] He came to consider that what mattered, and what his experience attested to, was whether the coerced person was led to accept as true what is good, namely Catholic orthodoxy.[204] The ruler's task of paying heed to the city of God consequently included the promotion of orthodoxy through coercive means. And this despite Augustine's fundamental ontology, which, as discussed, was a critique of 'peace' established by power settling the chaos of competing wills.

How should we understand this apparent tension? Rivers, for example, argues that the two strands – Augustine's pessimism of human societies and his turn to coercive authority – share a common abandonment of idealism, both for the ruling power and for the church.[205] This at least accords with Milbank's characterisation of coercive authority in Augustine's writing as fundamentally tragic. Augustine did recognise that there is a necessary place for *dominium* in this age (a point Milbank echoes in his own writing).[206] The contingent entry of sin into reality means there remains, tragically, a need for the coercive arm of temporal authority to restrain violence. 'Peace' through restraining competing wills is, consequently,

[201] See above n 158 and accompanying text.

[202] See Julian Rivers, 'Liberal Constitutionalism and Christian Political Thought' in Paul Beaumont (ed), *Christian Perspectives on the Limits of Law* (Paternoster Press 2002) 11, 15 and Kirwan (n 136) 211-13.

[203] ibid

[204] ibid

[205] Rivers, 'Liberal Constitutionalism' (n 202) 17.

[206] See John Milbank, 'Paul Against Biopolitics' in John Milbank, Slavoj Žižek, and Creston Davis (eds), *Paul's New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press 2010) 21, 44-46 and 72.

accorded some value.[207] But, Milbank argues, because this is the field of tragedy entailing a privation from the more fundamental reality of peaceful consensus and order, Augustine does not present a theory of when and how coercive authority is to be exercised and he remains doubtful as to its use. It would be wrong, Milbank argues, for Augustine within his ontology to lay down settled norms governing the exercise of coercive force because such force belongs to the ends of *dominium.*[208] Thus, Augustine argues that the Christian ruler, faced with the dilemma of exercising coercive authority, must resist the temptation to exclude himself from public office.[209] But the ruler's pain arising from this dilemma is characterised as tragic – the conditions of the fall, in which penal coercion is a part of life.[210]

Despite this, Augustine did suggest that in the case of heresy and schismatics it is *the church herself* through her imperial members that does the coercing, supporting Rivers' claim that he abandoned idealism in respect of the church.[211] He continued to express misgivings over coercion's efficacy and rightness, considering that it leads to a shallow peace.[212] He exhorted rulers to make use of the disciplinary methods of the teacher – a pedagogical rather than punitive approach to coercion.[213] Perhaps most importantly, as the O'Donovans discuss, he considered the civil ruler should be attentive to and, where necessary, subject to the

[207] See, e.g., Augustine (n 132) Book XIX, ch 5 and ch 13.

[208] Milbank, TST (n 162) 411.

[209] Augustine (n 132) Book XIX, ch 6. See also Rist (n 158) 215.

[210] ibid

[211] ibid 241.

[212] ibid 226, 252.

[213] Milbank, *TST* (n 162) 425-26.

church's pastoral discourse of mercy and forgiveness.[214] Nevertheless, he also intimated that the church itself exercises coercive rule.

For Milbank, this is contrary to Augustine's own ontology. An act of violence is always a tragic risk, contrasting a self-giving love that offers reconciliation and forgiveness. The coerced heretic or schismatic, Milbank argues, may always be left with the memory of pain now associated with the message.[215] Taking Augustine's earlier rejection of coercion, Milbank argues that while the church makes use of peace in the earthly city,[216] this is always foreign to its own rule and order.[217] By raising the possibility of the church exercising coercive power through imperial members, the church, to quote Rivers, 'began to look rather like a state'.[218] Such a shift, apparent in later Western rulers, entailed a failure to maintain the distinctiveness of the city of God as a new society, challenging and transforming the sometimes lamentably necessary power of temporal authority but never being conflated with it.

RO's political vision can be described, in large part, as a contemporary recovery of this Augustinian vision. I suggest this vision can be understood through two themes: judgement and transformation. Judgement entails appealing to a truth beyond 'politics', the city of God. Following from this, transformation entails the peace of the Church (as practice and performance)[219] manifested in new contexts, reflecting a contemporary iteration of

---

[214] Augustine (n 132) Book IV, ch 3. See O'Donovan and Lockwood O'Donovan (n 79) 106-07.

[215] Milbank, *TST* (n 162) 426.

[216] See Augustine (n 132) Book XIX, ch 14.

[217] Milbank, *TST* (n 162) 411.

[218] Rivers, 'Liberal Constitutionalism' (n 202) 17.

[219] See Introduction, Part II (e).

Augustine's contention for households and cities as the desired shape of social order. Through these themes, religious liberty can be considered an institutional manifestation of the commitment to the flourishing of new bodies appealing to, directly or analogously, a life of charity. Examining these themes accordingly emulates RO writing's general trajectory: a thick description of Christian ecclesiology is taken to provide the logic for social theory as such, relating political order to a religious horizon.

(a) Judgement

Appealing to the Augustinian tradition, Rowan Williams argues the West's historical and contemporary character has been shaped by a Christian conception of 'graded levels of loyalty'.[220] He argues the church since its beginning has called temporal authority to account based on a transcendent universalism. And, in doing so, the church also points public life towards a 'depth and moral gravity that cannot be generated simply by the negotiation of practical goods and balanced self-interests.'[221] It is, in other words, Christian judgement that both holds authority to account and shapes a richer social narrative.

For both Milbank and Ward, narratives of trial form the 'precedent' for the exercise of Christian judgement. Ward looks to Jesus before Pilate, while Milbank adds to this Socrates before the city of Athens and Paul before Festus and Agrippa.[222] Each of these narratives, Milbank contends, reflects a defence before the city of a truth that is prior to the city's foundation, eternal, and only partially known but nevertheless pursued.

---

[220] Rowan Williams, 'Secularism, Faith, and Freedom' in *Faith in the Public Square* (Bloomsbury 2012) 23, 29.

[221] ibid 35.

[222] Ward, *Politics* (n 150) 289 and Milbank, 'An Apologia' (n 197) xiii (John 19; Acts 25-26).

The narrative of Jesus before Pilate takes Socrates' appeal to a truth beyond the city a step further, as Jesus 'claims to be in some sense the King of an unworldly kingdom.'[223] Faced with judgment at the hands of Pilate and possible crucifixion, Jesus tells Pilate, 'You would have no power over me unless it had been given you from above'.[224] To the charge that Jesus claimed to be the Son of God, we are told Pilate 'was more afraid than ever'.[225] The title was one used in respect of the emperor himself.[226] There is, in other words, a claim to an alternative authority that is beyond the power of this world and yet is providentially orchestrating it, even permitting it to be.[227] Paul's narrative continues this tension. He offers a defence or *apologia* for his evangelism before the Governor and King in Judea after facing the anger of local religious authorities. This takes the form of relating his conversion experience, which presents his faith in Christ as a superior truth that, he demands, must now come before Caesar himself.[228]

In each instance, the truth that is appealed to is contrasted with worldly power. Socrates, Jesus, and Paul are threatened with legal execution or the vicious rule of the mob. Both the legal power and the mob enact a scapegoating logic, in which worldly power is secured through an act of violent expulsion.[229] Pilate's power is confronted as derivative, but also arbitrary and pragmatic. The question of truth is, for Pilate, irrelevant: 'What is

[223] ibid xv.

[224] John 19:10-11.

[225] John 19:8.

[226] Ward, *Politics* (n 150) 289.

[227] ibid 293.

[228] Milbank, 'An Apologia' (n 197) xvi.

[229] See John Milbank, 'Christ the Exception' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 203, 218-19.

truth?'[230] He becomes a figure of tension; although he attempts to advocate for Jesus, doubting his guilt, he nevertheless relativistically capitulates to mob rule in order to maintain order (including his own power).[231] Here we have, in Augustinian terms, Christ revealing the nature of worldly power – any individual can become the outcast treated almost indifferently for the sake of establishing power.[232]

Milbank argues that these narratives establish a dialogical tension at the heart of Christianity. On the one hand, Christianity appeals to an order that is not of this world (but is deeply for it). On the other hand, there is a counter-apology for the 'quotidian', as Milbank puts it.[233] In Jesus' trial there is a 'certain caution … even a hesitating shyness' to the claims of Jesus' kingship, leaving a certain degree of respect for political order.[234] Paul's story finishes with him anti-climactically languishing in Rome, leaving the sense that the trial, the tension at the heart of Christianity, is unresolved.[235] Christianity, Milbank consequently argues, 'transcends and fulfils, yet does not abolish, the political level'.[236] Thus, political order is affirmed, but provisionally. There remains a 'differentiation' as between this temporal order and the Christian community, although its 'boundaries' are hazy. The political order is 'outside' of Christianity as an order that is at times coercive and, as such, is what Christianity is in dialogue with. But, Milbank argues, ultimately this is not outside of Christian theology at all. First, political order's *raison d'être* is provided only within the

[230] John 3:18. See Ward, *Politics* (n 150) 291.

[231] ibid 292.

[232] Milbank, 'Christ the Exception' (n 229) 214-19.

[233] Milbank, 'An Apologia' (n 197) xvii.

[234] ibid xv-xvi.

[235] ibid xvi.

[236] John Milbank, 'The Power of Charity: What has the Church to do with the State?' (*ABC Religion and Ethics*, 29 May 2012) <www.abc.net.au/religion/articles/2012/05/29/3513425.htm> accessed 8 September 2012.

frames of a theological and ecclesiological dialogue, rather than on the basis of an autonomous 'political' argument. Second, the appeal to a more fundamental eternal truth is an appeal to transforming all order as such in response to this new event, the founding of the Church. Kings will now exercise mercy and forgiveness as well as judgment.[237] Laws will now become more humane. Warfare will be more constrained. Welfare and alms-giving will expand.[238]

The *civitas Dei*, in other words, has a transformative impact.[239] Religious liberty scholars have suggested that religious bodies present a challenge to the state.[240] Judgement, as described here, gives content to this act. It is making manifest worldly power, the nature of secular order on the RO account.[241] The earthly city is revealed to be rooted in violence – achieving stability by scapegoating or exclusion from the city, managing the chaos of individuals' asserting their desires or claims to possession. But, importantly, this judgement is not *simply* a negative refusal of the way of the world; rather, as stressed at the outset of the chapter, the claim to challenge secular power must also be experienced as instantiating something desirable, a higher good.[242] Judgement, then, also proceeds into an offering of an alternative – a material, new social order.[243]

---

[237] See Augustine (n 132) Book IV, ch 3. See also O'Donovan and Lockwood O'Donovan (n 79) 1106-07.

[238] Milbank, 'The Power of Charity' (n 236). Milbank contends that this was historically the case.

[239] See Ward, *Politics* (n 150) 288 and Milbank, *TST* (n 162) 413.

[240] See Chapter One, Part V (b).

[241] Ward, *Politics* (n 150) 291.

[242] See above n 1 and accompanying text.

[243] Oliver O'Donovan writes, 'Even were the same conditions as once prevailed [for the hero-warriors of Troy] or [for the warrior-monarchs of *Beowulf*] were to prevail again, we could not return to that state of mind in innocence; for something of our vocation has been shown to us'. Oliver O'Donovan, *The Ways of Judgment* (William B Eerdmans 2005) 5.

Judgement consequently is also a creative act, ushering in a way of life, a social order that is outside of the provisional, though often tragically necessary, secular realm of coercion and punishment (what Milbank identifies with 'law', as discussed below).[244] Centrally, offering peaceful resistance to acts of violence, as with Christ, is both a judgement on that violence and a way of living.[245] Likewise, Milbank argues, offering forgiveness in the face of lapsed charity, or refuge to our enemies, offers a sanctuary from punishment.[246] It is thus a judgement against violence and a transforming initiative. We might say peaceful resistance ushers in, or is vindicated in, new life that must be accounted for by temporal authority (Williams's 'graded levels of loyalty'). Milbank argues that the Church as a series of practices forms a new community working towards the ontological peace that grounds Augustine's discussion of the city of God.[247] Oliver O'Donovan similarly writes of the establishment of a *koinōnia*, prominent in St Paul's writing.[248] Concretely, *koinōnia* refers to a community; dynamically, it refers to a communion or communication of gifts and work (not simply employment) shared as common possession, for a common purpose.[249] Again, in echoes of Augustine, O'Donovan emphasises that this new solidarity is in contrast to the earthly city's social order, based on exclusion and accumulation of what is mine over what is yours.[250] And it is experienced in different places, at different times, and in different ways – the expanded household of the early church (family, workers, communion); the medieval

[244] See below n 257 and accompanying text. See also O'Donovan, *The Ways of Judgment* (n 243) 233-40.

[245] Milbank, 'Paul Against' (n 206) 46.

[246] Milbank, *TST* (n 162) 394-5, 427. Milbank argues that punishing someone (perhaps inevitably, but tragically) is to deny that person's spiritual equality to speak against our sins.

[247] Milbank, 'Paul Against' (n 206) 36, 53.

[248] O'Donovan, *The Ways of Judgment* (n 243) ch 14.

[249] ibid 242-44.

[250] ibid 233. See also Milbank, 'Paul Against' (n 206) 42.

monastic community; the town or village; or (as Milbank advocates) the professional guild.[251] This is 'Church' in its widest sense,[252] reflected in the breadth of *koinōnia* expressed in multiple settings. Indeed, Ward argues that institutional churches could never be entirely coterminous with the Kingdom of God, the *civitas Dei*. Rather, while church bodies are central in seeking to make this new life visible, there can be expressions of *koinōnia* outside of institutional church arrangements.[253]

A question in need of further answer remains: *what* is the *civitas Dei* appealing to? In what does the life of ontological peace (Milbank) or *koinōnia* (O'Donovan) consist? Unpacking this further leads us, on the RO account, into a social order of fellowship based in charity and what Rowan Williams calls the 'optimal exchange' of gifts.[254]

(b) Transformation

(i) Charity and Gift

Drawing from St Paul, Milbank argues there is a fundamental contrast between the life of 'law' and the life of 'charity'. In his Letter to the Romans, Paul writes, '[W]e have been released from the law so that we serve in the new way of the Spirit.'[255] While not identifying the law itself as sinful, Paul argues, 'Nevertheless, I would not have known what sin was had

---

[251] O'Donovan, *The Ways of Judgment* (n 243) 280; Milbank, 'Complex Space' (n 90) 278. See further below n 319 and accompanying text.

[252] See Introduction, Part II (e).

[253] Ward, *Politics* (n 150) 288 quoting Stanley Hauerwas, *The Peaceable Kingdom* (University of Notre Dame Press 1983) 97 (the church is a 'foretaste' that lives the 'narrative of God').

[254] Milbank, 'An Apologia' (n 197) xvi and Williams, 'Secularism, Faith, and Freedom' (n 220) 25.

[255] Romans 7:6.

it not been for the law. … Once I was alive apart from the law; but when the commandment came, sin sprang to life and I died.'[256] Milbank interprets this, in Augustinian terms, as understanding the life of 'law' as semi-malicious.[257] 'Law' reacts to an evil or deficiency: the restraining of violence, apportionment in the face of scarcity, or injunctions in the face of moral weakness. Fundamentally, Milbank connects the life of 'law' to the regulation or restraint of an original egotism.[258] This, he contends, underlies the modern moral order: the settling of original conflicting wills through a central sovereign promulgating law to ensure liberty. Milbank argues, however, that this life is subsumed or surpassed by a more fundamental reality – the life of charity.

What is 'charity'? St Paul identifies it as the greatest of the virtues.[259] Traditionally, it has been understood as a divinely infused habit (that is, a form of grace), by which the person is inclined to cherish God and to cherish other persons for the sake of God.[260] In Pope Benedict's words, charity entails making ourselves 'instruments of grace' who, being loved by God, 'pour forth God's charity'.[261] To live a life of charity is consequently to participate

[256] Romans 7:7-9.

[257] John Milbank, 'Paul Against Biopolitics' (n 206) 21 and John Milbank, 'Can Morality be Christian?' in *The Word Made Strange: Theology, Language, Culture* (Blackwell Publishing 1997) 219, 220. I place 'law' in inverted commas because Milbank is not arguing against law as reflection of divine and natural order, used for coordination towards a common end. Rather, he is discussing 'law' as the regulation and restraint of wills.

[258] Milbank, 'Paul Against Biopolitics' (n 206) 72.

[259] 1 Corinthians 13:13.

[260] See Joseph Sollier, 'Love (Theological Virtue)' in Kevin Knight (ed) *The Catholic Encyclopedia* (Robert Appleton Company 1910) <www.newadvent.org/cathen/09397a.htm> accessed 11 November 2012. See also Oliver O'Donovan, *Common Objects of Love: Moral Reflection and the Shaping of Community* (William B Eerdmans 2002) 18 ('to love God for the sake of his goodness is also to love the ways in which his goodness is known to us').

[261] *Caritas in Veritate* (n 46) [5].

in God's own life. And, as Pope Benedict elaborates, this is characterised by 'gift, acceptance, and communion'.[262]

Sounding a personalist note, Maritain wrote in 1948 of each person having unparalleled dignity on account of being directly ordained to God as his or her absolute end.[263] This does not mean, however, merely an extra-temporal fate. Rather, Maritain, consistent with later Christian personalist writing, emphasised that ordination to God is participation in the divine life.[264] God is Trinity: the continual offering of love or mutual bestowing of gifts between three 'persons'.[265] RO writers take up this personalist theme. Ward, for example, argues that outside of God's sharing of his own life, the person is *nihil*, nothing.[266] The person, he continues, is constituted through the continual reception of form, life itself, from God.[267] This is not static, however. Rather, Ward argues, persons are to emulate the life of God, pouring out their own lives as a gift to others as they are sustained by 'the infinite plenitude' of God's own gifting of grace.[268] Ward writes, 'Here lies the basis for a sociality that is the burning vision in all ecclesiological practice.'[269] Ordained to emulate and participate in God's life of gift, the person is thereby constituted in a series of relationships, exchanges making up a new 'body'. In St Paul's terms, this is the Body of Christ.

---

[262] ibid [3].

[263] See Jacques Maritain, *The Person and the Common Good* (Geoffrey Bles 1948) 12, 72.

[264] ibid 30. See also Karol Wojtyla, 'On the Dignity of the Human Person' in *Person and Community: Selected Essays* (Theresa Sandok tr, Peter Lang 1993) 177, 179.

[265] Maritain, *The Person and the Common Good* (n 263) 40.

[266] Graham Ward, 'The Schizoid Christ' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 228, 241.

[267] ibid

[268] ibid 242.

[269] ibid 241.

For Paul, the vision of peaceful social life is one body – the body of Christ – made out of 'parts'. The one God is manifested through the bestowal of a diversity of gifts exercised for a social whole, 'given for the common good' in Paul's words.[270] One person is characterised as the 'ear', another as the 'eye', the 'foot', the 'hand'.[271] Each finds its meaning in relation to the other, as a different offering of gift. Milbank argues that for Paul, this exchange of gifts and the co-operation of diverse *charismata* or talents is the reality of salvation – seeking and living within a social consensus characterised by difference, representing the 'infinite harmony of God'.[272]

What then does this exchange of gifts consist in? Parts of the body will, for example, offer gifts of generosity or prayer when other members are suffering, or forgiving forbearance when there is a lapse of charity (on this basis members will not, in Paul's terms, 'go to law' against each other).[273] This is solidarity. But, Milbank argues, mutual self-offering of persons to one another extends to the harmonious blending of roles. Milbank, drawing on Paul's framing of gifts for the common good, argues that here we find a virtue discourse.[274] Each 'part' exercises a particular role or talent, which furthers the goal of human flourishing, understood as ordering life towards God.[275] This entails an act of judgement, for if the diversity of talents or gifts is to still be one body there must be a discerning of right positioning or right order. The Body of Christ is in this sense a *polis*, as described by

[270] 1 Corinthians 12:7.

[271] 1 Corinthians 12:15.

[272] Rupert Shortt, 'Radical Orthodoxy: A Conversation' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 28, 41 (quoting Milbank in interview).

[273] See Milbank 'Paul Against Biopolitics' (n 206) 63-65 (1 Corinthians 6:6).

[274] ibid 57-58.

[275] ibid

MacIntyre.[276] As a 'form of social order' it attempts to express a collective answer to how particular roles – like giving ourselves to one another in marriage, raising a family, becoming educators, or exchanging products and talents (including labour) on just terms – reflect a right order, undoubtedly in creative and different ways.

Here, we see a 'social' endeavour. In Chapter Three, I discussed Milbank and Cavanaugh's argument that the modern moral order – ensuring the mutual protection of individuals' rights – was not 'social'.[277] The only common end in this order is an agreement of non-interference or respect for mutual rights claims. But the 'burning vision' of sociality developed by RO writers points to the elevation of the entire community to a common end, human flourishing, that is itself inherently social – continual self-giving and receiving; the use of talents and roles for the betterment of others.[278]

Both Ward and Milbank consequently emphasise civic participation.[279] Milbank, for example, considers that society should be orientated by the following question: 'How is the peace of the Church mediated to and established in the entire human community?'[280] This is not, however, a top-down discourse of Church institutional power over the polity. Rather, it is advocacy for practising a life of charity in all places. For example, the ruler should now also exercise mercy, reflecting the practices of forgiveness and restitution; the economic 'sphere' should be characterised by just exchanges of products and talents rather than the

[276] See above n 129 and accompanying text. See also Milbank, 'Shari'a' (n 92) 157.

[277] See Chapter Three, n 189 and accompanying text.

[278] Milbank, 'Paul Against Biopolitics' (n 206) 57-57. Milbank argues that Christianity, in its end goal, affirms the dignity of *the human community*, the elevation of all its members.

[279] See, e.g., Ward, *Politics* (n 150) 188.

[280] John Milbank, 'Politics: Socialism by Grace' in *Being Reconciled: Ontology and Pardon* (Routledge 2003) 162.

maximisation of profit.[281] In all of life, 'it would be our ethical imperative to associate well'.[282] The shape of this, Milbank contends, entails rehabilitating social pluralist theories, crafting what he labels 'complex space'.

(ii) Social Pluralism and Complex Space

For Milbank, the shape of ecclesial life challenges the vision of 'simple space'. 'Simple space' it will be recalled is a construal of political reality as fundamentally consisting in individuals and the state as the only 'real' entities. Groups, within such a vision, are vehicles for individual interests, which, in a sceptical vein, they are perceived as also threatening. In contrast, Milbank argues that there remains for recovery (and adaptation) within Western thought and practice a form of constitutionalism which draws from a Christendom legacy. FW Maitland called this a 'federalistic structure … the body politic as *communitas communitatum*, a system of groups'.[283] John Neville Figgis, Maitland's student, referred to a 'community of the communities'.[284] Milbank draws from these early twentieth century figures of political pluralism (often socialist, corporatist, or Anglo-Catholic) and places them in conversation with more overt theological themes. He argues in favour of 'complex space'.[285] This is a vision of social space modelled after the Pauline description of the Body of Christ. Various 'parts', understood as organic groups, provide new contexts for the exercise of political authority (reconceived as entailing charity, the exchange of gifts). And

[281] Milbank, *TST* (n 162) 428-29.

[282] Milbank, 'Paul Against Biopolitics' (n 206) 73.

[283] FW Maitland, 'Moral Personality and Legal Personality' in HD Hazeltine, G Lapsley, PH Winefield (eds), *Maitland: Selected Essays* (CUP 1936) 223, 229.

[284] John Neville Figgis, 'The Great Leviathan' in Paul Q Hirst (ed), *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (Routledge 1989) 111, 121.

[285] Milbank 'Complex Space' (n 90).

each of these parts, while not subordinated to the whole in the form of a central sovereign, is nevertheless understood as participating in an harmonious order. On this account, religious liberty as an institutional manifestation of the commitment to the flourishing of new bodies appealing to, directly or analogously, a life of charity, is deepened beyond the borders of 'church' and 'state'.

In this section, I unpack this vision further. Within the social pluralist tradition we find a challenge to the construal of political authority as centred upon sovereign will. The abiding concern is with recovering and promoting an understanding of the group as 'real', that is, as 'pre-given' outside of any authorisation from state authority. Exploring what underpins the claimed reality of the group, and its relationship to the life of a 'society' (commonwealth, *res publica*, or 'people') as such, raises Milbank's claim that this vision is ultimately religious in outlook.[286]

The social pluralist writers were fundamentally anti-statist. Developing a similar interpretation to Taylor,[287] they argued that groups – for example churches, trade unions, guilds, cooperatives, universities – faced a precarious existence under the sovereignty of the state. Maitland, for example, argued that the movement towards understanding the state and individual as the only 'natural' entities' witnessed a stripping away of the 'fiction' of the group, evident in Europe through the taking of ecclesiastical property.[288] Harold Laski, writing within the same tradition, argued that there was a continual theme from Bodin through to modern notions of parliamentary sovereignty: the assertion of the state's

[286] ibid 280.

[287] See above n 94 and accompanying text.

[288] Maitland (n 283) 229-30.

supremacy as embodying the (apparently) universal interests of individuals.[289] The pluralists consequently argued that, as a legal fiction only granted personality by the state, corporations like the Church faced pressure not only from the state, representing the will of individuals, but also from individuals themselves. Both Maitland and Figgis were, for example, troubled by the House of Lord's decision in *Free Church of Scotland v Overtoun*.[290] There the Lords decided that deference to the church polity, its decision to join with the United Presbyterian Church, was subject to the claim of dissenters to be representing the intentions of the founders of the church. The controversy's end result was statutory intervention seeking an equitable distribution amongst the parties.[291] Maitland lamented how a law-suit from individuals could 'dissolve [the group] into its constituent atoms.'[292]

For the pluralists, the modern conception of sovereignty also produced undesirable democratic consequences. In an argument with contemporary echoes, Laski contended individuals are passively removed from the workings of power when politics concerns the supremacy of the centralised state.[293] What is needed, he argued, is 'the multiplication of centres of authority'.[294] Amongst other things, Laski considered that this would lift up citizens to 'the capacity to rule not less than to be ruled in turn.'[295] But, for social pluralists, the failure to recognise groups as 'real' and exercising their own authority was a failure to

[289] Harold Laski, 'The Pluralistic State' in Paul Q Hirst (ed), *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (Routledge 1989) 183,185.

[290] *Overtoun* (n 13). See Maitland (n 283) 237 and Paul Q Hirst, 'Introduction' in Paul Q Hirst (ed), *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (Routledge 1989) 1, 18-19.

[291] See further Rivers, *Law of Organized Religions* (n 1) 98-99.

[292] Maitland (n 283) 232.

[293] Laski (n 289) 192.

[294] ibid

[295] ibid 188. See also Figgis, 'The Great Leviathan' (n 284) 118.

comprehend political reality. Rowan Williams reflected this in his shari'a law lecture: 'The danger is in acting as if the authority that managed the abstract level of equal citizenship represented a sovereign order, which then allowed other levels to exist. But if the reality of society is plural … this is a damagingly inadequate account of common life'.[296] In statements such as this, Williams had Figgis particularly in mind.[297] Figgis characterised as unreal a vision of society as 'a sand-heap of individuals, all equal and undifferentiated unrelated except to the state'.[298] Rather, he considered social reality to be 'an ascending hierarchy of groups, family, school, town, country, union, church … .'[299] Such groups, he argued, have a 'real life'.[300]

What does it mean for the group to have a 'real life'? Vickers, for example, is sceptical of the claim that the group's life could amount to more than its collective individual interests.[301] She argues that such a claim would mean there is a group right 'even if no individuals actually held the beliefs being collectively represented.'[302] But this appears to characterise the 'real life' claim as casting the group as another kind of 'individual', existing as an agent independent of persons. The social pluralist argument does claim that the group is more than the sum of its parts, but this is in no sense abstracted from persons. Rather, the

[296] Williams, 'Civil and Religious Law in England' (n 40) 271.

[297] See, e.g., Williams, *Faith in the Public Square* (n 220) 32, 50-51.

[298] Figgis, 'The Great Leviathan' (n 284) 124.

[299] ibid

[300] ibid

[301] See above n 51 and accompanying text.

[302] Vickers, 'Twin Approaches to Secularism' (n 51) 201.

focus is on *exchange* between persons, creating, in Pope Benedict's phrase, 'networks of charity'.[303] This transcends individuals but is not removed from them.

The pluralists echoed this, referring to the personality of the group in terms of 'purpose'. Maitland quoted from Dicey, arguing, 'When a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but the very nature of things, differs from the individuals of whom it is constituted.'[304] Laski considered we 'assume' the reality of groups, acting upon the assumption that they exercise a 'will' for 'the singleness of their purpose'.[305] And Figgis referred to a 'unity of direction', comparing groups and associations to public bodies exercising forms of government.[306]

They were less concerned with detailing the metaphysical import of their claim – what underpins the 'reality' of the group, such that we can say it holds a 'purpose' – than with the law recognising what they took to be a social reality.[307] But I suggest this arguably raises a tension in their work, one which points towards a more theological vision. At times, they come across as anarchic – concerned primarily for the independence of a group. Nevertheless, although this was coupled with a critique of sovereignty, there remained a

[303] *Caritas in Veritate* (n 46) [7].

[304] Maitland (n 283) 14-15 quoting AV Dicey, 'The Combination Laws as Illustrating the Relation between Law and Opinion in England during the Nineteenth Century' (1904) 17 Harv L Rev 511, 513.

[305] Laski (n 289) 179.

[306] Figgis, 'The Great Leviathan' (n 284) 117.

[307] See Hirst (n 290) 22.

concern for order.[308] This could be framed as a question – how do independent (potentially 'anarchic') groups relate to the whole?

The pluralist resolution of this question arguably implicitly points to a theological account. Figgis considered subjecting the group to the will of the sovereign individual or state undermined its 'permanent end'.[309] He argued that if the group is understood as a collection of individuals, then it is difficult to conceive of it as appealing to a supernatural life that may transcend individual interests and pose a 'standard of morals different from those of the state'.[310] In itself, this points towards a place of judgement, ordering the life of groups and the state, that is beyond 'politics'. But, more generally, behind the pluralist's writing was an attempted sociological translation of Pauline terms. Through Maitland's translations, Otto van Gierke's work was influential. Gierke, a German historian, drew from the political thought of the Middle Ages to argue the group was a living entity, characterised by an 'organic ordering of parts' and directed towards a 'supra-individual unity of life'.[311]

Arguably underlying the pluralist vision then was Christendom's 'corporation of corporations'.[312] Within Christendom, the proliferation of guilds, hospitals, monastic houses, clergy and laity courts, and universities was understood as arising organically from the social nature of life itself. These different corporations were understood to have an independent existence for the ends of religious and charitable purposes, expressed differently. In theory,

---

[308] See ibid 17 ('Figgis never denied the need for a public power to make and enforce law, as Cole and Laski sometimes seem to do.')

[309] Figgis, 'The Great Leviathan' (n 284) 114.

[310] ibid 116. See also Hirst (n 290) 22.

[311] See George Heiman, *Otto Gierke, Associations and the Law: The Classical and Early Christian Stages* (University of Toronto Press 1977) 7, 9.

[312] O'Donovan and Lockwood O'Donovan (n 79) 235.

this was not a rival system of jurisdictions to be settled by a single sovereign.[313] Rather, temporal and papal authority existed for the purpose of coordinating the different groups in light of the common good of the universal society.[314] And as discussed in Chapter Three, this form of organic pluralism was problematically overlain with a growing discourse of absolutist papal and royal power.[315]

What the Christendom vision points to then is associational life as arising organically through gift exchange, manifesting a life of charity.[316] While such associations are independent – new contexts for charity – there remains a common life. Associations are also, in Pauline terms, 'parts' exercising a role for the common good.[317] Milbank discusses households, educational institutions, professions and guilds, and cooperatives as exercising a diffuse sovereignty, but also within a (sometimes dimly perceived) harmony.[318] For example, he proposes that professional guilds develop trade and produce creatively as 'primarily a gift to the community which will relate to community values in crucially important ways.'[319]

Milbank labels this mediation – between independence and a common life – 'complex space'. He characterises social life as a 'network' of 'overlapping jurisdictions' that are

---

[313] See Milbank, 'Shari'a' (n 92) 141.

[314] ibid

[315] See Chapter Three, Part I (a).

[316] See Milbank, 'Shari'a' (n 92) 155-56. Milbank offers a complex reflection on how gifts establish sociality. In short, he points to the role of delay and asymmetry in gift-giving. We trust in return gifts (delay), which are always, he argues, in excess of and different from our own gift (asymmetry).

[317] See above n 271 and accompanying text.

[318] He describes households as an 'in principle self-sufficient political society', gathered in 'association for mutual benefit'. Milbank, 'Complex Space' (n 90) 278. Education is characterised as the hierarchical transmission of a tradition, raising the student up to a life ultimately of *theoria*, the contemplation of the eternal in dynamically new ways. Milbank, 'Politics: Socialism by Grace' (n 280) 162, 182.

[319] ibid 185.

independent of, but to be coordinated by, government authority.[320] Milbank analogises this space with the gothic cathedral: 'it is a building which can be endlessly added to, either extensively through new additions, or intensively though the filling in of detail.'[321] This extends to different persons. Milbank argues that the person and the group are each 'wholes' expressing unique gifts.[322] As unique, they can always cause an 'innovation' 'without thereby surrendering the quest for harmonic coherence'.[323]

This is a distinctly religious vision of social life. Ecclesiology is taken to be social theory, ramifying outwards as networks of charity. But also, more generally, the notion of a 'people', 'communion', a 'community of communities', or 'parts' relating to a 'whole', entails, Milbank argues, a form of trust. Milbank writes of the hope of distilling 'order out of an irreducible diversity' and finding 'a measure between diverse things'.[324] But to contend that our differences, of unique persons, gifts, and roles, are positioned within and directed towards a harmonious order is arguably to point to a transcendent, unifying purpose, end, or identity.[325] In Christian, Augustinian terms, difference is understood as the unique expressions of the unchanging Good of the Triune God.[326]

---

[320] Milbank 'Complex Space' (n 90) 276.

[321] ibid 276.

[322] ibid 277.

[323] ibid. Arguably, this description is similar to Rivers' characterisation of the church or religious association as a 'complex network of persons' or 'self-governing polities rather than homogenous organizations'. Rivers, *Law of Organized Religions* (n 1) 88. Milbank would agree, but he takes this network to be the aimed for shape of society itself. Once again, ecclesiology is social theory.

[324] Milbank, 'Complex Space' (n 90) 280.

[325] ibid 280 and Milbank, 'Shari'a' (n 92) 139, 143.

[326] See Deede Johnson (n 47) 195-96 and O'Donovan, 'The Language of Rights' (n 187) 202.

How can we know this? Fundamentally, Milbank argues it depends on trusting we are lured towards this transcendental reality of charity. He describes a 'romantic' longing, possible only because God himself has placed this upon the person.[327] And he argues this can only be understood through the mediation of a tradition. Only by reciting 'particular cases, particular biographies' of ecclesial living can we begin to discern authentic enactments of charity.[328] There is, accordingly, no foundationalist claim here, no appeal to a universal 'reason' for the argument in favour of the life of charity. But this does not mean the RO vision is without recourse to reason. Milbank writes, 'from the point of view of my ontology, the "choice" for peaceful analogy and the Augustinian metanarrative is not really an ungrounded decision, but a "seeing" by a truly-desiring reason of the truly desirable.'[329] He characterises the RO narrative as recovering a bias for reason ('which *might* be just an accident of our animality').[330] This is, he considers, a tendency towards searching for meaning, 'indeed, a final reason for things, a reason for being as such'.[331] Such a search is shaped by desire, for beauty and hope – the beauty of a harmonious vision and the hope of peace – which, Milbank argues, are 'moods' of reason.[332]

---

[327] Milbank discusses this in his work-in-progress, 'On Anglican Extremism: The Theopolitical Legacy of Hooker' (2011) (on file with the author). This 'longing' was expressed by both Augustine (*Confessions* (Henry Chadwick tr, OUP 2008) Book I, 4) and Aquinas (ST I-II.1.5). Milbank further argues this reflects the 'Meno Problematic': one must already have been gifted some knowledge of the direction of inquiry in order for a theoretical project even to begin.

[328] John Milbank, 'Enclaves, or Where is the Church?' in *The Future of Love: Essays in Political Theology* (SCM Press 2009) 133, 139.

[329] Milbank, *TST* (n 162) xvi.

[330] ibid xvii.

[331] ibid

[332] Milbank, 'On Theological Transgression: The Theological Virtues' in *The Future of Love: Essays in Political Theology* (SCM Press 2009) 145, 150.

V Conclusion

In this chapter, I have discussed the RO vision of political and social life. Rather, than a *mythos* of agonistic wills, self-love, and ego, the RO vision poses a *mythos* based on the hope of unity-in-difference, peace as the continual enactment of charity. Importantly, this is beyond static entities, like 'church' and 'state'.[333] Rather, the RO vision points to complex space, a social pluralism in which the life of Church provides the logic and example for social living more generally. This runs counter to visions of religious liberty based on a more agnostic sense of clashing associational interests limiting state power. In the RO vision, religious liberty supports both judgement against 'politics' and transformation of society itself. Undoubtedly, this is a form of hope and subject to the fallibility of persons.[334] But it is this vision or quest, and its partial success in institutional and group settings, that on the RO account 'religious liberty' should be supporting. In Chapter Six, I continue to explore this vision, looking at three possible points of tension with current religious liberty discourse.

[333] Milbank, 'Complex Space' (n 90) 277, 288.

[334] See Milbank, 'Politics: Socialism by Grace' (n 280) 186 and Ward, *Politics* (n 150) 166-77.

6

Pluralism

The Radical Orthodoxy account developed in this thesis offers a comprehensive social and political vision. It does not eliminate secular government, understood as a provisional power restraining conflict. Such restraint is, however, understood wholly within theological and ecclesiological terms. It is exercised to ensure the space for a new life of charity to flourish. It maintains, indeed it insists on, an Augustinian two cities. But there is, also within the Augustinian sense, an expectation that the new life of charity, seeking the city of God, should be instantiated everywhere. RO writers thus emphasise that secular (temporal, provisional) government must now exercise mercy and forgiveness as well as judgment.[1] And, more generally, they contend that secular government, in recognising the new life of charity, is construed as a coordinating authority.[2] Religious liberty, within this social and political vision, is the institutional commitment to the flourishing of the life of charity, expressed paradigmatically in the church and instantiated analogously elsewhere.

Manifestly, this account draws from the language and shape of 'Church'. Seeking the divine in community with others is understood as encouraging more generally a life of charity in associational settings that have authority independent of state sanctioning. For RO and related writers, this continues the West's tradition of graded levels of loyalty, outside of

[1] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (2nd edn, Blackwell Publishing 2006) 428-29 (*TST*).

[2] See, e.g., John Milbank, 'Shari'a and the True Basis of Group Rights: Islam, the West, and Liberalism' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 135, 141.

which religious liberty begins to dissolve into a general category of negative liberty, equal concern and respect, or diffuse individual autonomy. The positing of a 'thick' tradition as the logic of social and political life, however, raises objections from the vantage point of much of contemporary religious liberty discourse. The European Court of Human Rights (ECtHR) has repeatedly stated that the state is 'the neutral and impartial organiser of various religions, faiths and beliefs', meaning the state cannot 'assess the legitimacy of religious beliefs'.[3] And in its foundational Article 9 case, *Kokkinakis*, the Court framed religious liberty as central to 'pluralism indissociable from a democratic society'.[4] Within these statements, we find a commitment to two concepts common within religious liberty discourse – pluralism and neutrality. The potential difference between this commitment and the RO-based account raises two questions. First, how does the RO account, focusing on persons in association, with a clear interest in group authority, treat the individual claimant? Second, how does the account comprehend the manifest plurality of religious traditions within society? These may not be the only questions raised by an RO-infused account of religious liberty, but they go to the heart of two key concepts often appealed to by commentators and courts. I treat each question – the individual's claim, and a pluralism of traditions – in turn. Following this, I examine the apparent 'conflict' between religious liberty and sexual orientation discrimination through the lens of the Catholic adoption agencies controversy. Here I develop Chapter Five's arguments of social pluralism and complex space.

[3] See, e.g., *Şahin v Turkey* (2007) 44 EHRR 5 (Grand Chamber) [107].

[4] *Kokkinakis v Greece* (1994) 17 EHRR 397 [31].

I The Individual Claimant

I have emphasised that an RO-based account of religious liberty focuses on a commitment to the flourishing of independent bodies, groups which appeal to and participate in a life of charity beyond 'politics'. Notably, the Pauline account of the group construed the person as a 'gift', exercising his or her talents for the common good. Individuals do not cohere to one single whole. Rather, in a social pluralist vein, persons cohere in different, multiple bodies, themselves forming 'parts' of the whole. And it is this account, the RO writers contend, that provides the hoped-for shape of sociality as such. These are strong communitarian themes and they raise the following question: how does this account treat the individual claimant? When, for example, Lydia Playfoot appears before the court contending that her school's uniform policy conflicts with her Christian-inspired claim to wearing a 'purity ring', is it relevant that this is not 'required … by any branch within Christianity'?[5] When Shabina Begum claims she must wear a jilbab to school, is it relevant that leaders in the local Muslim community disagreed?[6] The courts, as we will see, are not entirely clear when answering these questions. In principle, they contend that what matters is the individual's sincere claim. In practice, however, the matter is more complicated. Here I first address why some have contended that focus should rest on the individual's construal of belief alone. I then consider, within the communitarian *and* personalist threads of the RO account, how the individual claimant should be treated.

[5] *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698, [2007] HRLR 34 (Admin) [30].

[6] *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 (*Begum*).

(a) 'Hands-Off' Individual Construal of Belief

As discussed in Chapter Four, courts have focused on the sincerity of the individual when deciding whether a religious liberty claim exists and what is at stake when faced with a competing state interest.[7] In *Amselem*, the majority of the Supreme Court of Canada considered that claimants 'should not need to prove the objective validity of their beliefs' as 'recognized as valid by other members of the same religion'.[8] Such an inquiry would not, the majority continued, be appropriate for a court.[9] This approach has been followed in the UK.[10] Fundamentally, as discussed in Chapter Four, the court adopts the view that religion is a personal matter concerning self-definition.

The court consequently emphasises not gainsaying the individual's articulated beliefs. Several claims are apparent: first, that the court cannot say what religious truth is (I discuss this further below);[11] second, that the court itself cannot say what a particular religion requires; and third, that the court cannot use the beliefs of a community as a basis for, most likely, rejecting an individual's claim.[12] My focus at present is on the third claim, but it is worth noting why the second claim has become a point of interest.

---

[7] See Chapter Four, n 133 and accompanying text.

[8] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [43] (Iacobucci J).

[9] ibid

[10] *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [22] (Lord Nicholls of Birkenhead).

[11] See below n 92 and accompanying text.

[12] Appealing to the existence of a belief in the wider religious community to support the *evidential* task of proving an individual holds a particular belief (i.e. is sincere) is uncontroversial. See Ian Leigh, 'Recent Developments in Religious Liberty' (2009) 11 Ecc LJ 65, 70.

The second claim – that the court should not come to its own assessment of what a religion requires – has been raised in recent religious liberty claims involving Christians. Vickers has noted the courts appear to be more willing to determine what Christianity requires, against the claimant's articulation.[13] Buxton LJ's judgment in the Court of Appeal's *Williamson* decision is a striking example.[14] He concluded, in his own opinion, that the practice of corporal punishment, a manifestation of religious belief in the eyes of the various private Christian school claimants, did not in fact follow from the scriptural support cited by the claimants.[15] Certainly this conclusion would have surprised the claimants. And the manner of reasoning would have, I suggest, surprised even Christian groups that disagreed with the practice of corporal punishment. Why? While disagreeing, such groups could nevertheless understand that the issue of scriptural interpretation is for the church, in her institutional settings and relations. The judge might, in this respect, consider how the potential curtailing will affect the wider group or groups, going beyond the articulation of the claimants before him or her, but this is different from the judge injecting his or her own understanding of what, typically, Christian doctrine requires. However, courts and commentators have also argued that looking beyond the claimant to consider how co-religionists or a wider tradition understand the practice in question falls foul of a more general claim of incompetency: the court should only inquire into the claimant's belief; to do otherwise would illegitimately offer support to one construal of self-definition over another.

Courts, several commentators have argued, should remain 'hands-off' as between competing doctrinal articulations, to borrow American church and state scholar Kent

[13] Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc LJ 280, 296.

[14] *R (Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, [2003] QB 1300.

[15] ibid [23].

Greenawalt's phrase.[16] To appeal to the views of the community would, Greenawalt argues, entail the state promoting 'the exercise of religion of that side at the expense of the exercise of religion of the other side.'[17] In contrast, Greenawalt contends that focusing on the individual's construal of belief in cases concerning a sought after accommodation against a general law does not undermine any other construal.[18] To take a well-known US case, if one Jehovah's Witness claims that he or she cannot work on the production of armaments this does not affect the continued capacity of another Jehovah's Witness to argue that this is permissible.[19] The law, on such an understanding, merely neutrally facilitates an environment in which different conceptions of, for example, 'Christian' or 'Jew' can be developed by individuals or individuals collectively which then, independent of the law, 'compete' or cohere in their conceptions.[20]

What does it mean under this hands-off argument to designate oneself Christian or Jew? Because the individual is the determiner of belief, the designation can be largely a matter of self-description. Indeed, the designation 'Jewish' in *Amselem*, for example, is rendered largely arbitrary. What arises is the potential of multiple 'Christianities', 'Judaisms' and so on, according to each individual's authentic search or quest. This is Edge's conclusion, with the explicit adoption of these and 'Catholicisms' as descriptors.[21]

---

[16] Kent Greenawalt, 'Hands Off! Civil Court Involvement in Conflicts over Religious Property' (1998) 98 Colum L Rev 1843, expanded to individual claims of religious liberty as such in Kent Greenawalt, 'Hands Off: When and About What' (2009) 84 NTDLR 913. See also Ian Leigh, 'Recent Developments' (n 12) 70 (arguing how widely a belief is held should not matter); and Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74 MLR 287, 292 (arguing that religious liberty should focus on the individual construal of belief). See also the discussion of Peter Edge, below n 21 and accompanying text.

[17] Greenawalt, 'Hands Off: When and About What' (n 16) 914.

[18] ibid

[19] *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981).

[20] Greenawalt 'Hands Off: When and About What' (n 16) 914.

Edge objects to focusing on organisational structures in religious liberty adjudication.[22] First, he argues that the court should not adopt such a focus because this would favour one branch of the group over another. He gives the example of the 'True Catholic Church', a minor conclavist group operating in Springdale USA, objecting to Vatican II and claiming their own pope.[23] Implicitly, Edge considers that the court illegitimately favours the Roman Catholic Church over this group if it 'defers' to the former's authority. Second, he argues, not all religions contain such organisational structures. Rastafarians are an often cited example. Courts and governmental authorities have found it difficult to determine how and when cannabis is used within Rastafarianism, noting its absence of internal supervision structures.[24] From these concerns, Edge argues that focusing on organisational structures – or the views of the group – favours this form of religion over the religious individual, dissidents, or those with 'fuzzy fidelity'.[25] The court should, he concludes, 'focus on the individual in order to determine the content of their beliefs.'[26]

---

[21] Peter W Edge, 'Determining Religion in English Courts' (2012) 2 Ox J Law Religion 402, 406.

[22] ibid 408.

[23] ibid 409.

[24] See, notably, *Prince v President, Cape Law Society* 2002 (3) BCLR 231, [101] (CC) (Chaskalson CJ, Ackermann and Kriegler JJ) (focusing on Rastafarianism's lack of internal structure as problematic for any regulation of cannabis usage).

[25] Edge, 'Determining Religion' (n 21) 409.

[26] ibid 419. Edge has also argued that religious freedom is founded upon the modern legal order's renunciation of 'the capacity to adjudicate statements about metaphysical reality'. Peter Edge, *Religion and Law: An Introduction* (Ashgate 2006) 32. This is debatable. First, states do not disclaim such competency; in some instances, as with Islam, they seek to encourage particular moderate doctrinal directions. See Luke Bretherton, *Christianity and Contemporary Politics* (Wiley-Blackwell 2010) 15, 35. Second, Edge's argument depends upon accepting that curtailing religious manifestation for reasons other than the truth of the 'statement' (for example, on the basis of 'harm') is not a claim as to the truth of the religious belief and that adjudication which turns a neutral blind eye to the transcendent is not a denial of the transcendent. Finally, if the denial of metaphysical competency was a fundamental principle of the legal order then it is not entirely clear why this results in religious liberty rather than the complete subjection of all claims to a single 'non-metaphysical' law.

Describing these arguments as promoting 'hands-off' neutrality is, however, problematic. The court in a case like *Amselem* may not explicitly base its decision on which conception of *Judaism* is true, but this is because the court has already adopted a conception of 'true religion'. As discussed in Chapter Four, this is a view of 'normal' religion as entailing a primacy of individual belief and self-definition. Such a view, stamped with the court's imprimatur, participates in and even promotes a culture of authenticity. Greenawalt and others contend that the court avoids deciding in favour of one construal of religion by accepting the individual's construal of Judaism, Christianity, Islam, and so on. But there is a choice, and it is in how we conceive of religion in the first place. The court favours deference to the individual. Such a view is more consistent with certain religious or spiritual expressions over others. Larry Alexander, for example, lists 'atheists, religious skeptics, nonfundamentalist Protestants, reform Jews, and adherents of certain mystical religions.'[27] In other words, more individualistic religions (potentially consistent with the 'spiritualising of human subjectivity' discussed in Chapters Three and Four).

The contrast is a thicker understanding of persons cohering in groups, which, as sites for the potential exchange of charity, are also sites of authority. The individualised construal of belief potentially undermines, for example, the Christian understanding of church as 'one body', universal. Arguably, even through various denominational forms, there remains a sense of, admittedly strived for, Christian unity.[28] Oliver O'Donovan, for example, writes of Anglicanism as 'simply a specific modulation of being a Christian', and discusses how schism is always a judgement of God based on the universal church's failure to receive and

[27] Larry Alexander, 'Liberalism, Religion, and the Unity of Epistemology' (1993) 30 San Diego L Rev 763, 790 n 60.

[28] '[O]ur communion', wrote John the Evangelist, 'is with the Father and with his Son Jesus Christ' (1 John 1:3).

sustain the gift of unity.[29] From this perspective, difference occurs within, and is negotiated, determined, or held in tension, by the one body (ecumenical though it may be) – that is, at least, the hope. James K Smith, for example, refers to 'the particularities of dogmatic confession' and 'institutional organization', the rootedness of a denomination, as the touchstone for both the affirmation of Christian practice and doctrine and the beginning of conversation within the wider Christian body.[30]

This thicker understanding is better understood as a 'tradition', the 'historically extended, socially embodied argument' over particular practices within a community.[31] O'Donovan writes of a tradition as both an action and a possession.[32] A person is enabled to engage in common action through the reception of practices and communicative patterns, recognised as good by a community.[33] Authority within this understanding is not housed in individuals, who, while potentially innovating a tradition, are not the locus of definition. Recall Hauerwas' argument, for example, that the 'one body' of Christian life entails the development of practices 'through which we learn that our bodies are not "ours."'[34] In large part, this means, within this community, subjecting oneself to the authority of others. MacIntyre refers to the tradition's 'masters' or 'scholar-saints' – those tasked with pedagogy on account of their deep imbibing of the tradition and their ability to innovate it.[35]

---

[29] Oliver O'Donovan, *A Conversation Waiting to Begin: The Churches and the Gay Controversy* (SCM Press 2009) 23, 34.

[30] James K A Smith, *Who's Afraid of Postmodernism?: Taking Derrida, Lyotard, and Foucault to Church* (Baker Academic 2006) 122.

[31] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (3rd edn, Duckworth 2007) 187-88.

[32] Oliver O'Donovan, *Common Objects of Love: Moral Reflection and the Shaping of Community* (William B Eerdmans 2002) 32-33.

[33] ibid

[34] Stanley Hauerwas, *In Good Company: The Church as Polis* (University of Notre Dame Press 1995) 24. See Chapter Two, Part III (a).

From this perspective, to adopt a conception of religion as the individual's authentic construal of belief is potentially a form of 'memory loss'.[36] Tracey Rowland, in her contribution to the RO *oeuvre,* notes the role of memory in Christianity.[37] A tradition is passed on through communal practices – feasts, Eucharistic practice, the sharing of the Lord's Prayer, for example. In contrast, she labels the modern quest for autonomy – framed in terms of self-realisation or the Romantic sense of authenticity – as anti-historical.[38] Favouring this quest is consequently akin to, in Smith's terms, a 'rejection of time, history, and tradition.'[39] Such 'memory loss' goes hand-in-hand with schism – the proliferation of claims to being the 'true' faith, all the way through to individual construal.

If the court is therefore favouring a particular construal of religion and spirituality, we might expect that this can re-shape the religious group. Legal religious liberty discourse, as this thesis has discussed, parallels shifts in the conceptualisation and practice of religion more widely. But the adoption or development of the contemporary understanding of religion in a legal setting arguably has a central role in promoting that understanding. More generally, if the practice of constitutional politics embeds an orientation towards equal concern and respect – a focus on the self and its pursuit of innumerable ends – this arguably structures 'what we believe and how we come to value certain acts.'[40] The fullness of how these

---

[35] See Tracey Rowland, *Culture and the Thomist Tradition: After Vatican II* (Routledge 2003) 123-24.

[36] See James K A Smith (n 30) 130-35.

[37] Rowland (n 35) 78.

[38] ibid 78, 124-25.

[39] James K A Smith (n 30) 130.

[40] Graham Ward, 'Narrative and Ethics: The Structures of Believing and the Practices of Hope' (2006) 20 Literature and Theology 438, 439. The contention here has Augustinian overtones: institutions are orientated towards an end, a pursuit of an ultimate love.

dynamics are manifested entails a complex story of the interaction of rights discourses and religious communities. This thesis has contributed to this story by looking at RO and related writing, and comparable reflections on religious liberty from within Christian discourse. But further work could look at the reception of legal rights discourse *within* religious communities. Mary Ann Glendon contends that there has been a penetration of 'rights-talk' into society, diminishing our commitment to intermediary associations through an 'excessive homage to individual independence and self-sufficiency'.[41] Michael Perry notes that rights discourse has become the moral *lingua franca*.[42] Alasdair MacIntyre contended some time ago that lawyers have become the clergy-philosophers of society, dealing in a language of rights as subjective entitlements.[43] And Benjamin Berger argues that in the context of religious liberty discourse, the law 'asserts ultimate authority' and thus 'the dominance of its basic understandings'.[44] All of these writers are pointing, implicitly or explicitly, towards the law's potential to re-shape the way a community understands itself, either through a form of discursive leading or legal power.

The fuller inquiry would, consequently, entail seeing how religious communities receive human rights discourse. To give one example, Rowan Williams, commenting in the wake of the Episcopal Church's ordination of clergy living in a same-sex union, warned against the uncritical adoption of 'human rights'.[45] He considered that beyond such a discourse, the church (as the Anglican Communion) must engage in 'painstaking biblical exegesis', reflecting a tradition of some two thousand years which also includes the

[41] Mary Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991) 14.

[42] Michael Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (CUP 2007) 4.

[43] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth 1988) 344.

[44] See Benjamin Berger, 'The Cultural Limits of Legal Tolerance' (2008) 21 Can J L & Juris 245, 273.

[45] Rowan Williams, 'Communion, Covenant and our Anglican Future' (*Anglican Communion*, 27 July 2009) <www.anglicancommunion.org/acns/news.cfm/2009/7/28/ACNS4641> accessed 14 February 2012.

'teachings of ecumenical partners'.[46] Following the inquiry – how groups are affected by the development of legal human rights discourse – down paths such as this example is beyond this thesis. I imagine that the reception is a mixture of adopting and re-casting legal human rights discourse within the language and tradition of the church. Certainly, this mixture characterises *Dignitatis Humanae*.[47] Given the discussion in this thesis, however, can something be said about how the court's development of personal autonomy or authenticity as hallmarks of religion shapes religious communities? I suggest two ways, noted in this thesis, in which a focus on the individual's construal of belief could shape a religious community.[48]

The first is the instrumental framing of the group. Edge is clearest in this respect, adopting the arbitrary signifier of 'Christianities'. Here a group, or a tradition, like Christianity is not itself a real entity, but rather the name for a collection of individuals or else a series of potential singularities each expressing their own version or self-labelling. The group on this account, I have suggested, becomes the vehicle for individual interests. Indeed, Greenawalt's hands-off model has a strong religious marketplace motif.[49] The group acts as a supplier of religion in a competitive marketplace, with individuals adopting this brand or else developing their own. Potentially, this means the group, as a vehicle for individual belief narratives, is always subject to the disruption of individual difference. The individual can, on this account, appeal to the court for validation of his or her construal of belief, against the group's self-understanding. In practice, this is not always successful. The Strasbourg

[46] ibid

[47] See Chapter Two, Part II (b).

[48] See also below n 118 and accompanying text discussing *JFS*, where the Court's decision shaped the community's practice.

[49] Greenawalt, 'Hands Off: When and about What' (n 16) 914.

institutions have, for example, recognised that priests are subject to the decisions of relevant church authorities.[50] But this construal of the group does appear to be part of what is at issue in the context of apparently clashing rights. In Chapter Five, I discussed the case of *Schüth*, in which Mr Schüth's claim of self-determination was also cast as a claim to practice Catholicism in his own way.[51]

The second way that focusing on individual construal of belief can re-shape the understanding of the group is through the elevation in importance of certain practices. Berger argues that once a religious practice becomes the subject of legal contest, it is 'suddenly embraced as uniquely definitional of a given religious culture' because it comes to represent a wider negotiation with the legal culture – a site of resistance or accommodation.[52] As his reference to 'culture' intimates, this elevation of a particular practice can occur in terms of a group asserting a religious practice. Issues of sexuality, for example, have become central for religious communities arguably in light of equality law. But this negotiation can become more fractured as individual construal of belief is given central importance. To borrow from Milbank, this focus on individual construal could be described as the rejection of doctrinal and communal commitments in favour of an 'insistence on adherence to inessentials or to eccentric distortions of a tradition.'[53] The case of Lydia Playfoot is a good illustration of this dynamic.[54]

---

[50] *Knudsen v Norway* (1985) 8 EHRR 45 (Commission Decision).

[51] See *Schüth v Germany* (2011) 52 EHRR 32 and Chapter Five, Part III.

[52] Berger (n 44) 264-65.

[53] John Milbank, 'The Grandeur of Reason and the Perversity of Rationalism: Radical Orthodoxy's First Decade' in John Milbank and Simon Oliver (eds), *The Radical Orthodoxy Reader* (Routledge 2009) 367, 395.

[54] *Playfoot* (n 5).

Miss Playfoot, a high school pupil, asserted a right to wear at school 'the Silver Ring Thing' purity ring. She claimed it was a sincere manifestation of Christian belief in sexual abstinence prior to marriage. Her father, a minister, was central to the importing of the purity ring programme from the United States.[55] The school permitted her to attach the ring to her bag, but did not make an exception to its jewellery policy.[56] Miss Playfoot's claim concerned her own sincere articulation of Christianity, but she argued it also concerned 'upholding the religious liberty of Christian people in the United Kingdom', comparing it, for example, to headscarves for Muslim women.[57]

Litigation then precipitates, I suggest, something of a curious dynamic. Either it becomes increasingly difficult to identify, for example, 'Christianity' as a reality because all that matters is individual sincerity or the individual's sincere construal is adopted by at least parts of the group as uniquely definitional (itself a potential distortion). So in respect of the latter, for example, Miss Playfoot's case became something of a *cause célèbre* within the evangelical community.[58] A similar dynamic occurred in cases brought by Christians challenging prohibitions on wearing crosses at work. There, most recently before the ECtHR, several intervening Bishops from the Church of England argued that the cross is a 'universally-recognised Christian symbol' *and* that whether it is a manifestation of religious belief or not is a subjective matter not dependent on communal practice or authority.[59] This establishes a tension. On the one hand, there is an appeal to a notion of the group or tradition,

---

[55] '"Chastity Ring" Girl Loses Case' *BBC* (London, 16 July 2007) <http://news.bbc.co.uk/2/hi/6900512.stm> accessed 29 December 2012.

[56] *Playfoot* (n 5) [10].

[57] Lydia Playfoot, 'Response' (*Lydia Playfoot: Silver Ring Thing Internship Diary*, 16 July 2007) <www.lydiaplayfoot.blogspot.co.nz/> accessed 29 December 2012.

[58] See Christian Concern and the Christian Legal Centre, '*Not Ashamed' Campaign* <www.notashamed.org.uk/stories.php> (accessed 25 January 2013).

[59] *Eweida v United Kingdom* App no 48420/10 (ECtHR, 15 January 2013) [76].

but, on the other hand, senior members of the group's hierarchy accept that the individual's construal of religious manifestation is paramount. In some sense, this is arguably removing the group – its hierarchy, for example – from a position of authority.

(b) The Individual within a Communal Frame

How then would the individual claimant be treated within the more communitarian frames developed in this thesis? Following debates in religious liberty jurisprudence, I suggest two points: first, emphasising the centrality of the person, in respect of coercion in particular; and second, relating the individual conscience to a wider group.

RO writers draw in part from and contribute to personalist writing.[60] This stands firmly against religious coercion. As noted in Chapter Four, the ECtHR gives particular pride of place to the importance of non-coercion in matters of religion or belief.[61] While the contours of non-coercion are debatable, the personalist understanding in no way dissents from its importance – indeed, it sees it as central. In *The Person and the Common Good*, Maritain aligned the dignity of the person with an eternal vocation: each person has unparalleled dignity because each person is ordained directly to God as his or her absolute end.[62] This entailed, he argued, participation in the divine life.[63] But being drawn to participation in this life, Maritain continued, is a necessarily subjective act.[64] It is, in other words, in the nature of truth that God desires each individual to assent to truth personally, to

[60] See Chapter Five, n 183 and accompanying text.

[61] See Chapter Four, n 8 and accompanying text.

[62] See Jacques Maritain, *The Person and the Common Good* (Geoffrey Bles 1948) 12, 72.

[63] ibid 30.

[64] Jacques Maritain, *Man and State* (Chicago University Press 1951) 161-62.

offer him or herself as a free gift back to God. Milbank continues this line of thought. He argues, 'truth requires free consent else it is not understood, and a freely consented-to partial error displays more truth than an obviously or subtly coerced, or even a mechanically habitual opinion.'[65]

But what of the individual claiming a right to religious manifestation? What of Miss Playfoot arguing her purity ring is a manifestation of Christianity, Miss Begum arguing her jilbab is a manifestation of Islam, or Ms Ladele arguing her objection to officiating over civil partnerships is a manifestation of Christianity? On the account developed in this thesis, the primary concern of religious freedom is the protection of different groups which embody a tradition with an ethos, purpose, or goal-orientation that contributes to desirable social ends (expressions of charity). How does an individual claimant fit within these frames?

The circumstances in which an individual makes a claim of religious freedom are varied. Famously, Robert Bellah coined the term 'Sheilaism'. His referent was Sheila Larsen, who claimed a belief in God but stated the goal of her religion was to 'love yourself and be gentle with yourself', including listening to your own little voice.[66] God on such a view, Bellah notes, becomes 'the self magnified'.[67] This is perhaps an extreme case, but it is continuous with the understanding of religion as the writing of personal belief narratives, a pastiche of traditional symbols, technology, and therapy. On an RO-inspired conception of religious freedom, Sheilaism, assuming it made claims to accommodation of certain

[65] John Milbank, 'The Gift of Ruling: Secularization and Political Authority' (2004) 85 New Blackfriars 212, 236-37.

[66] Robert Bellah, *Habits of the Heart: Individualism and Commitment in American Life* (University of California Press 1996) 221, 235 discussed in Rebecca R French, 'Shopping for Religion: The Change in Everyday Practice and its Importance to the Law' (2003) 51 Buff L Rev 127, 164.

[67] Bellah (n 66) 235.

practices, would not fair particularly well. There would remain a prohibition against coercion – religion is a free act of consent. But the individualistic claim to manifestation would be unlikely to carry significant weight. To quote Rowan Williams: 'to be able to assess or even prioritise the wildly varied entitlements that are currently called "rights" means developing some means of seeing how far – in a specific social context – this or that claimed entitlement reflects what is required for participation in the human 'form of life' as such'.[68] And the human form of life articulated in this thesis, focusing on civil society or corporate life, is at root relational (seeking right relationship with God and with others).

But the individual claimant may identify with a religious tradition. This may be a simple matter. Ms Ladele, the evangelical Christian registrar who objected to officiating over same-sex partnerships, was making a claim in her own right.[69] She also represented an understanding or ethic of right relationship developed, sustained, and debated by the Christian tradition more generally. However, identifying an individual with a tradition may sometimes be a more complex relationship. He or she may, for example, represent one (perhaps heavily contested) strand in a religious tradition's on-going debate or even cast him or herself as a prophetic voice, calling the tradition to its better self. Recognising such internal dynamics between an individual claim and the practices of the group is, I suggest, possible within legal practice.

Determining in advance what the court should consider is difficult, and I do not here propose a set of rules. There are dangers. McCrudden, for example, discusses scholars who view the Roman Catholic Church in monochrome terms, pointing to a limited set of sources

[68] Rowan Williams, 'Religious Faith and Human Rights' (*London School of Economics and Political Science*, 1 May 2008) <www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20080501_RowanWilliams.pdf> accessed 5 June 2009.

[69] *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955. See Chapter Four, Part II.

at the expense of complexity to reflect a pre-disposed view as to Catholicism's 'conservative' nature.[70] The court can certainly fall into this difficulty. Nevertheless, McCrudden suggests, both for scholars investigating a group's stance and for the court considering the claims of a religious group, a need to engage with the community's internal debates and point of view.[71] Failure to do so may create, as I have argued, its own imposition of religion as individual in orientation or else mischaracterise the group's understanding of authority. While McCrudden's examples concern instances of group claimants (the JFS school) or debating a group's stance (how does the 'Catholic Church' view homosexuality?), I am suggesting there is value in considering how to engage with the group's point of view even when faced with an individual claimant. A few observations are possible.

First, the court clearly can investigate the views of a religious community. Indeed, sometimes this is required. For example, the Employment Tribunal has had to determine whether prohibiting a youth leader from being in a same-sex relationship complies with Church of England doctrine, part of the test for an exemption from sexual orientation non-discrimination set out in the Equality Act 2010.[72]

Second, although religious liberty doctrine strongly points towards construing religion in terms of individual belief, recent cases have considered relevant communal dynamics when assessing whether any limitation upon religious manifestation is justified (Article 9(2)). Silber J, rejecting a school's failure to accommodate the Sikh Kara Bangle, noted as one

---

[70] Christopher McCrudden, 'Reva Siegel and the Role of Religion in Constructing the Meaning of "Human Dignity"' in Hanoch Dagan (ed), *The Role of Religion in Human Rights Discourse* (forthcoming).

[71] ibid and Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The *JFS* Case Considered' (2011) 9 ICON 200.

[72] *Reaney v Hereford Diocesan Board of Finance* Case 1602844/2006 (ET, 17 July 2007) <http://thinkinganglicans.org.uk/uploads/herefordtribunaljudgment.html> [48]-[64] (discussing the Church of England's position on same-sex orientation and relationships). See Equality Act 2010, Sch 9, Part 1, para 2(1).

important feature that the Kara 'is regarded universally by observant Sikhs as a matter of exceptional importance'.[73] Judge Supperstone QC, upholding a school's limitation on how Miss Playfoot could wear her purity ring, stated the ring was 'not required to be worn by any branch within Christianity.'[74] The House of Lords, concluding that a school could justifiably prohibit the jilbab while allowing alternative Muslim dress, in part emphasised the school's uniform policy arose out of significant consultation with the local Muslim community.[75] The High Court, concluding against Mr Ghai's Hindu-based challenge to the prohibition against open-air funeral pyres, took into account evidence from the British Hindu Council, the National Council of Hindu Priests UK, and experts.[76] Cranston J noted that demands for open-air funeral pyres were an evolving matter within the Hindu community, 'by no means universal', and still not generally favoured.[77] The court evidences in these cases attentiveness to whether and how an individual claim will relate to the wider group. Does the claim represent an idiosyncrasy, a strand of a tradition, or the accommodation of a whole group's way of life? Is this claim better pursued through other institutional avenues – the conversation internal to a group and tradition, or with other members or institutions of the local or wider community?

---

[73] *R (Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin) [5] (decided under the Race Relations Act 1976 (racial discrimination) and the Equality Act 2006 (religious discrimination)).

[74] *Playfoot* (n 5) [30].

[75] *Begum* (n 6) [34] (Lord Bingham of Cornhill). *Begum* was also decided on the 'specific situation rule'. In short, there was no interference with Miss Begum's Article 9 rights because she was free, without 'undue hardship or inconvenience' ([23]), to attend a different, more accommodating school. This rule was developed in earlier Strasbourg decisions. See, e.g., *Ahmad v United Kingdom* (1981) 4 EHRR 126 [11] (Commission Decision). The ECtHR has, in recent years, moved away from it. In *Eweida* (n 59) [83], the ECtHR abandoned the rule explicitly, holding that the presence of an alternative venue for the claimant is a factor only relevant to the proportionality analysis.

[76] *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin) [47]-[50], [52], [21]-[43]. The case was overturned on other grounds: [2010] EWCA Civ 59.

[77] *Ghai* (Admin) (n 76) [127]. One could be critical of Cranston J's conclusion – the Hindu community had accepted the desire for the practice in the UK and was open to the conversation.

Third, building on this last point, I agree with Rowan Williams that the emphasis is consequently on the 'seriously rooted matters of faith and discipline' within a religious community.[78] Williams argues that any social pluralist vision will require, at moments of conflict between the law and a religious claim, means of determining the significance of the religious practice to a community. In Article 9 terms, I suggest failing to assess the significance of the particular religious practice would create an unrealistic proportionality exercise when assessing the legitimacy of any curtailment of the practice. Wearing a cross and maintaining a Sabbath rest (to take two likely types of claim) are not equally important and so any limitation of these should not require the same strength of justification.[79] Absent this kind of approach, that is, in treating all claims as indiscriminately part of a capacious right to religious liberty, the court appears only able to categorise types of grounds for limitations. The corporate image of a firm should now not be accorded significant weight against religious manifestation.[80] In contrast, health, safety, the private life rights of others, and notions of freedom *from* the religious manifestation of the claimant are given significant weight, regardless of the claim.[81] The scales, I suggest, need to be re-weighted to reflect that the individual's claim can represent a communal interest and practice of central importance.

And this reflects a more general argument: the individualistic cast to claims is inherently weak.[82] The focus on social dynamics means certain claims are less likely to be

[78] Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 Ecc LJ 262, 267.

[79] See comparably *Alberta v Hutterian Brethren of Wilson County* [2009] 2 SCR 567 [89] (McLachlin CJ) (contrasting prayer and basic sacraments with matters falling into a sphere of personal choice).

[80] *Eweida* (ECtHR) (n 59) [94].

[81] See, respectively, ibid [98] (prohibiting nurses from wearing a cross in a hospital was a proportional limitation for health and safety reasons); ibid [105]-[106], [109] (requiring all employees to offer services (civil partnership registration and sex-based therapy) to couples regardless of sexual orientation was permissible in light of the high value placed on non-discrimination); and *Şahin* (n 3) [111] (prohibiting religious clothing permissible in order to protect others from religious pressure).

upheld, but I suggest that this kind of conversation is more likely to result in greater opportunities for religious communities to flourish. Article 9(2)'s proportionality exercise asks whether there are sufficient reasons for limiting religious manifestation. On the individualistic construal this becomes a balancing of the sincerity of the individual against, usually, a rule of general application that is, in Rivers's words, 'formulated to maximize the public interest in spite of [the burden] to the individual'.[83] What is needed then, and what this thesis has proposed, is an understanding of the claim to religious liberty as a claim to be participating in an alternative site of authority. The group, I have argued, should centrally be seen as questing for, exploring, a life of charity – love of God and of others – a truth that stands in contrast to politics. But to do so it must be accepted that it has a significant degree of autonomy (or else it could not cultivate a contrast) and that it is an authority (something temporal power should pay heed to).

II Plural Religious Traditions

Society exists with the fact of pluralism. But how we interpret and respond to this is an open issue. Rawls characterised this fact as the presence of equally reasonable comprehensive doctrines.[84] He concluded that, for moral reasons as well as civil peace, this meant different groups or citizens must give up their comprehensive doctrines when addressing each other as citizens, instead adopting 'principles of political justice' that promoted neutrality towards different conceptions of the good.[85] The RO account, consistent with other writers, rejects

---

[82] See Chapter Four, n 175 and accompanying text.

[83] Julian Rivers, *The Law of Organized Religions* (OUP 2010) 320.

[84] John Rawls, 'The Idea of Public Reason Revisited' in *The Law of Peoples* (Harvard University Press 1999), 131. See Chapter One, Part II.

this as its own conception of the good, one which promotes an account of society as primarily a relationship of wills – the individual and the sovereign. But the fact of pluralism is, nevertheless, real. Oliver O'Donovan writes, 'Truth does not permit contradiction; but society does not permit unity'.[86] On the RO vision, our aim is to realise society as disclosing and enacting a true knowledge of the created world to us (our end, purpose, and relation to creation and God). But, as O'Donovan notes, the very sense of urgency to maintain a tradition implicitly admits that there are other ways of construing reality.[87] How can we maintain the goal of intelligibly speaking of a 'people', 'communion', or 'community', in the Augustinian sense? The tradition RO proposes through which we understand these collectives – and which signals to us when an action is right – faces other traditions. How can a tradition be 'lived in confidently', but with the reality of pluralism? These are real questions. And they can point to the initial attractiveness of the Rawlsian view, which seeks to transcend religion itself. As discussed in this thesis, the ECtHR has continually emphasised that states are obliged to remain neutral between different religious groups and ideas. This, the Court has contended, ensures two things. First, neutrality ensures that public life is characterised by the recognition of 'various beliefs and religions' and 'the constant evolution of public freedoms'.[88] In other words, there is a commitment to value pluralism.[89] Second, neutrality may also ensure equal access to legal recognition. For example, the Court has emphasised that conferring legal personality on religious groups, which may give it rights of association and public law powers, must be done in a non-discriminatory manner.[90] The

---

[85] ibid 143.

[86] O'Donovan, *Common Objects* (n 32) 38.

[87] ibid

[88] *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1 (Grand Chamber) [119].

[89] See Chapter Four, Part I.

[90] See, e.g., *Religionsgemeinschaft Der Zeugen Jehovas v Austria* (2009) 48 EHRR 17 [79], [92].

Court can be understood as offering a way of dealing with pluralism, albeit one which, I have argued, is ultimately inimical to religion and a 'social' account of justice beyond the mutual protection of rights and freedoms. Is proposing a thick tradition, with explicit overtones of Christendom, simply turning a blind eye to the reality of pluralism? Does the RO account imperil recognition of multiple groups? I contend that while the RO-based account develops a different understanding of pluralism – one which eschews value pluralism – it nevertheless offers significant recognition of religious difference. Indeed, arguably it goes further in recognising the actual character of the religious group, and its place within social pluralism.

Neutrality, the ECtHR states, entails not assessing the legitimacy of religion or belief.[91] The precise scope of this duty is unclear. It could be understood in Rawlsian or Dworkinian terms as a requirement that any reasons for curtailing a religious practice be based on arguments that 'speak to everyone's perspective', thus reflecting the equal moral status of citizens.[92]

The difficulty with this form of neutrality is that it assumes we can and should transcend particular religious traditions to establish common standards based on equal concern and respect or value pluralism. This thesis has contended that our understanding of political and social space is shaped by different, tradition-constituted imaginaries. There may be *ad hoc* agreement between these different traditions, found often because of genealogical connections. But equal concern and respect and value pluralist perspectives contain their own understandings of the person – non-teleological and deontological, as Sandel discusses – and their own view of politics – the pursuit, and regulation of individual conceptions of the

[91] See, e.g., *Şahin* (n 3) [107].

[92] See Chapter One, n 65 and accompanying text discussing Denise Meyerson, *Rights Limited* (Juta & Co Ltd 1997) 17 and Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 205-06.

good.[93] This is not necessarily consistent with religious traditions; certainly not the RO account of Christianity.

More generally, this raises a question whether adjudication based on neutral standards does not always, inherently, question the legitimacy of a belief. Consider the case raised in Chapter One: a Hindu community's temple bullock slaughtered to prevent harm to others – the threat of spreading bovine tuberculosis to neighbouring livestock.[94] Here, the Hindu community claimed the bullock was sacred, carrying, like all life, a 'spark of divinity'.[95] Does its slaughter constitute an assessment of the legitimacy of this belief? Our articulation of harm, I suggest, imports a truth evaluation.[96] Put simply, for the Hindu community the bullock's slaughter incurs immeasurable harm (a 'desecration of their temple').[97] But if this were true, if the bullock was touched with the divine, to permit its slaughter would pose a much more profound question.[98]

This is not to critique appeals to principles like harm. The court must use what it calls in another case raising similar questions 'general community standards'.[99] But such standards are not neutral in the sense of not assessing the 'legitimacy' of different religious traditions, each of which offers a competing account of social and political space and the

[93] See Chapter One, Part II (b) discussing, in part, Michael Sandel, *Liberalism and the Limits of Justice* (CUP 1982) 179.

[94] See Chapter One, n 66 and accompanying text; *R (Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893.

[95] ibid [83] (Lloyd LJ).

[96] See also John Finnis, 'Religion and State: Some Main Issues and Sources' (2006) 51 Am J Juris 107, 125-26 (discussing refusing leave to enter the UK to fundamentalist Islamic clerics).

[97] *Swami Suryananda* (n 94) [83] (Lloyd LJ).

[98] Pilate's question echoes: 'Shall I crucify your king?' (John 19:15).

[99] See *Re G (Children)* [2012] EWCA Civ 1233 [51] (assessing strict Hasidic education in light of the 'best interests of the child').

relationship of the person to creation and the divine. Rather, the 'general community standard' will be from within one of these traditions, or a kind of syncretism, asserting its own legitimacy by evoking its own sought-after sense of social and political space. What we have, therefore, is the development of constitutive commitments, a substantive basis for adjudication that will accommodate religious difference on its terms.[100] In this thesis, I have been discussing two such commitments – a vision of equal concern and respect, or value pluralism, supporting individual autonomy as the preeminent good, and a vision of a 'corporation of corporations', entailing social pluralism and appealing to an ethic of associating well.

The RO account eschews any claim to neutrality. Milbank puts the point starkly: '[A] Christian polity can only demand general respect for the "sacrality" of other religious communities insofar as they approximate Christianity's own sense of sacrality (or are not incompatible with it).'[101] Nevertheless, he argues that although the Christian vision (a pursuit of charity) holds an adjudicative pride of place, it 'can go further in acknowledging the integral worth of a [different] religious group as a group' than a competing vision of secular neutrality and value pluralism.[102] Milbank writes, 'Christians can validly see analogies to churches in mosques and Hindu temples, similarities that lead them to accord a considerable measure of respect to these institutions.'[103] What is meant by 'analogies'? Within the RO vision, this concerns a similarity of belief between traditions and a commonality of aims.

---

[100] See also Stanley Fish, 'Introduction: "That's Not Fair"' in Stanley Fish (ed), *There's No Such Thing as Free Speech (And it's a Good Thing Too)* (OUP 1994) 3, 4 (arguing 'fairness' is determined within a political vision).

[101] Milbank, 'Shari'a' (n 2) 138.

[102] ibid 138.

[103] ibid

The RO vision does not assume *sheer* incommensurability between religious traditions. On this point, Ward and Milbank express different views, pointing in similar directions. Ward is, on the whole, more circumspect when it comes to commenting on the relationship of other traditions to the divine. He writes, 'We do not know what we say when we say "Abba," "Lord", "Christ," "salvation," "God"'.[104] By this he means that God's acts of justice, mercy, love, and righteousness always extend past the boundaries of our own tradition. Thus, although he conceives of his political writing as developing a 'Christian theological imaginary' that might transform the 'civic imaginary', he states that it is only a Christian perspective, leaving analogous projects to be undertaken by Islamic and Jewish theologians.[105] Milbank is not entirely removed from this train of thought. He notes that the vision of a 'corporation of corporations', and the metaphysical conception of participation in the transcendental life of God, will connect well with certain traditions – Platonic threads and Judaism, in particular, but also some forms of Islam.[106] Thus, he argues that Christianity comes nearest to articulating and instantiating how to pursue human dignity, understood as right relationship and the inestimable worth of the person.[107] But, he also considers it impossible to 'be a good and orthodox (as opposed to fanatical) Jew, Christian, or Muslim without recognizing a great deal in the beliefs and practices of the other two faiths, which one would wholeheartedly endorse, and indeed could hope to learn from.'[108]

---

[104] Graham Ward, *Cities of God* (Routledge 2000) 257-59.

[105] Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009) 17, 22.

[106] See John Milbank, 'On Complex Space' in *The Word Made Strange: Theology, Language, Culture* (Blackwell Publishing 1997) 268, 282 and Milbank, 'Shari'a' (n 2) 139, 151. Milbank contends that Islam is most similar when characterised by Mosque-centred communities that have a 'collectivist "church"-like character, one that would fit will with the tacit adoption of a more critical (Christian) perspective towards the secular state.' This is in contrast to voluntaristic or command conceptions of Islam.

[107] Milbank, 'Shari'a' (n 2) 154.

[108] John Milbank, 'The Archbishop of Canterbury: The Man and the Theology Behind the Shari'a Lecture' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 43, 56.

Arguably, we see aspects of this interaction in what Luke Bretherton calls the 'postsecularist space'.[109] He writes of the present as 'a period in which, for the first time, multiple modernities, each with their respective relationship to religious belief and practice, are overlapping and interacting within the same shared, pre-dominantly urban spaces.'[110] Bretherton argues there is a fundamental engagement between faith communities for the ends of negotiating a 'shared territory in pursuit of goods in common' (health and education, for example), especially at the local level of community organising and civil society-based politics.[111] This, Bretherton contends, is the shape of practical Christian politics, which seeks the welfare of the city in light of theological reflection upon goods and Christian hospitality in the midst of different (and often new) neighbours.[112]

What could this mean legally? The image is of an interaction of groups acting largely autonomously within a complex civil society in pursuit of desirable social ends. This means recognition of groups in various contexts. At the general level, such recognition includes groups exercising autonomy over their internal structure, including membership, doctrine, and leadership. And it extends to participation in common goods. This reflects the reality of the life of at least major religious groups. Rather than being mere preferences of worship for associating individuals, Christianity, Islam, and Judaism for example, are traditions which through their social practices aim for particular ends.[113] Charitable care should be characterised by plural provision – recognising religious groups may contribute to welfare while maintaining a distinct ethic. Faith schools, whether independent or within the state

[109] Bretherton (n 26) 15.

[110] ibid

[111] ibid

[112] ibid 19.

[113] See, e.g., Rivers, *Law of Organized Religions* (n 83) 259 (discussing Muslim education's holistic nature).

system, are an appropriate reflection of the perennial role of religious communities in the person's formation.[114] Indeed, an argument can be made that such a role offers a valuable challenge to any tendency towards measuring education instrumentally by mere economic usefulness, pointing towards virtue and even, perhaps, a relationship to the eternal.[115]

The RO claim here, as Milbank puts it, 'is that even a vestigially Christian polity can go further in acknowledging the integral worth of a religious group as a group than a secular polity can.'[116] In Chapter Five, I discussed how a focus on self-determination and equal concern and respect can result in construing the group as a vehicle for individual interests. Potentially, this precipitates a flattening impulse, in which general rules representing abstract equal rights of citizenship are applied as against the group. The example of *Schüth* was discussed. But acknowledging the integral worth of the group extends to non-Christian groups. For example, we could, on the account this thesis has been developing, be critical of the Supreme Court's decision in *JFS*.[117]

The Court's decision primarily concerned whether the Orthodox Jewish school's failure to admit a Masorti Jew was 'on the grounds' of race or ethnicity.[118] But shaping the Court's conclusion ('yes') was the contention, I suggest, that the group is the vehicle for the

[114] See ibid ch 8 'Faith Schools'. Rivers concludes, 'Although Government policy since 1997 has shifted noticeably in the direction of greater openness to religious minorities, the law has also been used to narrow down the significance that religion is allowed to have.'

[115] See, e.g., Nigel Biggar, 'What are Universities For?' (2010) July/August Standpoint <www.standpointmag.co.uk/node/3156/full> accessed 10 December 2012 (placing formation at the heart of education).

[116] Milbank, 'Shari'a' (n 2) 138.

[117] *R (E) v JFS Governing Body* [2009] UKSC 15, [2010] 2 AC 728.

[118] ibid [13] (Lord Phillips). See generally John Finnis, 'Directly Discriminatory Decisions: A Missed Opportunity' (2010) 126 LQR 491.

individual's religious choice.[119] This is clearest in Lord Mance's decision. He considered that the anti-discrimination regime was directed towards treating persons as individuals rather than as 'members of a group defined in a manner unrelated to their individual attributes.'[120] Appealing to the right of parents to ensure education in conformity with their own religious and philosophical convictions, he argued that the school must give effect to the 'individuality or interests of the applicant'.[121] The school exists, in other words, as the vehicle for parental or individual choice. The majority's focus on the subjective identification and determination of the individual meant the school had to recognise M's claimed status (or else dismiss it as insincere). And, by doing so, it had to change its character fundamentally. After the Court's decision, the school adopted a 'Certificate of Practice' for admission.[122] The 'Certificate' provides that a child will be considered a priority applicant when the school is over-subscribed if he or she achieves three points, based on certain practices evidencing individual affiliation. For example, attending synagogue services (and the type of synagogue is not specified) at least eight times in the year will result in three points for a child. Rather than reflecting Orthodox Jewish practice, the model is Church of England school admissions.

For the school, as with Orthodox Judaism generally, religion entails the formation of a distinct, inter-generational people in which educators are tasked with inculcating practices and beliefs into members.[123] But I suggest that at least part of the reason the majority rejected this as 'religion' was because it was suspicious of religion in the form of a strong,

[119] See *JFS* (n 117) [44] (Lord Phillips) and [66] (Lady Hale) (suggesting that the group would have to recognise M's religious beliefs).

[120] ibid [90].

[121] ibid

[122] See 'JFS Admissions' <www.jfs.brent.sch.uk/admissions#/admissions-year-7> accessed 6 April 2013.

[123] See Naftali Brawer, *Judaism: Theology, History and Practice* (Constable & Robinson 2008) 69-70.

exclusivist claim to constitute a 'people'. This form of religion poses a difficult contrast to a view of religion as equal rights-bearing individuals appealing to 'a self-defined identity'.[124]

Would the RO-influenced account of religious liberty treat this case differently? Milbank argues the 'corporation of corporations' vision of society allows for 'a more heterogeneous pluralism and the toleration of different groups' in contrast to the egalitarian tradition.[125] The Christendom political society, he argues, need not entirely agree with the beliefs of different groups 'to be able nonetheless to accept that they are performing roles that contribute to the cohesion of the entire political body.'[126] 'Cohesion' for Milbank does not refer to a merely instrumental peace – that, for example, groups are permitted to flourish to ensure they do not engage in civil discord. Rather, cohesion for Milbank points to participation in a teleological ethic. He writes that recognition of group personality depends on characterising the group as 'aiming for a goal, that its collective character fosters desired social ends.'[127] This is not, therefore, value pluralism. Value pluralism would contend that there is a plurality of valuable conceptions of the good. RO writers, in contrast, conceive of an always-contested universalism – a discerning of right or objective order – in which our differences may at least participate. This represents an attempt to envisage the possibility and goal of forming, through a plurality of social groups, a *res publica*, a people 'united by a common agreement on the objects of their love'.[128] Thus, to take the example of *JFS*, it

[124] See McCrudden, 'Multiculturalism' (n 71) 214.

[125] Milbank, 'Shari'a' (n 2) 143.

[126] ibid. See similarly Maritain, *Man and State* (n 64) 170 (arguing the state should recognise 'moral codes peculiar to those minorities comprised in the body politic whose rules of morality, though defective in some regard with respect to Christian morality, would prove to be a real asset in the heritage of the nation and its common trend toward good human life.')

[127] Milbank, 'Shari'a' (n 2) 143.

[128] Augustine, *Concerning the City of God Against the Pagans* (Henry Bettenson tr, Penguin 2003) Book XIX, ch 24, 890.

could be argued within these frames that a Christian polity might not agree with the school's basis for selection. But such a polity can nevertheless respect the school's aim of forming a people, entailing membership and characterised by a commitment to 'the spiritual, moral, social and cultural development of the students' through the Jewish heritage.[129] There need not, in other words, be a construal of the group as the vehicle for a set of universal individual rights.

This forms RO and related writers' attempt to negotiate difference and the formation of a community that stands for something. There is no 'indiscriminate acceptance', to recall Pope Benedict's concern.[130] The appeal to religion as an abstract category concerning the individual's cultivation of authenticity or meaning is too indiscriminate, changing a religion's particularity into a bare focus on the individual's capacity. But rejecting this also allows for 'authentic dialogue' towards how we should live together as a community.[131] Integration of communities requires, on this account, encountering and engaging with the reality of the group, rather than an abstraction. For example, Milbank writes, 'We will not be able peaceably to accommodate Islam within Europe if we do not treat with Islam as a "political" body and not just as a mass of individual believers – a notion which is foreign to Islam itself.'[132]

---

[129] See JFS, 'The Jewish Dimension' <www.jfs.brent.sch.uk/what-we-teach/the-jewish-dimension#/general-jewish-studies> accessed 14 December 2012.

[130] See Chapter Five, n 46 and accompanying text.

[131] Pope Benedict XVI, Caritas in Veritate: *On Integral Human Development in Charity and Truth* (*The Vatican*, 29 June 2009) <www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html> accessed 25 November 2012, [26].

[132] John Milbank, 'Liberality versus Liberalism' in Michael Hoelzl and Graham Ward (eds), *Religion and Political Thought* (Continuum 2006) 225, 228.

But such dialogue takes place with reference to a central case, Christianity.[133] I suggest this tying to a central case is both inevitable and desirable. The attempt to maintain neutrality as to religions has simply created its own central case: the writing of individual belief narratives, which arguably is within a certain religious lineage. In contrast, I am proposing a change of central case, a form of recovery that points to a desirable shape of political community. It is Christianity that developed graded levels of loyalty and, consequently, the idea of associations pursuing charitable ends of fellowship or communion between persons and with God. Islam, for example, did not develop a comparable understanding of social space.[134] Christianity, in this sense, 'secularised' law.[135] And this central case, I suggest further, is understood through formative narratives. As Chapter Five discussed, Christ stands before Pilate and appeals to a kingdom not of this world, an eternal truth beyond politics. This story is then repeated through Christian history, as experienced in the formation of a new body. From within this narrative then we have a paradigm of religious liberty's aims, but also potentially paradigmatic cases of violation. Stories of martyrs executed for failure to renounce the faith, as well as stories asserting the church's authority – clashes over appointing bishops, instances of exhorting temporal rulers, or examples of charity in groups – give meaning to the vision of religious liberty. It is from within this central case that the boundaries of recognition for analogous cases, acknowledged in their difference, are shaped.

There is, within this view, an understanding of recognition as depending on being able, in some sense, to agree with or enter into the life-world of the different group. In other words, one has to understand the group's different commitment not as sheer difference or

[133] Milbank, 'The Archbishop of Canterbury' (n 108) 57.

[134] See Steven Smith, *The Disenchantment of Secular Discourse* (Harvard University Press 2010) 115.

[135] Milbank, 'Shari'a' (n 2) 146.

sheer dissent, but as pointing towards a shared understanding, or analogy to a central case. Milbank gives the example of pacifists.[136] He argues that the right of conscientious objection is recognised because 'we implicitly say that this hyperbolic respect for human life actually affirms – with an excess that is also usefully confirmatory – a basic principle of our social order to which we all adhere.'[137] The pacifist, accordingly, 'is never a rebel'.[138] Arguably this view provides a rationale for the ECtHR's largely under-theorised adoption of a conscientious objection requirement as part of Article 9.[139]

This requirement – granting recognition on the basis of seeing the good, at some level, of the group's practice – must be correct. We could not simply recognise 'conscience' *as such* without some evaluation as to what that claim of conscience points towards or enacts. Although Milbank writes in the context of a 'corporation of corporations' argument and a Christian vision, his contention that the ends of the claim must be assessed is similar to arguments from legal theorists. Waldron's discussion of cultural accommodation is comparable. He queries whether we do in fact, or should, treasure cultural diversity as in itself a good: in response to adultery '[s]ome people get upset and go to marriage counseling or ask for a divorce. Others drown their children. Others still set fire to the offending spouse or bludgeon her to death.'[140] His subsequent characterisation of the tensions of cultural accommodation, I suggest, similarly points towards a dialogue of plurality within

[136] ibid 143.

[137] ibid

[138] ibid

[139] *Bayatyan v Armenia* (2012) 54 EHRR 15 (Grand Chamber). The Court largely relied on the general practice of European states ([102]), but did also say the requirement would 'ensure cohesive and stable pluralism and promote religious harmony and tolerance in society' ([126]).

[140] Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) 59 Wash & Lee L Rev 3, 12.

universalism, or, put in similar language to the preceding discussion, difference within a shared commitment towards desirable ends.

Waldron argues that we should not assume that a single standard is the central feature of the rule of law.[141] 'State law', he argues, reflects one cultural configuration, one kind of 'law', over another.[142] This, he continues, is in contrast to, and in tension with, the myriad other sources of normative order. Cultural and religious traditions each form a *nomos*, to borrow from Robert Cover.[143] Waldron, sounding the pluralist note, therefore considers our initial question should be why *state law* should govern people, rather than these other orders.[144] These alternative orders, he notes, are 'regimes of regulation that were already there to some extent, regimes that have some entitlement, surely, not simply to be crushed or brushed aside at the imperious whim of the state.'[145] When should the law accommodate diverse practices? Waldron asks several questions: What is the law's purpose? What is the 'strategy' for accommodation (including its scope)? What is the fairness of any accommodation as between different groups?

Here the question of purpose, and how it is framed, is fundamental. Waldron gives the example of Sikhs and the prohibition of weapons in schools. The prohibition can also be directed at its religious use, the Sikh who publicly presents himself as a 'saint and warrior'.[146] In other words, if the purpose of the law is, bluntly, to eliminate all potential weapons in

[141] ibid 4-7.

[142] ibid 15.

[143] See Chapter Five, n 43 and accompanying text.

[144] Waldron (n 140) 15.

[145] ibid 18.

[146] ibid 7.

schools or public spaces then the Sikh faces a difficulty. But if the purpose is to promote the reasonable safety of the students and staff within a culture of non-violence, then there is greater space for accommodation.[147] We could, at this point, consider Sikhism's relationship to pacifism and adopt a pragmatic solution, such as the kirpan strapped securely to the body. Both of these were emphasised by the Supreme Court of Canada when it considered the issue.[148] This change in how we frame governmental interest or purpose points to a larger problem in religious liberty jurisprudence. Notably, in the equality context, there has been a shift towards presenting governmental purpose as enforcing for all purposes the individual's universal right to non-discrimination. On this basis, as discussed in Chapter Four, there is no room for accommodating a civil registrar who refuses to officiate at and register civil partnership ceremonies based on religious conscience.[149]

What is consequently needed is an understanding of governmental purpose that includes plurality and alternative sources of authority, while still aiming at specific ends. Indeed, on the RO account 'governmental purpose' is understood in terms of coordinating different groups in respect of shared ends. Here the group, Sikhs for example, are understood not as merely claiming their own identity or 'authenticity' interest, but as contributing to the common good. Milbank contends that this kind of agreement within difference – understanding the practice as aimed at shared desirable ends – can potentially extend to seemingly intractable disagreement. In particular, he makes this claim in respect of disagreement over same-sex unions. This is the subject of the chapter's final part.

---

[147] See *Multani v Commission scolaire Marguerite-Bourgeoys and A-G of Quebec* [2006] 1 SCR 256 [44], [48] (Charron J) (framing the school's purpose for banning weapons in these terms).

[148] ibid [36].

[149] See Chapter Four, n 98 and accompanying text (discussing *Ladele* (n 69)).

III An Example of Complex Space: Catholic Adoption Agencies

This thesis has, through conversation with RO writing, pointed towards understanding religious liberty as an institutional commitment to the flourishing of society as a *corporation of corporations*. Religious liberty, on this account, supports construing social life as a network of overlapping groups, different bodies independent of, but coordinated by, governmental authority.[150] This is a shift away from *value pluralism* towards *social pluralism*. Within this view, different groups, I have argued, participate in shared aims: ultimately, a life of charity. 'Charity' was discussed as the exchange of gifts – the formation of right relationships, or associating well, as between persons and extending to God. This extends to numerous contexts: households, educational institutions, professions, labour and production of goods and services. And it also concerns 'charity' in the more contemporary sense of welfare provision.

In the final part of this chapter, I will critically discuss one recent and prominent charitable care controversy, Catholic agencies providing adoption services.[151] In 2007, the Labour Government introduced a prohibition against sexual orientation discrimination in the provision of services.[152] This was intentionally passed without an exemption for religious adoption agencies, despite the lobbying of religious groups.[153] A number of Anglican and Catholic groups consequently either ceased providing adoption services or they severed ties

[150] Milbank, 'Complex Space' (n 106) 276.

[151] *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520, [2010] PTSR 1074 (Ch); *Catholic Care (Diocese of Leeds)* (Charity Commission, 21 July 2010) <www.charity-commission.gov.uk/library/about_us/catholic_care.pdf> accessed 6 April 2013; *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* CA/2010/0007 (Charity Tribunal, 26 April 2011).

[152] Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263 regs 3 and 4.

[153] See Matthew Tempest, 'No 10 Mulls Catholic Opt-Out from Gay Rights Law' *The Guardian* (London, 21 January 2007) <www.guardian.co.uk/politics/2007/jan/23/immigrationpolicy.religion?INTCMP=ILCNETTXT3487> (accessed 5 March 2013). For the prohibition, see now the Equality Act 2010, s 29.

with their dioceses in order to continue in a non-discriminatory manner.[154] Catholic Care of the Diocese of Leeds, however, unsuccessfully sought to amend its charitable instrument in order to continue to offer adoption services only to married couples (referring gay and unmarried couples to other agencies).

The case highlights several dynamics discussed in this thesis, providing an important vehicle to contrast current religious liberty doctrine and an RO-inspired approach. It raised questions over when religious groups may participate in a charitable public service, and how; the purpose of a general rule of non-discrimination; and whether difference can be accommodated in light of shared goals. More broadly, the case also illustrated what Rivers identifies as a 'mismatch' between successive governments adopting the rhetoric of welfare pluralism, including partnership with faith-based organisations, *and* the requirement that such organisations reformulate their ethos to adhere to particular norms, notably, anti-discrimination law.[155] And, finally, it raised squarely a prominent issue in current rights discourse: the apparent tension between sexual orientation non-discrimination and religious liberty.

(a) The Case

Religious groups providing public services are increasingly a subject of controversy. The Equality Act states that an organisation advancing a religion or belief cannot discriminate in the provision of services when it is done on behalf of a public authority and under the terms

[154] *Catholic Care* (HC) (n 151) [8].

[155] Rivers, *Law of Organized Religions* (n 83) 228.

of a contract.[156] Further, public contracting with a religious group that engages in, notably, sexual orientation discrimination is likely to face pressure from the newly enacted public sector equality duty.[157] Here, I put to one side the question of public contracting;[158] instead my focus is on the more general issue of how Catholic agencies were prevented from offering adoption services to the public. The Equality Act provides that a charity, regardless of public contracting, can only provide benefits to the public on a discriminatory basis if this is a proportionate means of achieving a legitimate aim.[159] Satisfying this requirement was the issue in *Catholic Care*.[160]

The High Court's framing of the proportionality inquiry reflected both the complex interaction of equality legislation and the ECHR, and the significant weight placed on universalising sexual orientation non-discrimination in ECtHR jurisprudence. The Equality Act's proportionality requirement was interpreted in light of Article 14 of the ECHR.[161] Article 14 provides for the securing of the rights of the Convention without discrimination, including in respect of sexual orientation.[162] Importantly, it has been interpreted as applying

[156] Equality Act 2010, Sch 23, para 2(10). Whether an agency like Catholic Care is considered a 'public authority' subject to the Human Rights Act 1998, s 6, is an unsettled question. It seems unlikely, however. Such an agency, as Rivers notes, is arguably exercising its Article 9 right when engaging in charitable care. Rivers, *Law of Organized Religions* (n 83) 281.

[157] Equality Act 2010, s 149. See *Catholic Care* (Tribunal) (n 151) [62]. The mounting difficulties are illustrated by *R (Johns) v Derby City Council* [2011] EWHC 375, [2011] HRLR 20 (Admin) [95]. The Court noted that while the statutory foster regime allowed foster carers themselves to discriminate, the local authority cannot discriminate by placing a child with such carers. See also Julian Rivers, 'Promoting Religious Equality' (2012) 1 Ox J Law Religion 386.

[158] See Rivers, *Law of Organized Religions* (n 83) ch 9 'Faith-Based Welfare'.

[159] Equality Act, s 193. *Catholic Care* considered the original provision, Equality Act (Sexual Orientation) Regulations 2007, reg 18.

[160] *Catholic Care* (HC) (n 151) [97].

[161] ibid [78].

[162] *Salguiero da Silva Mouta v Portugal* (2001) 31 EHRR 47 [28].

when the 'facts of the case fall within the ambit' of a Convention right.[163] There is no 'right to adopt children' in the Convention. However, if a Member State does engage in the provision of adoption services this is interpreted as engaging the 'ambit' of Article 8 (the right to respect for private and family life). Consequently, any differential treatment in the provision of adoption services must, in accordance with Article 14, be for a legitimate aim pursued by proportional means.[164] In respect of differential treatment on the basis of sexual orientation, the ECtHR has said this must be for 'particularly weighty and convincing reasons', a standard adopted by the High Court in *Catholic Care*.[165]

What did Catholic Care offer as 'particularly weighty and convincing reasons' for its differential treatment? Here, we might have expected Catholic Care to argue, appealing to Article 9, that the charity's aim was to pursue charitable adoption in light of Catholic teaching on right relationship. But the agency's subsequent formulation of its aim before the Charity Commission and Tribunal largely eschewed appeal to Article 9 in favour of pragmatic arguments.

Catholic Care framed its legitimate aim for differential treatment 'as *the prospect of* increasing the number of children (particularly "hard to place" children) placed with adoptive families.'[166] Such differential treatment, the agency also said, was proportional because gay and lesbian couples could still use other voluntary agencies or the local authority's adoption services.[167] Catholic Care *did* refer to the Catholic understanding of the family. In the

[163] *Thlimmenos v Greece* (2001) 31 EHRR 15 [40].

[164] *EB v France* (2008) 47 EHRR 509 (Grand Chamber) [41], [90]-[91].

[165] ibid [91]; *Catholic Care* (HC) (n 151) [58].

[166] *Catholic Care* (Tribunal) (n 151) [12] (emphasis added).

[167] ibid

Charity Tribunal, the Bishop of Leeds was called in evidence.[168] The Catholic Church's teaching, as the Bishop detailed, is that full sexual union without marriage is unacceptable, and the model of family is the Holy Family. Adoption services could not, accordingly, be offered by Catholic Care to unmarried heterosexual couples, same sex couples, and (generally) single persons.[169] But the relevance of this position, as framed by Catholic Care, was that it showed that if the charity were not permitted to discriminate its donors would cease providing funds and it would therefore no longer be able to continue its service, which it described as particularly successful with 'hard to place' children.[170]

The Charity Tribunal dismissed this argument. It concluded that the loss of Catholic Care's services would not necessarily result in reduced child placements because this ultimately depended on the willingness of local authorities to engage and financially support voluntary agencies.[171] Further, the Tribunal did not accept that Catholic Care's inability to discriminate would result in the loss of donations. It took the unusual step of suggesting that there is 'a wide range of opinion amongst donating Catholics', represented in groups such as the Roman Catholic Caucus of the Lesbian and Gay Christian Movement.[172]

Catholic Care's argument was missing a clear religious liberty claim. The reasons for this, as I elaborate below, are understandable. They can be divided into the following heads: religion's 'hostility' to LGBT orientation and the division of secular and religious spheres under Article 9.

---

[168] ibid [24].

[169] ibid

[170] ibid

[171] ibid [30]-[34], [49]-[50].

[172] ibid [55], [57].

(b) Religion's 'Hostility'

In *Catholic Care*, the Charity Tribunal also considered the agency's policy would be 'particularly demeaning' to same sex couples.[173] This is a common argument concerning LGBT persons' dignity: that existence of discriminatory conduct, even if framed as an exception to a general prohibition, makes a statement that people of a particular sexual orientation are of less worth.[174]

Arguments of this type are continuous with a more general claim, namely that failure to endorse plural sexual orientations is a form of 'hostility' or 'revulsion'.[175] On this basis, a number of scholars have suggested that there should be a hierarchy of non-discrimination values, with religion on the bottom or at least de-emphasised.[176] They contend the universal application of a rule against sexual orientation discrimination should be privileged, even as against claims of religious liberty or religious non-discrimination. To do otherwise would 'irreparably … undermine' the prohibition against sexual orientation discrimination,[177] or it would protect 'the holders of completely abhorrent, or irrational, or bigoted beliefs, including those which would certainly not accord equal rights to others if they were to prevail'.[178] Religion on this account is a source – perhaps the prime source – of dignitary harms; to

---

[173] ibid [52].

[174] See also Chapter Four, n 95 and accompanying text discussing *Ladele* (n 69) [52].

[175] See Robert Wintemute, 'Religion vs Sexual Orientation' (2002) 1 JLE 125 and Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 54-55.

[176] See, e.g., Lucy Vickers, 'An Emerging Hierarchy?' (n 13) 301.

[177] Aileen McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 ILJ 1, 11.

[178] Gwneth Pitt, 'Religion or Belief: Aiming at the Right Target?' in Helen Meenan (ed), *Equality Law in An Enlarged European Union* (CUP 2007) 202, 213.

curtail religious behaviour is necessary for the protection of others' dignity. Addressing this specific contention of 'hostility' is important. Here, I can offer only the beginning of a response.

In Part II, I discussed Milbank's argument that we can respect difference as nevertheless pointing to shared ends. His example was conscientious objectors. Although the objector's pacifism is generally rejected, we affirm their exercise of conscience as confirming a shared commitment against the taking of life. This follows a teleological ethic – we must look to whether the group's collective character aims for a goal that is desirable. I then argued that this fits with a general paradox of toleration or respect – we cannot tolerate or respect difference as sheer difference, regardless of content. But if the Catholic position on sexuality is simply 'hostility', then why should it be accorded any respect?

Milbank goes on expressly to note the *Catholic Care* case.[179] He argues that it might be viewed differently from conscientious objectors. In the case of *Catholic Care*, agreement appears to be illusive; rather, the Catholic position is likely to be seen as 'outright "error"' simply falsely limiting 'what is validly human and fully capable of the human task of child-rearing.'[180] Nevertheless, he contends that it is possible to have a 'displaced agreement'.[181] First, the Catholic Church is attempting to answer a question that society endorses: which people can be regarded as suitable to adopt children? Second, the Catholic answer can be tolerated, Milbank argues, for its 'positive performance of the task of finding heterosexual

[179] Milbank, 'Shari'a' (n 2) 144.

[180] ibid

[181] ibid

parents' provided other adoption agencies are available to consider gay parents, thus upholding a general judgement against the Catholic approach.[182]

Milbank's approach demonstrates how arguments from within the Christian tradition – appealing to the teleological good of parenting – can apply even when the dissenting party is Christian. In this sense, paradoxically, the Christian tradition seeks to incorporate difference within its own body (remembering Milbank's Christendom claim). Nevertheless, his approach needs supplementing. The two points where Milbank identifies value in the Catholic position, the asking of a worthwhile question and the contribution to a positive task, are too capacious. The immediate contrast that comes to mind is interracial marriage and child-rearing. A church like the apartheid-era Dutch Reformed Church of South Africa would argue that marriage can only take place between men and women of the same race and that accordingly children must be raised only in such marriages. (Imagine, to make the analogy complete, that the church establishes a charitable adoption agency, assuming it could.) Could we follow the logic of Milbank's argument? Such a practice asks a worthwhile question: who is suitable to raise children? And at a certain attenuated level although it is racist it undertakes a positive task, that of parenting. Here we have another form of 'outright "error"', but one we do not accept. Why? I suggest that Milbank's characterisation arguably concedes too much, and that there must remain a sense of the Catholic position as sharing in truth or common desirable social ends. This requires distinguishing racial from sexual orientation discrimination, and accordingly offering positive reasons for the Catholic (or analogous) position.

[182] ibid

The analogy between racial discrimination and sexual orientation discrimination is often made.[183] In the context of hate-speech, the ECtHR has said, '[D]iscrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"'.[184] Whether a matter of biology or choice, both are seen as 'a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.'[185] Arguably, underlying these claims is the view that race and sexual orientation are equivalently concerned with 'identity'. On this view, to discriminate against either is a failure of equal concern and respect. However, I suggest that adopting a general category of identity problematically fails to engage with (although not necessarily accept) the detail of the arguments put forward by those objecting to recognising same-sex relationships in different forms.

The Christian body, within itself, clearly disagrees on recognising same sex unions, whether in civil partnerships or in marriage. The Anglican Communion, for example, has an on-going debate over blessing such unions and ordaining those within them.[186] This is conscientious difference of opinion housed within the same body. Indeed, similarly, the RO 'body' appears to house its own conversation.

Arguing in favour of recognising same sex marriage, Ward contends that the church's sacramental practice of marriage is wrongly locked into a discourse of biology or physiology

[183] See, e.g., Wintemute (n 175) 136-38.

[184] *Vejdeland v Sweden* App no 1813/07 (ECtHR, 9 February 2012) [55]. In contrast, UK courts have stated that Christian objections to sexual orientation non-discrimination are 'clearly worthy of respect'. See *Johns* (n 157) [47] and *Preddy v Bull* [2012] EWCA Civ 83, [2012] 1 WLR 2514 [48].

[185] *Egan v Canada* [1995] 2 SCR 513, 528 (La Forest J).

[186] See, e.g., O'Donovan, *A Conversation* (n 29).

– 'male' and 'female' as stable identities exhibiting sexual difference.[187] He considers gender, rather than being stable, is a cultural performance in which the body is constantly defined and redefined through exchanges with other people (a conception which he relates to the Pauline understanding of the church body).[188] Heterosexual relations, he argues, can demonstrate a 'homosexual' logic whereby women are understood as completing men – there is, in other words, an inward gaze towards self-satisfaction (of men) and away from relation.[189] In contrast, he considers that same-sex relationships can, perhaps more easily, reveal a love beyond biological reproduction and therefore based on difference or desire for 'otherness' as such.[190]

In contrast, Milbank believes that while churches should bless civil partnerships – and thus bring them within the life of the church – it should also severely criticise any attempt to equate civil partnerships with marriage.[191] He agrees with Ward that gay and lesbian relationships can contribute unique social gains, namely, a more complete solidarity with one's own sex and valuing the pure human otherness of the opposite sex, a solidarity transcending gender difference.[192] (He speculates that this may be a reason why many gay men are attracted to Christian ministry.) But he argues that heterosexual marriage should be privileged. Marriage, he contends, is a reality that historically precedes the existence of the state. It is 'bound up with the securing of those kinship structures – of both horizontal

[187] Ward, *Cities of God* (n 104) ch 7.

[188] ibid 195. See also Graham Ward, 'There is No Sexual Difference' in Gerard Loughlin (ed), *Queer Theology: Rethinking the Western Body* (Blackwell Publishing 2007) 76, 84.

[189] Ward, *Cities of God* (n 104) 201.

[190] ibid

[191] See John Milbank, 'Gay Marriage and the Future of Human Sexuality' (*ABC Religion and Ethics*, 13 March 2012) <www.abc.net.au/religion/articles/2012/03/13/3452229.htm> accessed 20 March 2012.

[192] ibid

affinities and vertical generations – which have always been central to the very constitution of human society.'[193] That is, marriage entails the union of families in kinship structures and the hierarchic transmission of virtue, of a tradition, and of the continuity of humanity itself, from one generation to the next. This is both natural and cultural. And to undermine this kinship structure is, Milbank contends, at one with the decline of mediating institutions in general.

He continues by arguing that the sundering of marriage from heterosexuality would render 'the *relational* issue of who one is bonded with inferior to the *private* issue of elective preference.'[194] This would, he contends, further a libertarianism that is indifferent to the number of partners or their character, or to the question of procreation. In this way, he argues, bodies, including sexual difference, cease to matter in the face of one's will or choice. Thus, Milbank considers that while a child's adoption by loving gay parents is clearly better than the child languishing in an orphanage, nevertheless the optimal condition for child-raising is two biological parents.[195] Drawing a distinction then between marriage and civil partnerships, he concludes, reflects these differences and, indeed, this hierarchy.[196]

Milbank notes that the Christian's framing of marriage is likely to be at odds with a secular perspective. In contrast to elective preference, Christians 'are likely to frame the debate over gay marriage in terms of the true human good, the proper goals that human

---

[193] ibid

[194] John Milbank, 'On Anglican Extremism: The Theopolitical Legacy of Hooker' (2011) 87 (on file with the author).

[195] Milbank, 'Gay Marriage' (n 191).

[196] John Milbank, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 Ox J Law Religion 203, 214 n 33.

beings should aim for.'[197] This is a teleological vision, claiming that persons can participate in 'right order', dimly reflecting, and moving towards, a transcendental reality.[198] Marriage, in this light, is understood as sacramental: the union of the two halves of the human race evoking the consummation of God with creation.[199] In other words, to begin to accept his argument as to the reality of 'marriage' is, on his account, to begin to accept a Christian construal of reality.

These are not the only arguments within this much wider debate.[200] Nevertheless, they illustrate differences between sexual orientation and race-based discrimination. For example, to take the analogous question of interracial marriage, we can say the following. Laws and rules against interracial marriage were generally understood to be an interference with (a statutory incursion into) an otherwise accepted understanding of marriage as a union between a man and a women.[201] In other words, it was understood that blacks and whites were capable of marrying, but for reasons of white supremacy or supposed racial purity, legal obstacles were erected to prevent such marriages. In contrast, those disagreeing on the permissibility of same-sex marriage are asking a question of the nature of relationship itself. What is 'marriage'? What is the sexual act?

---

[197] Milbank, 'Gay Marriage' (n 191).

[198] See Chapter Three, Part I (b).

[199] Milbank, 'Gay Marriage' (n 191). See also Augustinus Lehmkhul, 'Sacrament of Marriage' in Kevin Knight (ed), *The Catholic Encyclopedia* (Robert Appleton Company 1910) <www.newadvent.org/cathen/09707a.htm> accessed 6 April 2013.

[200] See, e.g., Julian Rivers, 'Redefining Marriage: The Case for Caution' (2012) 21 Cambridge Papers 1 <www.jubilee-centre.org/uploaded/files/resource_432.pdf> accessed 5 March 2013.

[201] See Sherif Girgis, Robert P George and Ryan T Anderson, 'What is Marriage?' (2011) 34 Harv J L & Pub Pol'y 245, 250 and *Loving v Virginia* 388 US 1, 11 (1967).

Rather than potentially beginning with understanding the Catholic position as 'outright "error"', the law should recognise an agency like Catholic Care as contributing to worthwhile ends in a manner that can be tolerated, if not respected as potentially, for some, a persuasive account of right relationship. This allows for the possibility of both a strong affirmation of the norm of sexual orientation non-discrimination in general *and* exceptions from this norm for religious manifestation, with both understood as participating in shared goals. Arguably, such unity of purpose and difference of means reflects the complex space discussed in Chapter Five, in which multiple groups engage in public, charitable endeavours coordinated, although not authorised, by governmental authority.

(c) Religious Liberty and the Differentiation Thesis Problem

Advocating complex space in the sense described above faces, however, an additional problem. The public nature of Catholic Care's activity – that is, providing a service available to the general public, one beyond the confines of, for example, an institutional church – comes up against the central division of religious liberty jurisprudence. As discussed in Chapter Four, this is the public-private, secular-religious divide, which I described as a form of containment of religious manifestation.

In the High Court, Briggs J summarised the ECtHR's interpretation of Article 9 in the following terms: '[Article 9] affords a more or less absolute right to hold a religious belief, but only a heavily qualified right to manifest that belief by conduct. The more public and secular the sphere in which the conduct takes place, the less protection is afforded by article 9.'[202] On this basis, the provision of adoption services is construed as 'public',[203] and

[202] *Catholic Care* (HC) (n 151) [60].

therefore 'secular'. Its curtailing, to adopt the words of Lord Neuberger MR in *Ladele*, would mean that Catholics are 'in no way prevented … from worshipping' as they wish.[204] In other words, matters closer to the essence of 'religion' remain protected. In contrast, the universal requirement of non-discrimination on the grounds of sexual orientation is seen as a policy with 'fundamental human rights, equality and diversity implications'.[205] Religious liberty is conceived of as centrally non-public, while sexual orientation non-discrimination is understood to be the public benchmark (a status that, as the usual case, is not questioned by Catholic agencies, at least not in this context).

This public-private, secular-religious dichotomy also illustrates the flattening dynamic discussed in Chapter Five.[206] Labelling adoption provision as public leads to the conclusion that *all* providers must not discriminate against prospective parents on the grounds of sexual orientation. While groups may hold private opinions, they must be subjected to a uniform standard once they enter the public space. This is characterised as preventing threats to individual liberty. And here the threat is largely the mere knowledge of Catholic Care's existence;[207] there is no suggestion that adoption would otherwise be unavailable to same-sex couples.

The case consequently follows the instrumental logic discussed in Chapter Five. The group is understood to be the vehicle for individual rights-claims. As Rivers notes, equality comes to mean the equal provision of a set of rights belonging to individuals as they

---

[203] ibid [84].

[204] *Ladele* (n 69) [51].

[205] ibid

[206] See Chapter Five, Part III.

[207] *Catholic Care* (Commission) (n 151) [76]; (Tribunal) (n 151) [44].

encounter each and every group.[208] This means that the group cannot hold a different ethos; rather, it must conform to, and be a vehicle for, individual rights-claims (egalitarian access to adoption) as represented in the 'gaze of the absolutely sovereign state'.[209] As then Prime Minister Tony Blair stated, rejecting calls for an exemption for Catholic agencies, 'I start from a very firm foundation: there is no place in our society for discrimination.'[210]

Fundamentally, these dynamics – the secular-religious dichotomy and the flattening impulse – follow a secularisation-as-differentiation thesis. Difference, in the form of a group adopting an ethos that entails treating persons differently on the grounds of sexual orientation, is permitted so long as the group is internally orientated. Vickers endorses this as a permissible 'island of exclusivity'.[211] Within such an 'island', where religion remains private, she argues the harm to LGBT persons' dignity is minimal.[212] But where services are provided to the public, the group enters into the secular sphere regulated by the universal rule of non-discrimination on the grounds of sexual orientation. Here, in this sphere, religion poses a threat to the liberty or dignity interest of individuals.[213]

The islands of exclusivity trope is problematic. Canadian scholar Alvin Esau originally used it in respect of Hutterites, Amish, and Mennonites.[214] Effectively then, Vickers adopts typically (to varying degrees) isolationist religious communities as central

[208] Rivers, *Law of Organized Religions* (n 83) 288.

[209] Milbank, 'Shari'a' (n 2) 144.

[210] *Catholic Care* (HC) (n 151) [7].

[211] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 225-26.

[212] ibid 80, 225-26.

[213] ibid 80.

[214] Alvin J Esau, '"Islands of Exclusivity": Religious Organizations and Employment Discrimination' (1999-2000) 33 U Brit Colum L Rev 719.

cases, emphasising a differentiation account of social space. But this is certainly not the norm. Rather, even the 'internal' focus of a church typically entails an 'external' reaching out to the wider community. Indeed, on Vickers' account, the conventional understanding of a parish church as for the whole community would arguably place it within the apparent 'secular' sphere. She writes, 'To the extent that the group wishes to interact with the rest of society, however, they [religious groups] can be expected to conform to the norms of the rest of society in terms of respect for the dignity and autonomy of others.'[215]

The better approach is to welcome the reality of multiple groups engaging in what Bretherton calls the 'pursuit of goods in common', or what I have called desirable social ends, at the (usually) local level – health, education, charitable care, family life, for example.[216] Civic participation, in this sense, entails forging, as Bretherton argues, a common or public life, one that includes 'others with whom we disagree' and thus can look different depending on context.[217] And this works against the sense of political malaise identified by various authors.[218] 'Intermediary' groups more directly involved in charitable care, for example, encourages what Laski called 'the multiplication of centres of authority'.[219] Persons, on this basis, are 'more apt to responsibility', that is, they are more engaged and committed to social and political conversation at different levels.[220] And, importantly, this mutual pursuit of desirable social ends tries to show that the negotiation of different public ethos – notably, sexual orientation non-discrimination and religious liberty –

[215] Vickers, *Religious Freedom* (n 211) 80.

[216] Bretherton (n 26) 18.

[217] ibid 19.

[218] See Chapter Three, n 237 and accompanying text.

[219] Harold J Laski, 'The Pluralistic State' in Paul Q Hirst (ed), *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (Routledge 1989) 183, 192.

[220] ibid

need not be characterised by an all-or-nothing approach. We need not, in other words, view this tension as an irreconcilable conflict.

Others have made similar suggestions. McCrudden, for example, has argued that the aim should be a 'practical concordance', in which one claim of right or interests is not pushed to exclude other claims of right or interests.[221] He suggests that we might look to some forms of discrimination law analysis to promote this understanding. Here, I conclude this section by briefly highlighting the possible connections of this analysis to the arguments I have been developing, while noting the problems it faces.

(d) A Discrimination-Based Analysis

Whereas Article 9 has tended towards a focus upon conscience and individual choice, with the attendant consequence of the privatisation of religion, the religious discrimination regime might point us towards an accommodation of various groups within an undifferentiated public sphere. Historically, at least, discrimination law focused on group access to public goods.[222] Contemporary jurisprudence still contains notes of this. In *Eweida*, for example, Sedley LJ considered that any claim of indirect religious discrimination (the most frequent ground of religious discrimination) required being able to make a general statement about how a policy or measure of the apparent discriminator affects a religious *group* and not simply the claimant.[223]

---

[221] Christopher McCrudden, 'Dignity and Religion' in Robin Griffith-Jones (ed), *Islam and English Law* (CUP 2013) 90, 99.

[222] See *Mandla v Dowell-Lee* [1983] 2 AC 548 (HL) 562-63 (pointing to the accommodation of ethnic groups with, for example, 'a long shared history', 'a cultural tradition of its own', and 'a common religion').

[223] *Eweida v British Airways plc* [2010] EWCA Civ 80, [2010] ICR 890 [24]. Arguably, this focus on the group will need to change in light of the ECtHR's decision in *Eweida* (n 59) [94] (holding Ms Eweida's Article 9 right had been unjustifiably infringed).

A focus on the group could potentially contribute to the conception of civil society developed in this thesis, in which right distribution entails the right placement and support of different associations participating in goods in common. Article 14 of the ECHR, providing for non-discrimination in the exercise of rights or matters falling within the ambit of a right, would be particularly relevant. It could provide a lens for assessing state action or how statutory provisions should be interpreted. So, for example, *Catholic Care* could have been framed in terms of achieving a 'practical concordance' or a 'right distribution' as between different groups each operating in the public realm of service provision. This would be a clear shift from the current approach of the UK courts, which considers that appealing to Article 14 adds nothing to an analysis centring upon Article 9 jurisprudence.[224]

However, as the position of the courts indicates, appealing to Article 14 in this manner faces significant hurdles. My articulation of discrimination law is based on the claim that it concerns the distribution of public goods across particular groups.[225] This is, however, contested. Discrimination law is characterised by what McCrudden calls 'equalities-talk'.[226] Fredman, for example, argues that it concerns the 'full participation and inclusion of everyone in major social institutions'.[227] This articulation, which can be part of a distributive understanding, is, however, often coupled with a focus on historical exclusion.[228] How religion as a category for concern reflects this underlying rationale is ambiguous. Catholics

[224] See *Johns* (n 157) [104].

[225] See Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (2nd edn, OUP 2009) 499 [11.94].

[226] Christopher McCrudden, 'Thinking About the Discrimination Directives' (2005) 1 European Anti-Discrimination Law Review 17, 18-20. McCrudden notes four types of equality-talk: 'equality as individual justice, equality as group justice, equality as protecting and enhancing identity, and equality as participation'.

[227] Sandra Fredman, *Discrimination Law* (OUP 2002) 22.

[228] ibid 5-7, 22.

and Jews are arguably the UK's historical archetype victims of discrimination, but, as this chapter details, these groups are now often seen as sources of discrimination. Further, some view discrimination law as an attempt to reduce the costs to individuals of adhering to certain identities. Freedland and Vickers, for example, describe a shift in discrimination law's underlying purpose towards, in a multiculturalist vein, the maximisation of different lifestyles.[229] As McCrea notes, such a rationale brings us closer to religious freedom as understood under Article 9, 'centred on the idea of respect for and facilitation of individual autonomy' expressed through fundamental personal identity markers.[230]

Aligning discrimination law analysis with Article 9 is common. In cases where a claim of religious discrimination has been made, UK courts have readily adopted Article 9's tropes of public-private, secular-religious as support for dismissing the claim.[231] More recently, Ms Ladele's appeal to Article 14 before the ECtHR largely fell on deaf ears, appearing to make no discernible difference to the analysis.[232] We could describe this as the 'constitutionalism' of non-discrimination on the grounds of religion through Article 9. The constitutionalism of discrimination law is usually understood as the elevation of discrimination law to constitutional status and the importing of discrimination law norms into constitutional or rights adjudication.[233] But, in this case, constitutionalism entails tropes developed in Article 9 jurisprudence being adopted as useful to the articulation of a hierarchy between discrimination norms, in which religion occupies a lesser position in the pantheon of

[229] Mark Freedland and Lucy Vickers, 'Religious Expression in the Workplace in the United Kingdom' (2009) 30 Comp Lab L & Pol'y J 597, 606.

[230] Ronan McCrea, *Religion and the Public Order of the European Union* (OUP 2010) 152.

[231] See *Ladele* (n 69) [55]-[60] and Chapter Four, Part II.

[232] *Eweida* (ECtHR) (n 59) [106].

[233] See Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24 OJLS 693.

protected characteristics. In other words, while discrimination law may offer viable avenues, there remains a need to contest the differentiation thesis regardless of legal context.

IV Conclusion

In this chapter, I have considered three topics central to religious liberty jurisprudence in order to expand on the RO vision described in Chapter Five. RO's fundamentally communitarian and confessional approach raises questions of how it understands and potentially accommodates the individual religious claimant and the reality of plural religious traditions.

For the individual claimant, I have contended that 'hands-off' arguments supporting individual construal of belief adopt their own fundamentally contestable understanding of religion, one that undermines groups as sites of authority. I also suggested that despite the Court's rhetoric pointing to the centrality of the individual, it nevertheless at times also considers individual claims within a more communal lens. On the RO account, what Rowan Williams calls the 'form of life' is fundamentally relational. Consequently, it is appropriate to consider further how an individual claim relates to social endeavours, including the group's authority structures.

In respect of pluralism, I have set out a competing vision. Against value pluralism, which construes political authority as supporting individual pursuits of the good, the RO vision is one of social pluralism. Different groups are understood as potentially participating in shared desirable ends – the pursuit of goods in common, rising ultimately to participation in a life of charity – in their own, *different* ways. There is, within this view, always an

analogy being made to a central case. Christianity has pointed to 'graded levels of loyalty' and the establishment of a new body that challenges 'secular' authority with the more fundamental life of charity. But this vision, RO writers argue, is one that engages with like-minded groups.

This dynamic of difference of action and unity of purpose also characterises Milbank's suggested resolution of the tension between religious liberty and sexual orientation non-discrimination. Here, I explored how any resolution would require engaging with the reasons – arguably ultimately theological – for objections from within large quarters of the Christian body. Only then, I suggest, is it possible to accept different parties are desirably engaged in the shared end of marriage or family life. This account, I argued, fundamentally contrasts a differentiation thesis, in which religious groups occupy, primarily, a private realm of belief. Rather than the universal application of a non-discrimination principle in public life, the argument I have developed points to shared engagement in goods in common.

Conclusion

‘Post-Secular’ Religious Liberty: Beyond Differentiation

Developing a rationale for religious liberty quickly raises broader questions. What are the limits of state power? What is the relationship between individuals, groups, and the state? How do we recognise conscience? How is pluralism negotiated? What is our relationship to each other, created order, and the divine? Religious liberty is cast within a wider political imagination: how we envisage social existence, community, and political authority. A similar contention could be made in respect of other freedoms – free expression or privacy, for example. But how we treat religion is, I suggest, the paradigmatic case of liberty discourse cultivating a political imagination. Fundamentally, religious liberty discourse has the continual hallmark of challenging the claims of the state, or temporal authority, to sovereign or autonomous authority. How this challenge is treated is, I suggest, a fundamental fault-line in religious liberty discourse that increasingly will be characterised by competing articulations of ‘post-secular’ inquiry.

‘Post-secular’ appears in works of political theory, international relations, political theology, and literary and art criticism, but its usage in law remains rare.[1] However, the themes discussed under the post-secular banner raise the same broader questions noted above. For some, post-secular is largely characterised by an attempt to refine the boundaries between

[1] See the catalogue of references in James A Beckford, ‘Public Religions and the Postsecular: Critical Reflections (SSSR Presidential Address)’ (2012) 51 Journal of the Scientific Study of Religion 1, 1-2. For references in religious liberty discussion, see Zachary R Calo, ‘Religion, Human Rights and Post-Secular Legal Theory’ (2011) 85 St John’s L Rev 495 and Ian Leigh and Rex Ahdar, ‘Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away’ (2012) 75 MLR 1064.

the secular and the religious in light of religious resurgence or persistence.[2] But there is another, more critical vein of post-secular writing, within which Radical Orthodoxy writers are central exponents. Here, post-secular is characterised by *negating* the differentiation thesis's boundaries of secular and religious.

Jürgen Habermas' recent writing provides a notable example of the former.[3] For Habermas, the secular state should engage with the cultural sources that nourish its citizens' sense of solidarity. He defines solidarity as a shared commitment to abstract constitutionalism, understood as equal concern and respect for individuals' conceptions of the good.[4] Religion, for Habermas, is appealing as one cultural source insofar as it nourishes this solidarity. He proposes a 'dialogue' as central to the post-secular frame. The secularly-minded, he contends, must accept that religion, although different from reason, is not simply irrational. But when it comes to how political authority is understood, a religious frame is only acceptable if it engages in an act of translation, from religious language or practices to his understanding of natural reason, namely the requirement of equal concern and respect.[5] There remains, on this account, a neutral secular sphere. Indeed, Habermas' version of the post-secular arguably is orientated towards shoring up the boundaries of secular and religious

[2] See Hent de Vries, 'Introduction: Before, Around, and Beyond the Theologico-Political' in Hent de Vries and Lawrence E Sullivan (eds), *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press 2006) 1, 3-7.

[3] For the relevant texts, see, notably, Jürgen Habermas, 'Religion in the Public Sphere (2006)' in Bryan S Turner (ed), *Secularization: Defining Secularization, The Secular in Historical and Comparative Perspective*, vol 1 (Jeremy Gaines tr, Sage 2010) 271; Jürgen Habermas and Joseph Ratzinger, *The Dialectics of Secularization: On Reason and Religion* (Brian McNeil tr, Ignatius Press 2006); Jürgen Habermas, 'Notes on a Post-Secular Society' (*Sign and Sight*, 18 June 2008) <http://print.signandsight.com/features/1714.html> accessed 22 June 2012; Jürgen Habermas, 'An Awareness of What is Missing' in Norbert Brieksom and others (eds), *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (Polity Press 2010) 15; Jürgen Habermas, '"The Political": The Rational Meaning of a Questionable Inheritance of Political Theology' in Eduardo Mendieta and Jonathan Vanantwerpen (eds), *The Power of Religion in the Public Sphere* (Columbia University Press 2011) 15; and Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464.

[4] See Habermas and Ratzinger (n 3) 32-33 and Habermas, 'The Political' (n 3) 27.

[5] ibid 26 and Habermas and Ratzinger (n 3) 49-52.

by seeking allies in religious persuasions that would accept his egalitarian order as against the resurgence of those that would not.[6]

Habermas' post-secular thus continues what is arguably the dominant paradigm in religious liberty discourse – developing a spatial vision of politics based on demarcating boundaries. Locke considered the civil authority could not compel 'belief', but he also excluded Catholics from toleration because, owing allegiance to the Pope, they would challenge political power on the 'pretense' of religion; Rawls excluded from political deliberation as 'unreasonable' those doctrines that would 'struggle to win the world for the whole truth'; Scalia J in the United States Supreme Court affirmed the state's universal jurisdiction to craft general laws as against the feared 'anarchy' of individual religious claimants seeking accommodations; Laws LJ raised the spectre of 'theocracy' challenging the independence of the state; Habermas reflects that a certain type of religion should be welcomed in dialogue, but only when translated to contribute support to his vision of constitutionalism.[7] In each instance, where religion creeps over a boundary, the boundary must be vigorously affirmed or refined: spheres of belief and manifestation, of religion and secular.

Patrolling against boundary infractions – religious incursions into properly public spheres – aids a vision of the political community's purpose, a particular understanding of the *res publica* or commonwealth. Dworkin reflects on this when he describes a 'fresh meaning

[6] See Beckford (n 1) 8.

[7] See, respectively, John Locke, 'A Letter Concerning Toleration' in James H Tully (ed), *A Letter Concerning Toleration* (Hackett Publishing Co 1983) 50, 52; John Rawls, 'The Idea of Public Reason Revisited' in *The Law of Peoples* (Harvard University Press 1999) 132; *Employment Division v Smith* 494 US 872 (1990) 888; and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872 [24].

to the old idea of a commonweal'.[8] For him, the political community's life, the commonweal, consists in treating everyone formally with equal concern and respect. Put another way, the political community exists on this account for the mutual protection of individuals' subjective rights, quintessentially the right to cultivate one's own conception of the good.

Perry rightly argues this vision – of boundary refinement in aid of securing private freedoms – is an attempt to ensure that the good citizen and the faithful believer will always follow the same path, defined by the spatial parameters of, for example, 'church' and 'state'.[9] If we secure agreement that 'the political' exists for protecting our capacity for autonomous moral choice we secure continuity between the spheres of private freedoms (the church) and public action (the state). But Perry, reflecting on Sophocles' *Antigone,* poses an alternative: that boundary disputes are constitutive of the religious appeal to an eternal truth. This claim also lies at the heart of RO's post-secular claim.

In RO writing, challenging boundaries is exemplified in Christ and continued in the church. Christ appeals to an eternal truth not abstractedly, but in terms of a new Kingdom, the continuation of his own body, the constitution of a people. There remains a provisional affirmation of temporal authority (an ambiguity in continuity with Antigone's doubts or hesitation).[10] In this way, Christianity has always affirmed a kind of 'differentiation': a dialogical tension between temporal authority and the city of God. But even this 'two' is not

[8] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 234.

[9] John Perry, *The Pretenses of Loyalty: Locke, Liberal Theory & American Political Theology* (OUP 2011) 6.

[10] Sophocles' Antigone expresses well the doubt that comes with contesting temporal authority; the demands of the law can seem reasonable after all when the gods' presence is uncertain: 'Why should I look to the gods in my misery? Whom should I summon as ally? … If this proceeding is good in the gods' eyes I shall know my sin, once I have suffered. …' Sophocles, *Antigone* in David Grene and Richmond Lattimore (eds), *Greek Tragedies*, vol 1 (David Grene tr, 2nd edn, University of Chicago Press 1991) 177, 216.

conceived of as a static boundary. Differentiation is entirely defined within a singular purpose, the formation of a new community.

Temporal authority is exhorted to give heed to the church, as it enacts and points to an alternative community of charity. The church has different institutional forms, and in this thesis I have often discussed the Church of England and the Roman Catholic Church. But, through these institutions, it is also universal – an ideal shape, of practices and belief, that, it is claimed, unites the various institutional forms. And it is this more complete universal body that bears witness to forming a new community. Ecclesiology (the shape of the universal church) shapes a vision of civil society, forming 'the Church' as the practice of harmonious exchanges of gifts and talents, pursuing love of God and of one another in different contexts. This can be characterised as a quest or search. What does it mean to live participating in God's own life? What is the true human (common) end? How do we pursue goods in common in light of this? How do we associate? Church, in an institutional sense, remains fundamental because it is understood as establishing a new body, a new society that participates in God's own life. Such participation is a form of judgement against 'politics' as the management or maximisation of individual interests. And this entails a degree of autonomy: the ability freely to seek out an eternal truth, formed not just as an idea but as the shape of community itself. But such participation is the basis for transforming society as such in line with this new life of charity, encouraging new habits of association. 'Church', in this sense, is not bounded. The RO account consequently emphasises a form of social pluralism as the translation or instantiation of Church ramified throughout the polity – in families, educational institutions, unions and workplaces, and charitable organisations. Indeed, on the RO account this extends to recognition of other religious groups. The Christian construal shapes central religious liberty concerns, as discussed in this thesis – the

autonomy of religious bodies, including understanding the group as a 'body' rather than a vehicle for individual interests; the pursuit of charity beyond 'law'; and developing a qualified level of loyalty to any temporal authority. But this understanding of religion is able to comprehend other traditions as similarly a 'body' pointing to the quest for human flourishing and contributing to a polity that is characterised by more than the management of interests. Indeed, one characterisation of post-secular in the UK is an alliance of different religious groups against secularisation, participating in a conversation, often initiated by the churches and especially the Church of England, over how to pursue goods in common within an undifferentiated public space.[11]

As it relates to the person, both post-secular accounts appeal to human dignity. Within the modern moral order promoted by Habermas (following Dworkin), human dignity is a synonym for equal concern and respect for individuals' conceptions of the good, a capacity to develop our own sense of a successful life and 'style'.[12] Against this, human dignity within the RO account is a quest for human flourishing or perfection. Ordained to God as his or her end, the person has infinite worth. They are, on a more personalist account, a unique reflection of God's own glory, participating in his life by communicating charity to others. The person, consequently, is not a discrete will, but is always and necessarily formed in a network of relations – to God and to others. This means an emphasis on roles, talents, or gifts, parts contributing to a common good.[13]

---

[11] See John Milbank, 'Shari'a and the True Basis of Group Rights: Islam, the West, and Liberalism' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010) 135, 138; Luke Bretherton, *Christianity and Contemporary Politics* (Wiley-Blackwell 2010) 219-220; Graham Ward, *True Religion* (Blackwell 2003) 139, 153.

[12] See Habermas, 'Human Dignity' (n 3) 469 and Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 203-04.

[13] See John Milbank, 'Dignity Rather than Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) (forthcoming). See also Joel Harrison, '"A Communion in Good Living": Human Dignity

Here, this quest for human dignity, pursued for all people, begins to present its own, different understanding of the *res publica* or commonwealth. From the RO perspective, Dworkin's 'commonweal' is not a truly social endeavour. It does not concern any shared end other than mutual protection of rights. More than this, on the RO account Dworkin's 'commonweal' is its own kind of faith, an agonistic *mythos* in which secular space is required to regulate and protect distinct individual wills now 'bracketed' from God. In contrast, an Augustinian account of the *res publica* is appealed to: a 'people' is constituted through agreement in a common object of love, which on the Christian vision entails pursuing right distribution through participation in the source of right. On this account, religious liberty discourse, which concerns both the judgement of eternal truth and the transformation of society, is consequently central to a different understanding of 'rights'. Rather than an appeal to rights as protecting a capacity for autonomous moral choice, religious liberty points to the possibility of a right order – the harmonious interaction of diverse roles and bodies for a common pursuit of justice, perfected in charity. But an attempted discerning of right order, the formation of a people articulating a vision of society, means stepping beyond neutrality as to different conceptions of the good. While mindful of coercion and hospitable to religious difference, it entails identifying something as *right*, and society as orientated towards this. Arguably, the UK continues, albeit increasingly weakly,[14] to intimate these themes through the Church of England's privileged, established position. The Church is accepted by the state as 'the religious body in its opinion truly teaching the Christian faith'.[15] This arrangement, at

---

and Religious Liberty Beyond the Overlapping Consensus' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) (forthcoming).

[14] See *R (National Secular Society) v Bideford Town Council* [2012] EWHC 175, [2012] HRLR 12 (Admin). Although the case did not concern the Church of England's establishment, the decision certainly can be read as tending towards secularising public life. Ouseley J held opening local council meetings with a prayer was not (in the language of the Local Government Act 1972, s 111(1)) 'calculated to facilitate' the council's business. The council was not, in other words, empowered to pray.

least in theory, can be understood as constitutional recognition of the dialogical tension advanced by the Christian tradition: provisional affirmation of temporal authority as it directs society towards higher ends.

What we have then are two competing traditions, potentially claiming the label post-secular. Each understands religion in a particular way, treats differentiation differently, and develops a contrasting vision of the political community's purpose or end. Exploring the rationale for religious liberty consequently leads us into wider rights theory debates; these competing traditions parallel recent trajectories in rights discourse more generally. Rather than a single discourse, we are witnessing multiple articulations of rights (including articulations of *right*), or related ideas like human dignity, based on plural traditions. Of course, competing discourses may co-exist in tension. One could read the Church of England's establishment sitting alongside a discourse of neutrality as to different conceptions of the good in these terms. Moreover, if a tradition fails to convert its listeners, there are always potentially hybrid views. Wolterstorff, arguing against 'public reason' accounts that would try to exclude religious reasons from public deliberation, points to the likelihood of hybridity; we translate other perspectives, making allowances for those parts we do not accept and adopting connections where possible.[16] But hybridity (or syncretism), however likely, is not necessarily an improvement. This thesis has argued that there are strong currents within religious liberty discourse that are pressing towards its exhaustion. Contemporary discourse is often engaged in cultivating a modern moral order based on the regulation of competing subjective wills, neutrality, and value pluralism. These currents struggle to articulate a rationale for religious liberty beyond personal autonomy and they exhibit a tendency to treat the group sceptically as a restraint on abstract individual rights, as

[15] *Marshall v Graham* [1907] 2 KB 112, 116 cited in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [61] (Lord Hope of Craighead).
[16] Nicholas Wolterstorff, 'An Engagement with Rorty' (2003) 31 JRE 129, 135.

represented in the state's universal claim. Against this, we arguably do not need a synthesis, but rather a contemporary recovery, one, perhaps, that is radically orthodox.

BIBLIOGRAPHY

ARTICLES

Alexander L, 'Liberalism, Religion, and the Unity of Epistemology' (1993) 30 San Diego L Rev 763

Bamforth N, 'Conceptions of Anti-Discrimination Law' (2004) 24 OJLS 693

Beckford JA, 'Public Religions and the Postsecular: Critical Reflections (SSSR Presidential Address)' (2012) 51 Journal of the Scientific Study of Religion 1

Bell D, 'The Return of the Sacred? The Argument on the Future of Religion' (1977) 28 British Journal of Sociology 419

Bellah RN, 'Civil Religion in America' (1967) 96 Daedalus 1

Berger B, 'Law's Religion: Rendering Culture' (2007) 45 Osgoode Hall LJ 277
— — 'The Cultural Limits of Legal Tolerance' (2008) 21 Can J L & Juris 245

Berger P, 'Secularism in Retreat' (1996-1997) (Winter) The National Interest 3
— — 'Secularization Falsified' (*First Things*, February 2008) <www.firstthings.com/article/2008/01/002-secularization-falsified-1> accessed 23 September 2012

Bielefeldt H, 'Freedom of Religion or Belief – A Human Right under Pressure' (2012) 1 Ox J Law Religion 15

Biggar N, 'Nicholas Wolterstorff, *Justice: Rights and Wrongs*' (2010) 23 Studies in Christian Ethics 130

Brady KA, 'Religious Group Autonomy: Further Reflections about What is at Stake' (2007) 22 J Law Religion 153

Bradley GV, 'Life's Dominion: A Review Essay' (1993) 69 Notre Dame L Rev 329

Brennan B, 'Augustine's *De Musica*' (1988) 42 Vigiliae Christianae 267

Calo ZR, 'Human Rights and Healthy Secularity' (2010) 7 Journal of Catholic Social Thought 231
— — 'Catholicism, Liberalism, and Human Rights' (2011) 1 Journal of Christian Legal Thought (original paper on file with author)
— — 'Pluralism, Secularism and the European Court of Human Rights' (2011) 26 J L & Religion 261
— — 'Religion, Human Rights and Post-Secular Legal Theory' (2011) 85 St John's L Rev 495

Carter S, ‘Liberalism’s Religion Problem’ (March 2000) 121 First Things 21

Choper JJ, ‘Defining “Religion” in the First Amendment’ [1982] U Ill L Rev 579

Dorfman A, ‘Freedom of Religion’ (2008) 21 Can J L & Juris 279

Dworkin R, ‘Response’ (2010) 90 BU L Rev 1059, 1082

Edge PW, ‘Determining Religion in English Courts’ (2012) 2 Ox J Law Religion 402

Esau AJ, ‘“Islands of Exclusivity”: Religious Organizations and Employment Discrimination’ (1999-2000) 33 U Brit Colum L Rev 719

Evans C and Hood A, ‘Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights’ (2012) 1 Ox J Law Religion 81

Evans MD, ‘Advancing Freedom of Religion or Belief: Agendas for Change’ (2012) 1 Ox J Law Religion 5

Fiddes P, ‘The Root of Religious Freedom: Interpreting Some Muslim and Christian Sacred Texts’ (2012) 1 Ox J Law Religion 169

Finnis J, ‘Religion and State: Some Main Issues and Sources’ (2006) 51 Am J Juris 107
— — ‘Directly Discriminatory Decisions: A Missed Opportunity’ (2010) 126 LQR 491

Fish S, ‘Mission Impossible: Settling the Just Bounds Between Church and State’ (1997) 97 Colum L Rev 2255

Freedland M and Vickers L, ‘Religious Expression in the Workplace in the United Kingdom’ (2009) 30 Comp Lab L & Pol’y J 597

French RR, ‘From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law’ (1999) 41 Ariz L Rev 49
— — ‘Shopping for Religion: The Change in Everyday Practice and its Importance to the Law’ (2003) 51 Buff L Rev 127

Garnett R, ‘Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine’ (2004) 51 UCLA L Rev 1645
— — ‘Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?’ (2007) 22 St John’s J Legal Comment 515
— — ‘Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses’ (2008) 53 Vill L Rev 273
— — ‘Religious Freedom, Church Autonomy, and Constitutionalism’ (2009) 57 Drake L Rev 901

Garvey J, ‘An Anti-Liberal Argument for Religious Freedom’ (1996) 7 J Contemp Legal Issues 275

Gey S, 'Why is Religion Special? Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment' (1990) 52 U Pitt L Rev 75

Girgis S, George RP and Anderson RT, 'What is Marriage?' (2011) 34 Harv J L & Pub Pol'y 245

Goldberg JCP, 'Liberal Responsibility: A Comment on Justice for Hedgehogs' (2010) 90 BU L Rev 677

Greenawalt K, 'Religion as a Concept in Constitutional Law' (1984) 72 Cal L Rev 753
— — 'Hands Off! Civil Court Involvement in Conflicts over Religious Property' (1998) 98 Colum L Rev 1843
— — 'Hands Off: When and About What' (2009) 84 Notre Dame L Rev 913
— — 'Fundamental Questions about the Religion Clauses: Reflections on Some Critiques' (2010) 47 San Diego L Rev 1131

Grisez G, Boyle J and Finnis J, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 Am J Juris 99

Habermas J, 'Intolerance and Discrimination' (2003) 1 ICON 2
— — 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464

Hasson KJ, 'Religious Liberty and Human Dignity: A Tale of Two Declarations' (2003) 27 Harv J L & Pub Pol'y 81

Hatzis N, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74 MLR 287

Hauerwas S, 'On the Right to be Tribal' (1987) 16 Christian Scholar's Review 238

Hauerwas S and Baxter M, 'The Kingship of Christ: Why Freedom of "Belief" is Not Enough' (1992) 42 DePaul L Rev 107

Hittinger R, '*Dignitatis Humanae*, Religious Liberty, and Ecclesiastical Self-Government' (2000) 68 Geo Wash L Rev 1035

Horwitz P, 'The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond' (1996) 54 U Toronto Fac L Rev 1
— — 'Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion' (1997) 47 DePaul L Rev 85
— — 'Churches as First Amendment Institutions: of Sovereignty and Spheres' (2009) 44 Harv CR-CL L Rev 79

Koppelman A, 'How Shall I Praise Thee? Brian Leiter on Respect for Religion' (2010) 47 San Diego L Rev 961

Langlaude S, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (2006) 55 ICLQ 929

Laycock D, 'Formal, Substantive, and Disaggregated Neutrality Toward Religion' (1990) 39 DePaul L Rev 993

Leigh I, 'Recent Developments in Religious Liberty' (2009) 11 Ecc LJ 65
— — 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12 Ecc LJ 266
— — 'Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 Res Publica 55
— — 'Balancing Religious Autonomy and other Human Rights under the European Convention' (2012) 1 Ox J Law Religion 109

Leigh I and Ahdar R, 'Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away' (2012) 75 MLR 1064

Leiter B, 'Why Tolerate Religion?' (2008) 25 Const Comment 1

Lockwood-O'Donovan J, 'Historical Prolegomena to a Theological Review of "Human Rights"' (1996) 9 Studies in Christian Ethics 52

Marshall WP, 'Religion as Ideas: Religion as Identity' (1996) 7 J Contemp Legal Issues 385

McColgan A, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 ILJ 1

McConnell M, 'Religious Freedom at a Crossroads' (1992) 59 U Chi L Rev 115
— — 'The Problem of Singling Out Religion' (2000) 50 DePaul L Rev 1

McConnell M and Posner R, 'An Economic Approach to Issues of Religious Freedom' (1989) 56 U Chi L Rev 14

McCrudden C, 'Thinking about the Discrimination Directives' (2005) 1 European Anti-Discrimination Law Review 17
— — 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered' (2011) 9 ICON 200
— — 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecc LJ 26
— — 'Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence, and Dialogue?' (2012) 1 Ox J Law Religion 185
— — 'Benedict's Legacy: Human Rights, Human Dignity, and the Possibility of Dialogue' (draft, on file with the author).

McIlroy DH, 'Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape and Scope of Government' (2003) 45 J Church & State 739

Milbank J, 'Against Human Rights: Liberty in the Western Tradition' (2012) 1 Ox J Law Religion 203
— — 'The Gift of Ruling: Secularization and Political Authority' (2004) 85 New Blackfriars 212
— — 'A Closer Walk on the Wilder Side: Some Comments on Charles Taylor's A Secular Age' (2009) 22(1) Studies in Christian Ethics 89
— — 'On Anglican Extremism: The Theopolitical Legacy of Hooker' (2011) (on file with author)

— — Ethos and Education: Beyond Romanticism and Enlightenment (2011) (on file with author)
— — 'Blue Labour, One-Nation Labour and Postliberalism: A Christian Socialist Reading' (2012) Centre of Theology and Philosophy Working Papers <http://theologyphilosophycentre.co.uk/papers/Milbank_BlueLabourOneNationLabourAndPostliberalism.pdf> accessed 12 March 2013

Moyn S, 'Jacques Maritain, Christian New Order, and the Birth of Human Rights' (2008) Columbia University <http://ssrn.com/abstract=1134345> accessed 11 July 2012

Muñiz-Fraticelli VM, 'The Distinctiveness of Religious Liberty' (2011) McGill University <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921646> accessed 14 May 2012

Nickel JW, 'Who Needs Freedom of Religion?' (2005) 76 U Colo L Rev 941

Noonan J, 'Religious Liberty at the Stake' (1998) 84 Va L Rev 459

O'Donovan O, 'The Language of Rights and Conceptual History' (2009) 37 Journal of Religious Ethics 193

Ogilvie M, 'And Then There was One: Freedom of Religion in Canada – the Incredible Shrinking Concept' (2008) 10 Ecc LJ 197

Perry J, 'Two Questions for Wolterstorff: On the Roles Played by Rights-Talk in History and the Measuring of Worth' (2010) 32 Studies in Christian Ethics 147

Pope SJ, 'Aquinas on Almsgiving, Justice and Charity: An Interpretation and Reassessment' (1991) 32 Hey J 167

Porter J, 'From Natural Law to Human Rights: Or, Why Rights Talk Matters' (2000) 14 J L & Religion 77

Raday F, 'Culture, Religion and Gender' (2003) 1 ICON 663

Rishworth P, 'The Religion Clauses of the New Zealand Bill of Rights' [2007] NZ L Rev 631

Rivers J, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174
— — 'Law, Religion and Gender Equality' (2007) 9 Ecc LJ 24
— — 'Three Concepts of Natural Human Rights' (2010) 23 Studies in Christian Ethics 182
— — 'Promoting Religious Equality' (2012) 1 Ox J Law Religion 386
— — 'Redefining Marriage: The Case for Caution' (2012) 21 Cambridge Papers 1 <www.jubilee-centre.org/uploaded/files/resource_432.pdf> accessed 5 March 2013
— — 'The Secularisation of the British Constitution' (2012) 14 Ecc LJ 371

Rorty R, 'Religion as Conversation-Stopper' (1994) 3 Common Knowledge 1
— — 'Religion in the Public Square: A Reconsideration' (2003) 31 Journal of Religious Ethics 141

Rubin EL, 'Rethinking Human Rights' (2003) 9 Int'l Legal Theory 5

Sajó A, ‘Preliminaries to a Concept of Constitutional Secularism’ (2008) 6 ICON 605

Sandberg R, ‘Church-State Relations in Europe: From Legal Methods to an Interdisciplinary Approach’ (2008) 1 Journal of Religion in Europe 329

Sapir G, ‘Religion and State – A Fresh Theoretical Start’ (1999) 75 Notre Dame L Rev 579

Smith JK, ‘Reforming Public Theology: Two Kingdoms, or Two Cities’ (2012) 47 CTJ 122

Smith SD, ‘The Rise and Fall of Religious Freedom in Constitutional Discourse’ (1991) 140 U Pa L Rev 149
— — ‘Persons Pursuing Goods’ (2007) 13 LT 285
— — ‘Discourse in the Dusk: The Twilight of Religious Freedom?’ (2009) 122 Harv L Rev 1869

Song S, ‘Multiculturalism’ in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2010) <http://plato.stanford.edu/archives/win2010/entries/multiculturalism/> accessed 4 February 2013

Stern CA and Jones GM, ‘The Coherence of Natural Inalienable Rights’ (2008) 76 UMKC Law Review 939

Sullivan KM, ‘Religion and Liberal Democracy’ (1992) 59 U Chi L Rev 195

Vickers L, ‘Religious Discrimination in the Workplace: An Emerging Hierarchy?’ (2010) 12 Ecc LJ 280
— — ‘Twin Approaches to Secularism: Organized Religion and Society’ (2012) 32 OJLS 197

Waldron J, ‘Theoretical Foundations of Liberalism’ (1987) 37 Phil Q 127
— — ‘One Law for All? The Logic of Cultural Accommodation’ (2002) 59 Wash & Lee L Rev 3
— — ‘Dignity, Rights, and Responsibilities’ (2011) 43 Ariz St LJ 1107

Wannenwetsch B, ‘But to *Do* Right … Why the Language of “Rights” Does Not Do Justice to Justice’ (2010) 23 Studies in Christian Ethics 138

Ward G, ‘In the Economy of the Divine: A Response to James K.A. Smith’ (2003) 25 Pneuma 115
— — ‘Narrative and Ethics: The Structures of Believing and the Practices of Hope’ (2006) 20 Literature and Theology 438

Weiler JH, ‘A Christian Europe? Europe and Christianity: Rules of Commitment’ (2007) 6 European View 143
— — ‘State and Nation: Church, Mosque and Synagogue – the Trailer’ (2010) 8 ICON 157

Williams R, ‘Politics and the Soul: A Reading of the *City of God*’ (1987) 19/20 Milltown Studies 55
— — ‘Civil and Religious Law in England: A Religious Perspective’ (2008) 10 Ecc LJ 262

Wintemute R, 'Religion vs Sexual Orientation' (2002) 1 JLE 125

Wolterstorff N, 'Abraham Kuyper on the Limited Authority of Church and State' (2009) 7 Geo J L & Pub Pol'y 105
— — 'An Engagement with Rorty' (2003) 31 Journal of Religious Ethics 129

BOOKS

— — *The Holy Bible* (New International Version tr, Broadman & Holman 1995)

Ahdar RJ and Leigh I, *Religious Freedom in the Liberal State* (OUP 2005)

Appleby RS, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (Rowman and Littlefield Publishers 2000)

Aquinas T, *The Summa Theologiae of Saint Thomas Aquinas* (NovAntiqua 2008)

Asad T, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (John Hopkins University Press 1993)

Augustine, *Concerning the City of God Against the Pagans* (Bettenson H tr, Penguin 2003)
— — *Confessions* (Chadwick H tr, OUP 2008)

Badiou A, *Saint Paul: The Foundation of Universalism* (Ray Brassier tr, Stanford University Press 2003)

Bell DM, *Liberation Theology after the End of History: The Refusal to Cease Suffering* (Routledge 2001)

Bellah R, *Habits of the Heart: Individualism and Commitment in American Life* (University of California Press 1996)

Bender C, *The New Metaphysicals: Spirituality and the American Religious Imagination* (Chicago University Press 2010)

Berger P, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (NY Doubleday 1967)

Berkowitz P, *Virtue and the Making of Modern Liberalism* (Princeton University Press 1999)

Berman H, *Law and Revolution: The Formation of the Western Legal Tradition* (HUP 1983)

Black A, *Political Thought in Europe, 1250-1450* (CUP 1992)

Blond P, *Red Tory: How Left and Right Have Broken Britain and How We Can Fix It* (Faber and Faber 2010)

Bonhoeffer D, *Ethics* (Touchstone 1995)

Brawer N, *Judaism: Theology, History and Practice* (Constable & Robinson 2008)

Bretherton L, *Christianity and Contemporary Politics* (Wiley-Blackwell 2010)

Brown W, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press 2006)

Casanova J, *Public Religions in the Modern World* (University of Chicago Press 1994)

Cavanaugh WT, *Theopolitical Imagination: Discovering the Liturgy as a Political Act in an Age of Global Consumerism* (T&T Clark 2002)
— — *Being Consumed: Economics and Christian Desire* (William B Eerdmans 2008)
— — *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP 2009)
— — *Migrations of the Holy: God, State, and the Political Meaning of the Church* (William B Eerdmans 2011)

Deane HA, *The Political and Social Ideas of St. Augustine* (Columbia University Press 1963)

Doe N, *Law and Religion in Europe: A Comparative Introduction* (OUP 2011)

Dworkin R, *A Matter of Principle* (Clarendon Press 1986)
— — *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000)
— — *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006)
— — *Justice for Hedgehogs* (Belknap Press 2011)

Edge P, *Religion and Law: An Introduction* (Ashgate 2006)

Eisgruber CL and Sager LG, *Religious Freedom and the Constitution* (Harvard University Press 2007)

Evans C, *Freedom of Religion under the European Convention of Human Rights* (OUP 2001)

Fenn RK, *Key Thinkers in the Sociology of Religion* (Continuum 2009)

Figgis JN, *The Political Aspects of St. Augustine's City of God* (Longmans 1921)

Finnis J, *Natural Law and Natural Rights* (Clarendon Press 1980)
— — *Natural Law and Natural Rights* (2nd edn, OUP 2011)

Fredman S, *Discrimination Law* (OUP 2002)

Galston WA, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (CUP 1991)

George RP, *In Defense of Natural Law* (Clarendon Press 1999)

Glendon M, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991)

Grisez G, *The Way of the Lord Jesus* (St Paul's 2008)

Habermas J and Ratzinger J, *The Dialectics of Secularization: On Reason and Religion* (McNeil B tr, Ignatius Press 2006)

Hauerwas S, *The Peaceable Kingdom* (University of Notre Dame Press 1983)
— — *After Christendom? How the Church is to Behave if Freedom, Justice, and a Christian Nation are Bad Ideas* (Abingdon Press 1991)
— — *In Good Company: The Church as Polis* (University of Notre Dame Press 1995)

Hauerwas S and Willimon WH, *Resident Aliens: Life in the Christian Colony* (Abingdom 1989)

Heiman G, *Otto Gierke, Associations and the Law: The Classical and Early Christian Stages* (University of Toronto Press 1977)

Hittinger R, *A Critique of the New Natural Law Theory* (University of Notre Dame Press 1987)

Insole CJ, *The Politics of Frailty: A Theological Defense of Political Liberalism* (University of Notre Dame Press 2004)

Jenkins P, *The Next Christendom: The Coming of Global Christianity* (OUP 2002)

Johnson KD, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Difference* (CUP 2007)

Kirwan C, *Augustine* (Routledge 1989)

Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995)

Long DS, *Divine Economy: Theology and the Market* (Routledge 2000)

Luckmann T, *Invisible Religion* (Macmillan 1967)

MacIntyre A, *Whose Justice? Which Rationality?* (Gerald Duckworth 1988)
— — *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy and Tradition* (University of Notre Dame Press 1990)
— — *After Virtue: A Study in Moral Theory* (3rd edn, Duckworth 2007)

Macklem T, *Independence of Mind* (Oxford University Press 2006)

Maclure J and Taylor C, *Secularism and Freedom of Conscience* (Harvard University Press 2011)

Maritain J, *The Person and the Common Good* (Geoffrey Bles 1948)
— — *Man and State* (Chicago University Press 1951)

— — *Integral Humanism* (Charles Scribner's Sons 1968)

Markus RA, *Saeculum: History and Society in the Theology of St Augustine* (CUP 1970)

Martin D, *On Secularization: Towards a Revised General Theory* (Ashgate 2005)

McCrea R, *Religion and the Public Order of the European Union* (OUP 2010)

McGrade AS, *The Political Thought of William of Ockham: Personal and Institutional Principles* (CUP 1974)

McGrath A, *The Re-Enchantment of Nature: Science, Religion and the Human Sense of Wonder* (Hodder & Stoughton 2002)

McIlwain CH, *The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages* (The MacMillan Company 1932)

Meyerson D, *Rights Limited* (Juta & Co Ltd 1997)

Micklethwait J and Wooldridge A, *God is Back: How the Global Revival of Faith is Changing the World* (Penguin 2009)

Milbank J, *The Word Made Strange: Theology, Language, Culture* (Blackwell 1997)
— — *Being Reconciled: Ontology and Pardon* (Routledge 2003)
— — *Theology and Social Theory: Beyond Secular Reason* (2nd edn, Blackwell Publishing 2006)
— — *The Future of Love: Essays in Political Theology* (SCM Press 2009)
— — *Beyond Secular Order* (2011) (draft, on file with author)

Mill JS, *On Liberty* (Wordsworth Classic 1996)

Neuhaus RJ, *The Naked Public Square: Religion and Democracy in America* (2nd edn, William B Eerdmans 1986)

Nussbaum M, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books 2008)

O'Donovan O, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (CUP 1996)
— — *Common Objects of Love: Moral Reflection and the Shaping of Community* (William B Eerdmans 2002)
— — *The Ways of Judgment* (William B Eerdmans 2005)
— — *A Conversation Waiting to Begin: The Churches and the Gay Controversy* (SCM Press 2009)

Perry J, *The Pretenses of Loyalty: Locke, Liberal Theory & American Political Theology* (OUP 2011)

Perry M, *Toward a Theory of Human Rights: Religion, Law, Courts* (CUP 2007)

Pickstock C, *After Writing: On the Liturgical Consummation of Philosophy* (Blackwell 1998)

Rawls J, *A Theory of Justice* (Harvard University Press 1971)
— — *Political Liberalism* (Expanded edn, Columbia University Press 2005)

Raz J, *The Morality of Freedom* (Clarendon Press 1986)

Rist JM, *Augustine: Ancient Thought Baptized* (CUP 1994)

Rivers J, *The Law of Organized Religions* (OUP 2010)

Rowland T, *Culture and the Thomist Tradition: After Vatican II* (Routledge 2003)

Roy O, *Secularism Confronts Islam* (Holock G tr, Columbia University Press 2007)

Sabine G, *A History of Political Theory* (3rd edn, Holt, Rinehart and Winston 1961)

Sandel M, *Liberalism and the Limits of Justice* (CUP 1982)

Shakespeare S, *Radical Orthodoxy: A Critical Introduction* (SPCK 2007)

Smith JK, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker Academic 2004)
— — *Who's Afraid of Postmodernism?: Taking Derrida, Lyotard, and Foucault to Church* (Baker Academic 2006)
— — *Desiring the Kingdom: Worship, Worldview, and Cultural Formation* (Baker Academic 2009)

Smith S, *The Disenchantment of Secular Discourse* (Harvard University Press 2010)

Smith WC, *The Meaning and End of Religion* (Macmillan 1962)

Taylor C, *A Secular Age* (Belknap Press 2007)

Taylor P, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP 2005)

Tierney B, *The Idea of Natural Rights* (William B Eerdmans 1997)

Tuck R, *Natural Rights Theories: Their Origin and Development* (CUP 1979)

Vickers L, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008)

Ward G, *Cities of God* (Routledge 2000)
— — *True Religion* (Blackwell 2003)
— — *The Politics of Discipleship: Becoming Postmaterial Citizens* (SCM Press 2009)

Warner R, *Secularization and its Discontents* (Continuum 2010)

Webber RE, *The Younger Evangelicals* (Baker Books 2002)

Williams R, *Faith in the Public Square* (Bloomsbury Press 2012)

Wilson B, *Religion in Secular Society: A Sociological Comment* (CA Watts 1996)

Wolterstorff N, *Justice: Rights and Wrongs* (Princeton University Press 2008)

Woodhead L and Heelas P, *Religion in Modernity: An Interpretive Anthology* (Blackwell 2000)

BOOK CHAPTERS

— — 'Concluding Discussion' in Mendieta E and Vanantwerpen J (eds), *The Power of Religion in the Public Sphere* (Columbia University Press 2011)

— — 'Dialogue: Jürgen Habermas and Charles Taylor' in Mendieta E and Vanantwerpen J (eds), *The Power of Religion in the Public Sphere* (Columbia University Press 2011)

Ahdar R and Aroney N, 'The Topography of Shari'a in the Western Political Landscape' in Ahdar R and Aroney N (eds), *Shari'a in the West* (OUP 2010)

Augustine, 'Of True Religion' in Burleigh J (ed), *Augustine: Earlier Writings* (SCM Press 1953)

Bell DM, 'State and Civil Society' in Scott P and Cavanaugh WT (eds), *The Blackwell Companion to Political Theology* (Blackwell Publishing 2007)

Bruce S, 'Secularization and the Impotence of Individualized Religion (2006)' in Turner BS (ed), *Secularization: The Sociology of Secularization,* vol 2 (Sage 2010)

Cavanaugh WT, 'The City: Beyond Secular Parodies' in Milbank J, Pickstock C and Ward G (eds), *Radical Orthodoxy: A New Theology* (Routledge 1999)
— — 'From One City to Two: Christian Reimagining of Political Space' in *Migrations of the Holy: God, State, and the Political Meaning of the Church* (William B Eerdmans 2011)

Cover R, 'Violence and the Word' in Minow M, Ryan M and Sarat A (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (University of Michigan Press 1992)
— — 'Nomos and Narrative' in Minow M, Ryan M and Sarat A (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (University of Michigan Press 1992)

Davie G, 'Religion in Europe in the 21st Century: The Factors to Take into Account (2006)' in Turner BS (ed), *Secularization: The Sociology of Secularization,* vol 2 (Sage 2010)

Davis PD, 'Ecclesiology' in McGrath AE (ed), *The Blackwell Companion of Modern Christian Thought* (Blackwell 1993)

Eisgruber CL and Sager LG, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) U Chi L Rev 1245

Evans MD, 'Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflicts' in Lindholm T, Cole Durham W, and Tahzib-Lie BG (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004)
— — 'Does God Believe in Human Rights? A Reflection' in Ghanea N, Stephens A and Walden R (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers 2007)

Figgis JN, 'The Great Leviathan' in Hirst PQ (ed), *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (Routledge 1989)

Finnis J, 'Commensuration and Public Reason' in Chang R (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997)
— — 'Catholic Positions in Liberal Debates (1999)' in *Religion & Public Reasons, Collected Essays*, vol 5 (OUP 2011)
— — 'Human Rights and their Enforcement (1985)' in *Human Rights & Common Good, Collected Essays*, vol 3 (OUP 2011)
— — 'Introduction' in *Religion & Public Reasons, Collected Essays*, vol 5 (OUP 2011)
— — 'Introduction' in *Human Rights & Common Good, Collected Essays*, vol 3 (OUP 2011)
— — 'Limited Government (1996)' in *Human Rights and Common Good: Collected Essays*, vol 3 (OUP 2011)
— — 'Philosophy and God's Nature: Second Thoughts (2008)' in *Religion & Public Reasons, Collected Essays*, vol 5 (OUP 2011)
— — 'Secularism's Practical Meaning' in *Religion & Public Reasons, Collected Essays*, vol 5 (OUP 2011)

Fish S, 'Introduction: "That's Not Fair"' in Fish S (ed), *There's No Such Thing as Free Speech (And it's a Good Thing Too)* (OUP 1994)

Garnett R, '"Two There Are": Understanding the Separation of Church and State' in Hogan M and Frederking LC (eds), *The American Experiment in Religious Freedom* (Garaventa Center 2008)

Gelasius, 'Letter to Emperor Anastasius' in O'Donovan O and O'Donovan JL (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999)

Glendon M, 'Comments on Part 4' in Kirchof P and Kommers D (eds), *Germany and Its Basic Law: Past, Present and Future – A German-American Symposium* (Nomos Verlagsgesellschaft 1993)

Gorski PS, 'Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, CA. 1300-1700 (2000)' in Turner BS (ed), *Secularization: Defining Secularization, The Secular in Historical and Comparative Perspective*, vol 1 (Sage 2010)

Gorski PS and others, 'The Post-Secular in Question' in Gorski PS and others (eds), *The Post-Secular In Question: Religion in Contemporary Society* (SSRN and New York University Press 2012)

Gregory VII, 'Dictatus Papae (1075) and Letter (1081)' in O'Donovan O and O'Donovan JL (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999)

Habermas J, 'An Awareness of What is Missing' in Brieksom N and others (eds), *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (Polity Press 2010)
— — 'Religion in the Public Sphere (2006)' in Turner BS (ed), *Secularization: Defining Secularization, The Secular in Historical and Comparative Perspective*, vol 1 (Sage 2010)
— — '"The Political": The Rational Meaning of a Questionable Inheritance of Political Theology' in Mendieta E and Vanantwerpen J (eds), *The Power of Religion in the Public Sphere* (Columbia University Press 2011)

Hanegraaff WJ, 'New Age Spiritualities as Secular Religion: A Historian's Perspective (1999)' in Turner BS (ed), *Secularization: The Comparative Sociology of De-Secularization*, vol 4 (Sage 2010)

Harrison J, '"A Communion in Good Living": Human Dignity and Religious Liberty Beyond the Overlapping Consensus' in McCrudden C (ed), *Understanding Human Dignity* (OUP 2013)

Hervieu-Léger D, 'In Search of Certainties: The Paradoxes of Religiosity in Societies of High Modernity' in Turner BS (ed), *Secularization: The Comparative Sociology of De-Secularization*, vol 4 (Sage 2010)

Hirst PQ, 'Introduction' in Hirst PQ (ed), *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (Routledge 1989)

Jacob EF, 'Ockham as a Political Thinker' in *Essays in the Conciliar Epoch* (Manchester University Press 1943)
Kant I, 'An Answer to the Question: What is Enlightenment? (1784)' in Gripsrud J and others (eds), *The Public Sphere: Discovering the Public Sphere*, vol 1 (Sage 2011)

Laski HJ, 'The Pluralistic State' in Hirst PQ (ed), *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (Routledge 1989)

Lehmkhul A, 'Sacrament of Marriage' in Knight K (ed), *The Catholic Encyclopedia* (Robert Appleton Company 1910) <http://www.newadvent.org/cathen/09707a.htm> accessed 6 April 2013

Lindholm T, 'Philosophical and Religious Justifications of Freedom of Religion or Belief' in Lindholm T, Cole Durham W, and Tahzib-Lie BG (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004)

Lindholm T and others, 'Introduction' in Lindholm T, Cole Durham W, and Tahzib-Lie BG (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers 2004)

Locke J, 'A Letter Concerning Toleration' in Tully JH (ed), *A Letter Concerning Toleration* (Hackett Publishing Co 1983)

Luther M, ‘Psalm 82’ in Jaroslav Pelikan (ed), *Luther’s Works*, vol 13 (Jacobs CM tr, Concordia Publishing House 1956)

MacIntyre A, ‘Plain Persons and Moral Philosophy: Rules, Virtues and Goods’ in Knight K (ed), *The MacIntyre Reader* (Polity Press 1998)
— — ‘The Claims of *After Virtue*’ in Knight K (ed), *The MacIntyre Reader* (Polity Press 1998)

Maitland FW, ‘Moral Personality and Legal Personality’ in Hazeltine HD, Lapsley G, Winefield PH (eds), *Maitland: Selected Essays* (CUP 1936)

Marsilius, ‘Defensor Pacis (1324)’ in O’Donovan O and O’Donovan JL (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999)

McCrudden C, ‘Equality and Non-Discrimination’ in Feldman D (ed), *English Public Law* (2nd edn, OUP 2009)
— — ‘Dignity and Religion’ in Griffith-Jones R (ed), *Islam and English Law* (CUP 2013)
— — ‘Reva Siegel and the Role of Religion in Constructing the Meaning of “Human Dignity”’ in Hanoch Dagan (ed), *The Role of Religion in Human Rights Discourse* (forthcoming).

McGrath AE, ‘Soteriology’ in McGrath AE (ed), *The Blackwell Encyclopedia of Modern Christian Thought* (Blackwell 1993)

Milbank J, ‘Can Morality be Christian?’ in *The Word Made Strange: Theology, Language, Culture* (Blackwell Publishing 1997)
— — ‘A Critique of the Theology of Right’ in *The Word Made Strange: Theology, Language, Culture* (Blackwell Publishing 1997)
— — ‘On Complex Space’ in *The Word Made Strange: Theology, Language, Culture* (Blackwell Publishing 1997)
— — ‘Politics: Socialism by Grace’ in *Being Reconciled: Ontology and Pardon* (Routledge 2003)
— — ‘Forward’ in Smith JK, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker Academic 2004)
— — ‘Liberality versus Liberalism’ in Hoelzl M and Ward G (eds), *Religion and Political Thought* (Continuum 2006)
— — ‘Christ the Exception’ in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)
— — ‘Enclaves, or Where is the Church?’ in *The Future of Love: Essays in Political Theology* (SCM Press 2009)
— — ‘The Grandeur of Reason and the Perversity of Rationalism: Radical Orthodoxy’s First Decade’ in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)
— — ‘On Theological Transgression: The Theological Virtues’ in *The Future of Love: Essays in Political Theology* (SCM Press 2009)
— — ‘Stale Expressions: The Management-Shaped Church’ in *The Future of Love: Essays in Political Theology* (SCM Press 2009)
— — ‘Truth and Vision’ in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)

— — ‘The Archbishop of Canterbury: The Man and the Theology behind the Shari’a Lecture’ in Ahdar R and Aroney N (eds), *Shari’a in the West* (OUP 2010)
— — ‘Paul Against Biopolitics’ in Milbank J, Žižek S and Davis C (eds), *Paul’s New Moment: Continental Philosophy and the Future of Christian Theology* (Brazos Press 2010)
—–, ‘Shari’a and the True Basis of Group Rights: Islam, the West, and Liberalism’ in Ahdar R and Aroney N (eds), *Shari’a in the West* (OUP 2010)
—–, ‘An Apologia for Apologetics’ in Davison A (ed), *Imaginative Apologetics: Theology, Philosophy and the Catholic Tradition* (SCM Press 2011)
—–, ‘Dignity Rather than Rights’ in McCrudden C (ed), *Understanding Human Dignity* (OUP 2013)

Milbank J, Pickstock C and Ward G, ‘Suspending the Material: The Turn of Radical Orthodoxy’ in Milbank J, Pickstock C and Ward G (eds), *Radical Orthodoxy: A New Theology* (Routledge 1999)

Ockham, ‘Eight Questions on Papal Power’ in O’Donovan O and O’Donovan JL (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999)
— — ‘A Short Discourse on the Tyrannical Ascendancy of the Pope’ in O’Donovan O and O’Donovan JL (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999)

Oliver S, ‘Introducing Radical Orthodoxy: From Participation to Late Modernity’ in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)
— — ‘Introduction – Politics and Theology’ in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)

Pickstock C, ‘Radical Orthodoxy and the Meditations of Time’ in Hemming LP (ed), *Radical Orthodoxy? A Catholic Enquiry* (Ashgate 2000)
— — ‘Duns Scotus: His Historical and Contemporary Significance’ in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)

Pitt G, ‘Religion or Belief: Aiming at the Right Target?’ in Meenan H (ed), *Equality Law in An Enlarged European Union* (CUP 2007)

Rawls J, ‘The Idea of Public Reason Revisited’ in *The Law of Peoples* (Harvard University Press 1999)

Riordan, P, ‘Which Dignity? Which Religious Freedom?’ in Christopher McCrudden (ed) *Understanding Human Dignity* (OUP/Proceedings of the British Academy 2013)

Rivers J, ‘Liberal Constitutionalism and Christian Political Thought’ in Paul Beaumont (ed), *Christian Perspectives on the Limits of Law* (Paternoster Press 2002)

Rowland C, ‘Eschatology’ in Alister E McGrath (ed), *The Blackwell Encyclopedia of Modern Christian Thought* (Blackwell Publishing 1993)

Sandel MJ, ‘Freedom of Conscience or Freedom of Choice’ in Hunter JD and Guiness O (eds), *Articles of Faith, Articles of Peace* (Brookings Institution 1990)

Sarat A, 'Robert Cover on Law and Violence' in Minow M, Ryan M and Sarat A (eds), *Narrative, Violence, and the Law* (Michigan University Press 1992)

Sedley S, 'Forward' in Moon G, Stacey M and McGolgan A (eds), *Discrimination Law Handbook* (2nd edn, Legal Action Group 2007)

Shortt R, 'Radical Orthodoxy: A Conversation' in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)

Smith AP and Whistler D, 'What is Continental Philosophy of Religion Now?' in Smith AP and Whistler D (eds), *After the Postsecular and the Postmodern: New Essays in Continental Philosophy of Religion* (Cambridge Scholars Publishing 2010)

Sollier J, 'Love (Theological Virtue)' in Knight K (ed), *The Catholic Encyclopedia* (Robert Appleton Company 1910) <www.newadvent.org/cathen/09397a.htm> accessed 11 November 2012

Stark R and Iannaccone LR, 'A Supply-Side Reinterpretation of the "Secularization" of Europe (1994)' in Turner BS (ed), *Secularization: The Sociology of Secularization*, vol 2 (Sage 2010)

Suárez F, 'Laws and God the Lawgiver, Book 2 (1612)' in O'Donovan O and O'Donovan JL (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999)

Taylor C, 'The Politics of Recognition' in Gutmann A (ed), *Multiculturalism and the "Politics of Recognition": An Essay by Charles Taylor* (Princeton University Press 1992)
— — 'Why We Need a Radical Redefinition of Secularism' in Mendieta E and Vanantwerpen J (eds), *The Power of Religion in the Public Sphere* (Columbia University Press 2011)

Voegelin E, 'The New Science of Politics' in *The Collected Works of Eric Voegelin: Modernity Without Restraint*, vol 5 (University of Missouri Press 2000)
— — 'The Political Religions' in *The Collected Works of Eric Voegelin: Modernity Without Restraint*, vol 5 (University of Missouri Press 2000)

Vries Hd, 'Introduction: Before, Around, and Beyond the Theologico-Political' in Vries Hd and Sullivan LE (eds), *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press 2006)

Waldron MA, 'Virtue' in Knight K (ed), *The Catholic Encyclopedia* (Robert Appleton Company 1912) <http://www.newadvent.org/cathen/15472a.htm> accessed 11 February 2013

Ward G, 'The Commodification of Religion, or the Consummation of Capitalism' in Davis C, Milbank J and Žižek S (eds), *Theology and the Political: The New Debate* (Duke University Press 2005)
— — 'There is No Sexual Difference' in Loughlin G (ed), *Queer Theology: Rethinking the Western Body* (Blackwell Publishing 2007)
— — 'The Schizoid Christ' in Milbank J and Oliver S (eds), *The Radical Orthodoxy Reader* (Routledge 2009)

— — ‘The Future of Religion’ in Turner BS (ed), *Secularization: The Comparative Sociology of De-Secularization*, vol 4 (Sage 2010)

Weber M, ‘Politics as Vocation’ in Gerth H and Mills CW (eds), *From Max Weber: Essays in Sociology* (Routledge 1948)
— — ‘Religious Rejections of the World and their Directions’ in Gerth H and Mills CW (eds), *From Max Weber: Essays in Sociology* (Routledge 1948)
— — ‘Science as Vocation’ in Gerth H and Mills CW (eds), *From Max Weber: Essays in Sociology* (Routledge 1948)

Williams R, ‘Secularism, Faith and Freedom’ in *Faith in the Public Square* (Bloomsbury 2012)

Wilson BR, ‘Secularization: The Inherited Model’ in Hammond P (ed), *The Sacred in a Secular Age: Toward Revision in the Scientific Study of Religion* (University of California Press 1985)
— — ‘Aspects of Secularization in the West (1976)’ in Turner BS (ed), *Secularization: The Sociology of Secularization*, vol 2 (Sage 2010)

Wojtyla K, ‘On the Dignity of the Human Person’ in *Person and Community: Selected Essays* (Sandock T tr, Peter Lang 1993)

Wood JE, ‘An Apologia for Religious Human Rights’ in Witte J and Vyver JD (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (Kluwer Law International 1996)

EDITED BOOKS

Hoelzl M and Ward G (eds), *The New Visibility of Religion: Studies in Religion and Cultural Hermeneutics* (Continuum 2008)

Knight K (ed) *The MacIntyre Reader* (Polity Press 1998)

O’Donovan O and O’Donovan JL (eds), *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (William B Eerdmans 1999)

PAPAL ENCYLICALS AND DECLARATIONS

(available at http://www.vatican.va/holy_father/)

— — Unitatis Redintegratio*: Decree on Ecumenism* (The Vatican, 21 November 1964)

Pope Leo XIII, Immortale Dei: *On the Christian Constitution of States* (The Vatican, 1 November 1885)
— — Rerum Novarum: *On Capital and Labor* (The Vatican, 15 May 1891)

Pope John XXIII, Pacem in Terris: *On Establishing Universal Peace in Truth, Justice, Charity, and Liberty* (The Vatican, 11 April 1963)

Pope Paul VI, Dignitatis Humanae: *On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious* (The Vatican, 7 December 1965)
— — Gaudium Et Spes: *Pastoral Constitution on the Church in the Modern World* (The Vatican, 7 December 1965)

Pope John Paul II, Laborem Exercens: *On Human Work* (The Vatican, 14 September 1981)
— — Redemptoris Missio: *On the Permanent Validity of the Church's Missionary Mandate* (The Vatican, 7 December 1990)
— — Centesimus Annus (The Vatican, 1 May 1991)

Pope Benedict XVI, Deus Est Caritas: *On Christian Love* (The Vatican, 25 December 2005)
— — Caritas in Veritate: *On Integral Human Development in Charity and Truth* (The Vatican, 29 June 2009)

ELECTRONIC ARTICLES

— — '(CEN) Skateboards, BMX and the Gospel in Benfleet' *Fresh Expressions* (24 December 2010) <www.freshexpressions.org.uk/news/cen/201012> accessed 23 February 2013

BBC, 'Jedi Makes the Census List' *BBC* (London, 9 October 2001) <http://news.bbc.co.uk/1/hi/uk/1589133.stm> accessed 3 December 2010
— — '"Chastity Ring" Girl Loses Case' *BBC* (London, 16 July 2007) <http://news.bbc.co.uk/2/hi/6900512.stm> accessed 29 December 2012
— — 'Italy School Crucifixes "Barred"' *BBC* (London, 3 November 2009) <http://news.bbc.co.uk/1/hi/world/europe/8340411.stm> accessed 13 July 2011

Biggar N, 'What are Universities For?' (2010) July/August Standpoint <www.standpointmag.co.uk/node/3156/full> accessed 10 December 2012

Carter H, 'Jedi Religion Founder Accuses Tesco of Discrimination over Rules on Hoods' *The Guardian* (London, 18 September 2009) <www.guardian.co.uk/world/2009/sep/18/jedi-religion-tesco-hood-jones> accessed 3 December 2010

Dworkin, R, 'Religion without God' *The New York Review of Books* (New York, 4 April 2013) <http://www.nybooks.com/articles/archives/2013/apr/04/religion-without-god/?pagination=false> accessed 11 July 2013

Evangelicals and Catholics Together, 'In Defense of Religious Liberty' *First Things* (March 2012) <www.firstthings.com/article/2012/02/in-defense-of-religious-freedom> accessed 26 September 2012

Habermas J, 'Notes on a Post-Secular Society' (*Sign and Sight*, 18 June 2008) <http://print.signandsight.com/features/1714.html> accessed 22 June 2012

Kunzru H, 'The Frightening Hungarian Crackdown' *The New Yorker* (New York, 8 January 2013) <www.newyorker.com/online/blogs/books/2013/01/the-hungarian-crackdown.html> accessed 10 February 2013

Laborde C, 'Protecting Freedom of Religion in the Secular Age' (*The Immanent Frame*, 23 April 2012) <http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/> accessed 4 June 2012

Milbank J, 'Gay Marriage and the Future of Human Sexuality' (*ABC Religion and Ethics*, 13 March 2012) <www.abc.net.au/religion/articles/2012/03/13/3452229.htm> accessed 20 March 2012
— — 'The Power of Charity: What has the Church to do with the State?' (*ABC Religion and Ethics*, 29 May 2012) <www.abc.net.au/religion/articles/2012/05/29/3513425.htm> accessed 8 September 2012

Moyn S, 'Religious Freedom between Truth and Tactic' (*The Immanent Frame*, 27 March 2012) <http://blogs.ssrc.org/tif/2012/03/27/religious-freedom-between-truth-and-tactic/> accessed 12 July 2012

Playfoot L, 'Response' (*Lydia Playfoot: Silver Ring Thing Internship Diary*, 16 July 2007) <www.lydiaplayfoot.blogspot.co.nz/> accessed 29 December 2012

Roberts L, 'BBC Producer's Public Service Views 'On Par with Religion', *The Telegraph* (London, 9 May 2011) <www.telegraph.co.uk/culture/tvandradio/bbc/8501819/BBC-producers-public-service-views-on-par-with-religion.html> accessed 20 March 2013

Taylor M, 'Catholic Teaching the New Zeitgeist for Britain's Left' *BBC* (London 4 November 2012) <www.bbc.co.uk/news/uk-politics-20154986> accessed 12 March 2013

Tempest M, 'No 10 Mulls Catholic Opt-Out from Gay Rights Law' *The Guardian* (London, 23 January 2007) <www.guardian.co.uk/politics/2007/jan/23/immigrationpolicy.religion?INTCMP=ILCNETTXT3487> accessed 5 March 2013

Wilcox M, 'Parodic Politics' (*The Immanent Frame*, 6 August 2010) <http://blogs.ssrc.org/tif/2010/08/06/parodic-politics/> accessed 24 September 2011

Williams R, 'Communion, Covenant and our Anglican Future' (*Anglican Communion*, 27 July 2009) < www.anglicancommunion.org/acns/news.cfm/2009/7/28/ACNS4641> accessed 14 February 2012

REPORTS

Birdwell J and Littler M, *Faithful Citizens* (*Demos*, 2012) <www.demos.co.uk/files/Faithful_citizens_-_web.pdf?1333839181> accessed 11 February 2013.

Birdwell J, *Faithful Providers* (*Demos*, 2013) <www.demos.co.uk/files/Faithful_Providers_-_web.pdf?1358533399> accessed 11 February 2013.

Green E, *Mapping the Field: A Review of the Current Research Evidence on the Impact of Schools with a Christian Ethos* (*Theos*, 2009) <www.theosthinktank.co.uk/publications/2009/05/15/mapping-the-field> accessed 20 March 2013

Pew Forum on Religion and Public Life, *Global Restrictions on Religion* (*Pew Forum*, 17 December 2009) <www.pewforum.org/government/global-restrictions-on-religion.aspx> accessed 29 May 2012

Mission-Shaped Church Working Group, *Mission-Shaped Church* (Church House Publishing 2004) <www.chpublishing.co.uk/uploads/documents/0715140132.pdf> accessed 11 July 2011

LECTURES AND DRAFT PRESENTATIONS

— — 'Stanley Hauerwas, John Milbank & Luke Bretherton in Conversation' King's College, London 18 October 2010 <http://christianitycontemporarypolitics.blogspot.com/2010/10/stanley-hauerwas-john-milbank-luke.html> accessed 20 March 2013

Milbank J, 'Lecture: Against Human Rights' (Law, Religion and Liberty: Legal and Theological Perspectives lecture series, Regent's Park College, Oxford, April 2012)

Ward G, 'Response to Kuipers and Bretherton' Annual Meeting of the American Academy of Religion, Montréal, November 2009 (on file with author)

Williams R, 'Religious Faith and Human Rights' *London School of Economics and Political Science* (London, 1 May 2008) <http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20080501_RowanWilliams.pdf> accessed 5 June 2009

— — 'Freedom and Slavery (The Wilberforce Lecture)' (*The Archbishop of Canterbury*, 24 April 2007) < http://rowanwilliams.archbishopofcanterbury.org/articles.php/1167/freedom-and-slavery-wilberforce-lecture-2007> accessed 13 May 2012

DOCTORAL THESES

Norton JE, 'Law and Religious Organizations: Exceptions, Non-Interference and Justification' (DPhil, University of Oxford 2011)

INSTITUTIONAL WEBSITES

Christian Concern and the Christian Legal Centre, *'Not Ashamed' Campaign* <www.notashamed.org.uk/stories.php> accessed 25 January 2013

Church Urban Fund, *Near Neighbours Programme* <www.cuf.org.uk/near-neighbours> accessed 25 April 2012

JFS, <www.jfs.brent.sch.uk> accessed 20 March 2013

Radical Orthodoxy: Theology, Philosophy, Politics
<http://journal.radicalorthodoxy.org/index.php/ROTTP> accessed 11 March 2013

Routledge, *Radical Orthodoxy Series*
<www.routledge.com/books/series/routledge_radical_orthodoxy_SE0084/> accessed 14 March 2013

University of Nottingham, *Centre of Theology and Philosophy*
<http://theologyphilosophycentre.co.uk/> accessed 11 March 2013

MISCELLANEOUS

Shelley PB, *Prometheus Unbound* (JM Dent & Sons 1961)

Sophocles, *Antigone* in Grene D and Lattimore R (eds), *Greek Tragedies*, vol 1 (Grene D tr, 2nd edn, University of Chicago Press 1991)