

TOLERATING THE INTOLERANT: RELIGIOUS FREEDOM, COMPLICITY, and the Right to Equality

‘... the realization of the objective of tolerance would call for intolerance toward prevailing policies, attitudes, opinion ... which should not be tolerated because they are impeding, if not destroying, the chances of creating an existence without fear and misery’.¹

I. Introduction

To what extent should we tolerate the intolerant? Tolerance has always been a central principle underpinning freedom of religion, where individual convictions run deep and differences can be irreconcilable. Tolerance makes it possible to maintain a cohesive public order despite the fundamental incompatibility of different religious world-views.² But what if a person’s deeply held beliefs include intolerance of others’ rights or freedoms? Does tolerance of religious difference include tolerating intolerant behaviours?

¹ H Marcuse, 'Repressive Tolerance' in R Wolff, B Moore and H Marcuse (eds), *A Critique of Pure Tolerance* (Beacon Press Boston, 1968), 81-82

² J Habermas, 'Religion in the Public Sphere ' (2006) 14 *European Journal of Philosophy* 1, 4

The paradox of tolerance has been thrown into relief by recent case-law on ‘complicity’ claims by religious adherents. Complicity claims assert that freedom of religion includes the right to exemptions from laws which the claimant regards as making her complicit in the sinful behaviour of others.³ Examples include a baker refusing to supply a cake celebrating a same-sex wedding, a marriage registrar refusing to conduct same-sex marriage or civil partnership, a health-care professional refusing to assist in abortion or contraception services, or a guest-house refusing a double room to a same-sex couple. Such claims are distinctive in that, not only are they based on religious belief but, as NeJaime and Siegel point out, ‘accommodating the claim has the distinctive power to stigmatize and demean third parties’.⁴ This is particularly so where such objections, although couched in religious terms, feed into and reinforce existing social prejudices. Complicity claims are especially challenging for the principle of tolerance. From the perspective of the religious adherent, it appears intolerant of her religious beliefs to require her to be complicit in what she regards as sinful behaviour. For the affected party, permitting such an exemption appears to legitimise intolerance.

This difficulty raises the question of whether the framing in terms of tolerance is itself faulty.⁵ It is argued here that tolerance inevitably disguises a hierarchy of values, and it is preferable to be explicit about these hierarchies. Nor can the paradox of tolerance be resolved through an assertion of State neutrality. By considering comparative jurisprudence on

³ D NeJaime and R Siegel, 'Conscience Wars: Complicity Based Conscience Claims in Religion and Politics ' (2015) 124 Yale L.J. 2516

⁴ Ibid., 2566.

⁵ Contrast Y Nehushtan, 'What are Conscientious Exemptions Really About? ' (2013) 2 Oxford Journal of Law and Religion 393

complicity claims, I argue that both tolerance and neutrality are themselves value commitments, which need to take their place in an express hierarchy of values. In the context of complicity claims, the right to substantive equality should take precedence. This argument is developed as follows: Part II argues that tolerance on its own is unable to resolve the challenges raised by complicity claims, and nor can it be replaced by an assumption of a neutral State. Instead, I elaborate on the right to substantive equality and argue that, in the context of complicity claims, there should be a hierarchy of values which places the right to substantive equality above the values attached to tolerance and neutrality respectively. Part III applies this framework to complicity claims in the context of recent case-law on LGBTQI and reproductive rights

In developing this argument, I draw a clear distinction between claims of conscience that are not complicity-based and those that are.⁶ Whereas the former can be accommodated without imposing costs on specifically identified third parties, complicity-based claims ‘are oriented towards third parties who do not share the claimant’s beliefs about the conduct in question. For this reason, their accommodation has distinctive potential to impose material and dignitary harm on those the claimants condemn’.⁷ This paper is only concerned with the latter. Correspondingly, the paper is not concerned with the boundaries of the right to freedom of religion except in the context of complicity claims.

⁶ Nejaime and Siegel, n3 above, 2524 -2527

⁷ Ibid. 2527

II. From Tolerance and Neutrality to Substantive equality

Both tolerance and State neutrality have been proposed as the normatively preferable way of resolving the challenges posed by complicity claims.⁸ In this section, it is argued that neither on its own provides sufficient guidance. Indeed, both concepts contain implicit value judgements which are better made explicit. It is suggested here that, in complicity cases, the value of substantive equality should be given greater weight than the values implicit in tolerance and neutrality. This framework is then used to assess the series of complicity claims which have surfaced in apex courts in Canada, the US, the UK and under the ECHR.

(i) Tolerance

There has been much philosophical literature concerning the meaning of tolerance.

Philosophers point to three key components: tolerance entails an agent (i) having an objection to another agent, (ii) having the power to act negatively on such an objection, and (iii) making a deliberate decision not to exercise the power to act in this way.⁹ The key is forbearance: tolerance requires restraint against expressing or enacting disapproval of another.¹⁰

Tolerance and its relationship to freedom of religion have been the subject of much intense debate within liberal theory. This paper does not attempt to address the complexity of these issues. It is only concerned with whether tolerance can resolve the dilemmas raised by

⁸ J Adenitire, 'Conscientious Exemptions: From Toleration to Neutrality; From Neutrality to Respect' (2017) 6 Oxford Journal of Law and Religion 268; S Smet, 'Conscientious Objection through the legal Contrasting Lenses of Tolerance and Respect' (2019) 8 *ibid.* 93

⁹ A Cohen, 'What Toleration is' (2004) 115 *Ethics* 6878 -6879. Tolerance and toleration are used interchangeably in this paper.

¹⁰ M Minow, 'Tolerance in an Age of Terror' (2007) 16 *Southern California Interdisciplinary Law Journal* 453, 456

complicity claims in human rights law. Following Habermas, the paper emphasizes the distinction between the role of tolerance on the part of the State in granting permission to practice one's own religion, and tolerance on the part of the individual in her relationships with other individuals.¹¹ This reveals two distinct but interacting questions: firstly, whether the State should tolerate religious manifestations; and secondly, whether the State should require individuals to tolerate others. Much of the debate about the role of tolerance in relation to freedom of religion focuses on whether the State should tolerate different religious beliefs. Tolerance is rejected as a metric by Nussbaum on the basis that it signals a background moral objection on the part of the State to individual religious beliefs. This is demeaning of individual beliefs, and therefore in conflict with the principle of equal respect for all.¹² It is also said to run counter to the duty of the State to remain neutral in relation to religious differences and disagreements.¹³ This paper, however, is concerned with the second issue: how the State should respond when individuals are intolerant of others to the extent that they are prepared to obstruct the latter's access to rights or to intrude on their freedom to make their own choices. This squarely raises the question of whether the State should tolerate the intolerant.

It is argued here that the metric of tolerance is inadequate to properly guide the State's response to intolerance of this sort between individuals. Human rights pit one form of tolerance against another. If a person's deeply held beliefs include a belief that she should not tolerate certain behaviour, then the liberal state has to take sides. This is particularly so in

¹¹ J Habermas, 'Religious Tolerance—The Pacemaker for Cultural Rights' (2004) 79 *Philosophy* 5, 5

¹² M Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books, 2008), 24; Minow, n10 above, 457

¹³ Adenitire, n8 above

relation to freedom of religion. Freedom of religion demands tolerance for religious adherents' beliefs on the part of those who believe differently or do not have a religious belief. But does freedom of religion require religious adherents to tolerate others' value systems and identities, even when this might conflict with their religious belief? Conversely, does freedom of religion include permission for religious adherents to rely on their own religious belief to behave intolerantly by obstructing others' access to rights or freedoms? The principle of tolerance does not help us to reconcile these conflicts.

Complicity claims throw the limitations of tolerance into sharp relief. Many State functions must be delivered by individuals. Public services such as marriage ceremonies, abortion procedures, or provision of contraception cannot be delivered by the State in the abstract. Should the individuals who deliver these services be exempted from doing so when they regard them as sinful? Should they be permitted to interfere with others' provision of those services, for example by protesting outside abortion clinics? Alternatively, can a private service-provider providing a service widely available to the public decide to exclude particular individuals on the grounds that this would make them complicit in sinful behaviour? Tolerance on its own does not provide answers to these conflicts. From one direction, a complicity claim entails an insistence that the conduct of a third party should conform to the religious adherent's religious beliefs, or face a cost, which can be a material cost or demeaning or both. This appears intolerant to the third party. From the religious adherent's perspective, it appears intolerant to place the burden on her to protect third party rights or further a public interest which conflicts with her beliefs. This is the paradox of tolerance: in cases of deep social disagreement, any resolution will appear intolerant to the other party.

Attempts to reconcile the paradox of tolerance reveal the importance of open recognition of background value commitments. As is often commented on, Locke's argument in favour of tolerance is firmly situated within his own Christian context, and his assumption that the role of religion is to discern truth.¹⁴ His conclusion that 'the care of each man's salvation belongs only to himself'¹⁵ derives from his background premise that the State is no better able to further the individual quest for truth than the individual herself. However, this understanding of tolerance does not assist when 'truth' for one religious adherent includes taking care of another person's salvation. In such a contest, the State must take sides. By contrast, Rawls in *A Theory of Justice* expressly addresses the question of the conditions in which justice requires tolerance of the intolerant.¹⁶ He concludes that the tolerant should only curb the intolerant if the former 'sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.'¹⁷ Such a reconciliation explicitly depends on a prior normative commitment to the principle of 'a just constitution with the liberties of equal citizenship.'¹⁸ Even then, there is no agreement among liberals that an appeal to equal liberty can resolve the paradox. In his essay, 'Toleration and Reasonableness',¹⁹ Waldron comes to the 'bleak and uncomfortable conclusion' that the conviction of 'live and let live' which is

¹⁴ D McIlroy, 'Locke and Rawls on Religious Toleration and Public Reason' (2013) 2 *ibid.* 1, 14

¹⁵ J Locke, 'A Letter concerning Toleration' in R Vernon (ed) *Locke on Toleration (Cambridge Texts in the History of Philosophy)* (Cambridge University Press, 2010) , 32.

¹⁶ J Rawls, *A Theory of Justice (Revised Edition)* (Harvard University Press, 1999), 190

¹⁷ *Ibid.* 193

¹⁸ *Ibid.* 193

¹⁹ J Waldron, 'Toleration and Reasonableness' in C McKinnon and D Castiglione (eds), *Reasonable tolerance* (Manchester University Press, 2003)

central to liberal toleration is no longer sufficient to resolve deep-seated disagreements in a world in which many people's ethics and religions are sensitive to the activities and attitudes of others. 'The algebra intimated in Rawls' principle of an adequate liberty for each, compatible with a similar liberty for all is insoluble.'²⁰ For the State to weigh up the different interests in a principled way, there is a clear need for an alternative metric to tolerance.

This is further underscored by Laborde's analysis of tolerance in the context of the French principle of *laïcité*.²¹ One version of *laïcité* constitutes an equivalent to the liberal philosophy of toleration, in that it broadly prescribes a separation between 'a neutral political sphere and the diverse conceptions of the good held by individuals.'²² However, a second version is based on the promotion of individual autonomy as a perfectionist value rather than hidden behind an assumption of neutrality. In this sense, she argues, *laïcité* is a distinct alternative to the Anglo-American liberal philosophy of tolerance. 'In its commitment to the promotion of individual autonomy, it is centrally concerned with the legitimate limits to toleration, and its advocates often show puzzlement at the idea that the toleration of non-liberal practices of domination can ever be a liberal virtue.'²³ Ultimately, Laborde's own suggested alternative conceptualization of *laïcité* is aimed at doing 'justice to the republican – rather than liberal – language in which it is embedded.'²⁴ This entails bringing out its innate normative commitments to freedom as a value: 'not as a 'natural' condition but a fragile social status

²⁰ Ibid. 33

²¹ C Laborde, 'Toleration and *laïcité*' in C McKinnon and D Castiglione (eds), *The Culture of Toleration in Diverse Societies* (Manchester University Press, 2003), 162

²² Ibid. 164

²³ Ibid. 169

²⁴ Ibid. 162

that must be upheld by public institutions.’, This is then paired with a normative commitment to an ideal of non-domination rather than non-interference.²⁵

One way forward is to adapt the definition of tolerance so that it includes the need to value tolerance itself. Cohen argues that the principle of toleration should include affording a positive value to tolerance: in refraining from acting, the agent should have respect for the other person, or for the principle of toleration itself.²⁶ Habermas goes further and argues that the State’s toleration of different religions must also require adherents to different religions to show tolerance to one another.²⁷ For Habermas, State toleration of different faiths is a central tenet in maintaining public order and preventing internal religious conflict. Thus religious adherents need to internalize the importance of tolerating other beliefs, even if they cannot agree on any level.²⁸ But if anything, this deepens the paradox. Requiring all religious believers to have respect for the principle of tolerance is itself an imposition on religious autonomy. From the religious adherents’ perspective, tolerance could only be achieved if their beliefs were respected, including their refusal to tolerate certain behaviours.

(ii) Neutrality

State neutrality is taken to mean that the State should not privilege one version of the good over another: instead, it should respect the freedom of individuals to choose their own version of the good without State intrusion. Neutrality and tolerance are not identical concepts, in that tolerance requires one party to object to the actions of another, whereas neutrality simply

²⁵ Ibid. 174

²⁶ Cohen, n9 above, 80

²⁷ Habermas, 'Religious Tolerance—The Pacemaker for Cultural Rights' n11 above, 6

²⁸ Ibid., 12

requires desistance. On the assumption that the liberal State should not object to any particular view of the good, it has been argued that the concept of tolerance is not an appropriate description of the State's duty to refrain from interfering in freedom of religion.²⁹ On this view, then, neutrality could be seen to be the State correlative of tolerance amongst individuals. Thus Laborde argues that 'what is called neutrality in contemporary liberal philosophy could be seen as a generalization of the original ideal of religious toleration.'³⁰

However, the concept of neutrality itself disguises certain value commitments. A liberal State cannot be neutral as to the virtues of liberalism itself. The principle of respect for individuals' autonomy in relation to their own version of the good is itself a value commitment, as Rawls recognizes in his later work.³¹ To a large extent, therefore, the paradox of tolerance is magnified in relation to the ideology of a neutral State. Habermas's argument clearly demonstrates this. In answer to the question: 'How tolerantly may a democracy treat the enemies of democracy?'³² Habermas maintains that the imperative of remaining neutral means that there is good reason to be intolerant of behaviours, such as racism, which are prejudiced and discriminatory. The issue of tolerance only arises after those prejudices have been eliminated.³³ For Habermas, then, 'The legal reasons for excluding intolerant behaviour provide the yardstick for measuring whether the state adheres to the imperative of remaining neutral and whether legislature and jurisdiction have institutionalized tolerance in the right way'.³⁴ Neutrality therefore requires a normative commitment to determine which intolerant

²⁹ Adenitire, n8 above

³⁰ C Laborde, *Liberalism's Religion* (Harvard University Press, 2017), 27

³¹ J Rawls, *Justice as Fairness* (Harvard University Press, Cambridge, Massachusetts 2001), 156

³² Habermas, 'Religious Tolerance—The Pacemaker for Cultural Rights' n 11 above, 8

³³ Ibid. 10

³⁴ Ibid., 13

behaviour should be excluded. It will be seen in the cases below that the use of neutrality, like tolerance, can obfuscate this question, allowing unarticulated value assumptions to hold sway. As Laborde argues, ‘neutrality has become evanescent when its guidance often seems to be most required – in controversies about the just place of religion in the state.’³⁵ Instead, in central dilemmas over how to resolve questions about religious exemptions ‘substantive liberal ideas such as rights to health care, gender equality, fairness in the distribution of costs and freedom of religion do all the work. This is exactly as it should be.’³⁶

This paper therefore does not seek to replace the metric of tolerance with neutrality. The assumption that it is possible for the State to remain value-neutral itself disguises specific value commitments on the part of the State, such as prioritizing autonomy and individual choice, including freedom of religion itself.³⁷ Moreover, the suggestion that liberalism requires the State to refrain from expressing a preference in relation to particular religions does not hold true for all jurisdictions. It is true that in the US, the First Amendment of the Constitution, which states that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’, has been interpreted as requiring that the State take a strictly neutral position as regards religion.³⁸ However, in jurisdictions, such as the UK and many European countries, there remains an express State-Church link. In others, such as South Africa, the Court has expressly eschewed pure neutrality in relation to religion.

³⁵ C Laborde, 'The Evanescent of Neutrality' (2018) 46 Political Theory 99, 104

³⁶ Ibid.

³⁷ S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford 2008) 18 – 24; S Fredman, *Comparative Human Rights Law* (Oxford University Press, 2018), chap 12.

³⁸ Fredman n38 above, 405

In its view, the right to freedom of religion in the South African Constitution could not ‘be elevated into a constitutional principle . . . that the State abstain from action that might advance or inhibit religion.’³⁹

Instead of hiding behind an illusion of neutrality, then, the question should be openly framed in terms of when the State should not intervene (for example, when a plurality of values is essential to maintain equality and freedom in a diverse society) and when the State is entitled to take positive action to further specific values or prevent what it regards as bad outcomes.⁴⁰ These questions can only be resolved against the background of the explicit commitments that the State has already made to human rights and democracy. The commitment to both freedom of religion and the right to equality points to the limits of tolerance and neutrality when freedom of religion is used to infringe on equality rights.

(iii) Substantive Equality

It might be argued that equality, like tolerance, can be used by both sides, with the right to religious equality battling on a level playing field against gender and sexual orientation equality. This in turn requires a clearer idea of what the right to equality entails. A formal approach to equality, which requires that an individual should not be subjected to less favourable treatment on grounds of her religion, gender or sexual orientation, would appear to give little direction going forward. However, a more substantive conception of the right to equality gives a far more nuanced picture. There are several different ways of conceptualizing

³⁹ *S v Lawrence* [1997] ZACC 11 (South African Constitutional Court) at [103]

⁴⁰ Fredman n38 above, 21

the right to substantive equality, including equality of opportunity, equality of results, dignity, or social inclusion and representation. For the purposes of this paper, I draw on a four dimensional approach to the right to substantive equality, which constitutes a synthesis of these ideas. On this view, the right to equality should redress disadvantage (the distributive dimension); address stigma, stereotypes, prejudice and violence (the recognition dimension); facilitate participation, voice and social inclusion (the participative dimension) and accommodate difference, including through structural change (the transformative dimension).⁴¹ These dimensions are mutually supportive, so that a measure which decreases disadvantage at the cost of increasing stigma would not suffice. It will be shown in the cases discussed below that a four-dimensional approach to equality strongly suggests that gender and sexual orientation equality cannot be fulfilled by permitting complicity claims. Conversely, however, such claims can be limited while still achieving freedom of religion.

This approach falls squarely within the territory of perfectionist liberalism, such as that argued for by Raz. Raz not only rejects the possibility of a neutral State; he views it as a positive attribute of the State to promote a public morality. This does not entail the coercive imposition of a particular world-view. But it does acknowledge that any understanding of political freedom is based on particular value choices.⁴² In the context of the adjudication of complicity claims, there is already a background commitment of human rights for courts to draw on. There is no longer any question of whether the State should remain neutral: value

⁴¹ S Fredman, 'Substantive Equality Revisited ' (2016) 14 International Journal of Constitutional Law 712; J Fudge, "Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution" (2007) 23 SAJHR 235 ; C Albertyn, "Substantive Equality and Transformation in South Africa" (2007) 23 SAJHR 253

⁴² J Raz, *The Morality of Freedom* (Clarendon Press, 1986), 410, 425 - 426.

commitments have already been made to equality and freedom of religion. The central dilemma is therefore how these can be reconciled.

My concern is not to develop a conception of equality in the abstract or to engage in the many philosophical dilemmas entailed in a perfectionist approach to liberalism. Instead, it is concerned with the interpretation of the right to equality within the context of adjudication of complicity claims. I acknowledge that the choice between different conceptions is itself one of values or policy rather than of logic. At the same time, my approach is rooted in existing understandings, extrapolating from the ways in which courts have in fact interpreted the boundaries of the rights to equality and religion to develop a critical framework which is capable of evaluating these approaches. My framework of substantive equality is therefore intended as an analytic tool to assist in determining ways to reconcile the conflicts inherent in complicity claims which further the right to equality.

Nehushtan has argued that granting conscientious exemptions is better understood as an application of tolerance rather than of equality.⁴³ This is because, he argues ‘the tolerant person treats equally things he (sic) regards as unequal.’ His argument assumes that equality is limited to treating likes alike. However, the right to equality in human rights law has progressed well beyond this conception.⁴⁴ In later work, Nehushtan and Coyle distinguish between conscientious objections that ‘rely on unjustly intolerant, morally repugnant and illegitimate values; and objections that rely on misguided yet legitimate values.’⁴⁵ In their

⁴³ Nehushtan, n5 above

⁴⁴ Fredman, n42 above

⁴⁵ Y Nehushtan and S Coyle, ‘The Difference between Illegitimate Conscience and Misguided Conscience: Equality Law, Abortion Laws and Religious Symbols’ in J Adenitire (ed) *Religious and Conscientious Exemptions in a Liberal State* (Hart, 2019), 113

view, refusing to perform abortions, assist in abortion procedures, or prescribe contraception are based on misguided but legitimate values, since they do not result from an adverse judgement made about others because of their identity. On the other hand, they regard refusal to provide services to homosexuals as relying on intolerant, anti-liberal and illegitimate values. They conclude that whereas the former should be tolerated, the latter should not.⁴⁶

It will be seen below that refusing to perform an abortion or prescribe contraception could well result from an adverse judgement about the recipient of the services.⁴⁷ In addition, the right to substantive equality as elaborated here regards it as too limited a view of the right to equality to confine it to whether an action is based on perceiving others as inferior. Although this is one dimension of substantive equality (the recognition dimension), it is not the only one. Substantive equality also requires the very real material effects of intolerant actions on grounds of race, gender or other protected ground to be taken into account (the distributive dimension), as well as their ability to exclude and silence the recipient of their actions (the participative dimension). Similarly relevant is the extent to which such behaviour reinforces existing dominant structures and demands conformity to a dominant norm (the transformative dimension). All of these dimensions of substantive equality together form a framework through which these complex contestations can be mediated.

The remainder of the paper considers the extent to which the above principles are reflected in judicial responses to complicity claims in the US, Canada, the UK and under the ECtHR.

Although there are differences in the human rights framework used to resolve these difficult

⁴⁶ Nehushtan and Coyle 116

⁴⁷ *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario* 2019 ONCA 393 (Court of Appeal for Ontario)

questions, particularly in the extent to which freedom of religion can be justifiably limited, the reasoning of courts in these jurisdictions casts helpful light on the ways in which tolerance disguises value judgements, and on possible alternatives. Some courts mediate the conflict of values through a proportionality analysis. This is an important step forward: it does not deny freedom of religion, but sets out its limits, where necessary to further a legitimate aim, such as protecting the rights and freedoms of others. Proportionality is, however, highly dependent on the respective weights given by courts to the competing interests. Tolerance without more suggests that there is no *a priori* reason for giving one value system greater priority than another. Substantive equality gives a framework based on explicit values to determine the hierarchical ordering. Part III examines the application of substantive equality to complicity claims in respect of reproductive rights and sexuality. It should be recalled that this paper only addresses the potential limits of religious manifestation when it entails the imposition of burdens on specifically identified third parties whose actions religious adherents condemn.

III Complicity Claims and Substantive Equality: Sexuality and Reproductive Rights

A major arena for complicity claims has been in relation to sexuality and gender identity, and particularly, the equal rights of LGBTQI persons. This issue has particularly crystalized in the ‘cake cases’, in which bakers on both sides of the Atlantic have refused to supply cakes which celebrate or support same-sex marriage. In such cases, religious adherents have claimed that their religious beliefs entitle them to tolerance for their intolerance. But, as these cases show, neither the metric of tolerance nor neutrality is sufficient to resolve the dispute. Tolerance of one party will almost invariably appear as intolerance of the other. Nor can the State take a neutral stand without implicitly endorsing one or the other side. Instead, it will be

argued that an express hierarchy of values is needed, and that substantive equality is a valuable normative approach for courts to apply in resolving the proportionality issue.

Complicity claims also have particular traction in relation to reproductive rights. If there is a legal right to abortion or contraception, to what extent do religious individuals have the right to refuse to provide a woman with this service, or impede her access to it? Some argue that there is no place for conscientious objection in medicine. As Savulescu puts it: 'If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors'.⁴⁸ It might nevertheless be possible, within the proportionality analysis, to give some latitude to medical professionals to conscientiously object provided it has no effect on pregnant women's rights. A common way is to place a duty on conscientious objectors to provide effective referrals to others who are willing to supply the service. However, there are now claims that this too offends religion or conscience by making religious adherents complicit in what they regard as the sinful behaviour of others. Here again tolerance is of little use: tolerance from one perspective appears as intolerance from the other. The religious adherent claims that she is being required to provide a public service which conflicts with her deeply held beliefs; but the burden on the person denied access to her lawful rights is considerable. The same is true of State neutrality. The conflict of rights requires the State either to take sides, or to weigh up the different claims against a background metric. In adjudicating this decision through the proportionality exercise, courts require a clear articulation of the relevant hierarchy of values. An application of the four-dimensional conception substantive equality framework points to the issues that

⁴⁸ Savulescu, J. (2006). Conscientious objection in medicine. *British Medical Journal*, 332, 294–297. doi: 10.1136/bmj.332.7536.294

need to be weighed up. The applicability of each dimension is considered below although their interaction needs to be borne in mind.

(i) Redressing disadvantage

The first dimension requires attention to be paid to redressing disadvantage on grounds of gender,⁴⁹ sexual orientation, religion, or other protected characteristics. In the context of complicity claims relating to same-sex relationships, refusal to afford services generally available to the public to same-sex couples or LGBTQI people is not merely demeaning. This dimension of substantive equality highlights the extent to which such a refusal also reinforces disadvantage through the exclusion and marginalisation of a group that has been subject to a long history of discrimination. This dimension was at the forefront of the decision of the UK Supreme Court in *Hall v Bull*.⁵⁰ In this case the Christian owners of a bed-and-breakfast hotel refused to allow Hall and Preddy, a same-sex couple, to rent a double-room on the grounds that this would make them complicit in sinful behaviour. When Hall and Preddy successfully argued that they had been discriminated against, the proprietors complained of a violation of their freedom of religion under Article 9 ECHR. The Supreme Court held that the restriction on freedom of religion was a proportionate means of protecting the right not to be discriminated against on grounds of sexual orientation. Given the continuing legacy of centuries of discrimination and persecution on grounds of sexual orientation, the Court held,

⁴⁹ Gender here includes all women, regardless of their race, sexual orientation, or other characteristics, incorporating intersectionality.

⁵⁰ *Hall and Preddy v Bull and Bull* [2013] UKSC 73 (Supreme Court UK)

‘we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.’⁵¹

More complex is the case of *Ladele v Islington*⁵² which concerned a claim by a marriage registrar employed by the London Borough of Islington who refused to conduct same-sex civil partnerships because she believed they were contrary to God’s law. She was dismissed by her employers in pursuance of the latter’s equal opportunities policies. She claimed that this constituted religious discrimination. The case is distinctive in that the function of performing civil partnerships and marriages is provided by the State in the UK, so that same-sex couples are dependent on the availability of registrars to perform such a function. On the other hand, Ladele might argue that she should not be required to carry the burden of respecting other people’s equality rights when that conflicts with her own religious beliefs.

The contrasting principles applied by tribunals at different levels demonstrate the importance of replacing the metric of tolerance with a clear hierarchy of values based on substantive equality. In the domestic proceedings, the tribunal upheld her claims of religious discrimination, holding that the local authority had “placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community than it placed on the rights of [Ms Ladele] as one holding an orthodox Christian belief”.⁵³ Given that it is not possible to resolve the dispute by giving equal weight to both rights, the result of the tribunal’s decision was to place greater value on the rights of the Christian believer. What is not clear, however, is why placing greater value on the orthodox Christian believer was more acceptable than the reverse. The Court of Appeal, by contrast concluded that Ms Ladele’s desire for respect for

⁵¹ Ibid. [53]

⁵² *Eweida v UK* [2013] 57 E.H.R.R. 8 (European Court of Human Rights)

⁵³ Cited in *ibid.* [28]

her religious views should not be allowed to override Islington's concern that all its registrars show equal respect for the homosexual community.⁵⁴ This was upheld by the ECtHR,⁵⁵ which held that it was legitimate for the employers to give priority to pursuing equality and non-discrimination on grounds of sexual orientation. Although the Court recognized the serious consequences for the applicants, it held that the State had a wide margin of appreciation when it came to balancing rights, which had not been exceeded in this case.⁵⁶

It could be argued that in these cases, the material disadvantage to the religious adherent was substantial. Ladele was left with the option of leaving her post or colluding in what she regarded as sinful behaviour. The framework of substantive equality acknowledges this possibility and requires a clear account of the justification for giving one higher priority than the other. The Court of Appeal in *Ladele* provided a clear justification for its hierarchy of values: Ladele was employed in a public job, to perform a purely secular task; and her refusal to perform the job involved discriminating against gay people. Particularly importantly, the Court held that Islington's requirement in no way prevented her from worshipping as she wished.⁵⁷

There are of course possible accommodations that the State could make, as the ECtHR recognized, which would be compatible with redressing disadvantage without being demeaning to the applicant and therefore comply with substantive equality. For example,

⁵⁴ *Islington London Borough Council v Ladele* [2009] EWCA Civ 1357 (CA), [52]

⁵⁵ *Eweida v UK*, n79 above [72]

⁵⁶ *Ibid.* para [106].

⁵⁷ *Islington London Borough Council v Ladele*, n81 above [52]

allocations to marriage registrars might be sensitive to the latter's conscientious objection without the same-sex couple being aware of how allocations are made. However, this would not work if there was widespread refusal to provide the service, as will be seen in the abortion cases. Moreover, a complicity claim could extend to refusing to refer a person to a different provider, as has been in the case in relation to abortion,⁵⁸ or even to file a certificate to claim the exemption.⁵⁹ The possibility, then of finding an accommodation depends, not on principle, but on how widespread the objection is. The dividing line in normative, as against practical, terms, is not clear.

From the opposite perspective, it might be argued that in *Ladele* and *Bull v Hall*, the applicants in fact suffered no disadvantage, as they could have found another marriage registrar or bed-and-breakfast. Similarly, it could be argued that the same-sex couple who were refused a wedding cake by Masterpiece Bakers in the US case of *Masterpiece*⁶⁰ could find an alternative baker, as could Mr Lee, whose order for a cake with a slogan supporting gay marriage was turned down by Ashers bakery in the UK case of *Ashers*.⁶¹ However, this too assumes that such an alternative exists. It is conceivable that all marriage registrars, bed-and-breakfasts and bakeries could take a similar stand. Kennedy J recognized the possibility in *Masterpiece*, holding that while it was acceptable to create an exception for clergy who refuse to perform gay weddings, such an exception should be narrowly confined. Otherwise 'a long list of persons who provide goods and services for weddings and marriage might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with

⁵⁸ *P v Poland* [2012] 10 WLUK 932 (European Court of Human Rights)

⁵⁹ *Zubick v Burwell* 136 S. Ct. 1557 (2016) (US Supreme Court)

⁶⁰ *Masterpiece Cakeshop v Colorado Civil Rights Commission* 138 S.Ct. 1719 (2018) (US Supreme Court)

⁶¹ *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 (UK Supreme Court)

the history and dynamics of civil rights laws that ensure equal access to goods, services and public accommodations'.⁶² This is not a far-fetched possibility. As we will see below, refusal to provide contraception or abortion can be so widespread as to significantly impede access.

In the context of complicity claims relating to contraception and abortion, redressing disadvantage as a dimension of substantive equality puts the spotlight on the extent to which women's reproductive rights, including legally guaranteed rights to a safe abortion and contraception, are damaged. Too wide a latitude for conscientious objection could materially interfere with the exercise of these rights, especially where there are insufficient alternatives available. The South African experience is salutary. Although abortion in South Africa is legal in a relatively broad range of circumstances,⁶³ the right to conscientiously object is based on the right to freedom of conscience, religion and belief in section 15 of the Constitution. Albertyn shows how 'the unregulated nature of conscientious objection, with little guidance offered by policy makers, has seen conscientious objection becoming one of the biggest barriers to abortion service delivery'.⁶⁴ This is true too of other countries where widespread conscientious objection in practice impedes access to lawful abortion.⁶⁵ This bears out NeJaime and Siegel's argument that it should be recognised that complicity claims go further than protecting individual freedom of religion. They also require third parties whose conduct is considered sinful by religious adherents to bear the burden of the latter's religious beliefs.⁶⁶

⁶² *Masterpiece Cakeshop v Colorado Civil Rights Commission* n89 above 1727

⁶³ Choice on Termination of Pregnancy Act, 1996.

⁶⁴ C Albertyn, 'Claiming and defending abortion rights in South Africa' (2015) 11 Rev. direito GV 429, 445

⁶⁵ For Colombia see Smet, n8 above; for Poland see *P v Poland* n87 above.

⁶⁶ Nejaime and Siegel, n3 above.

This was recognised by in the 2020 case of *Grinmark v Sweden*,⁶⁷ where the ECtHR rejected a complaint by a nurse who was refused positions as a midwife when she stated that she would not assist in providing abortions due to her religious faith and conscience. The Court held that although there had been an interference with her right to manifest her religion, the requirement that all midwives should be able to perform all the duties required by the posts was not disproportionate. Since Sweden provides nationwide abortion services, ‘it has a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of such services.’⁶⁸ A similar position was taken by the Ontario Court of Appeal when physicians challenged the requirement that they should provide an ‘effective referral’ if they objected to providing certain medical procedures or pharmaceuticals on the basis of religion or conscience.⁶⁹ The appellants claimed that these requirements obliged them to be complicit in actions, including abortion and contraception, that offended their religious beliefs. Although the Court accepted that the appellants’ right to religion had been breached, it found that this was a justifiable limitation. The need to redress disadvantage was central to its decision. In particular, it pointed to evidence that refusal by physicians to provide these treatments frequently falls most heavily patients who already have financial, social, educational or emotional challenges, and do not have the resources to find alternative treatment on their own in a complicated health care system. Importantly, it endorsed the view that ‘patients should not bear the burden of managing the consequences of physicians’

⁶⁷ *Grinmark v Sweden* Application No. 43726/17 (European Court of Human Rights)

⁶⁸ *Ibid.* [26]

⁶⁹ *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario* n 47 above

religious objections.’⁷⁰ The requirement of effective referral constituted a fair balance between patients’ rights to equitable access to lawful health care services and physicians’ freedom of religion.

This dimension of substantive equality also requires attention to be paid to the disadvantage inflicted on religious opponents of contraception and abortion. Here the hierarchy of values needs to take account of both who is making the claim and in what circumstances. Many might regard it as extremely burdensome to require a doctor to surgically perform an abortion when she regards this as a taking of life. However, complicity claims in the form of conscientious objection to women’s rights to contraception or abortion rights have spread well beyond medical practitioners, to include secretaries, receptionists, cleaners, nurses and even whole institutions. The burden on religious objectors becomes more attenuated further down the line of causation. Moreover, with the rising trend towards medically induced abortion,⁷¹ there is increasing distance from the act on the part of the medical practitioners themselves.

This has been recognized in the application of the UK Abortion Act 1967. The 1967 Act provides that anyone who has a conscientious objection to any treatment authorised by the Act is under no legal duty to participate in such treatment, except where necessary to prevent grave permanent injury to the physical or mental health of a pregnant woman or to save her life.⁷² The UK Supreme Court has limited the extent to which complicity claims can be

⁷⁰ Ibid. [185]

⁷¹ Medication abortions in the US increased from 5% of all abortions in 2001 to 39% in 2017: See <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [accessed 25 Sept 2019].

⁷² Abortion Act 1967, s4.

upheld by firmly circumscribing what it means to ‘participate’ in such treatment. In 1989, it rejected a claim by a secretary and receptionist at a health centre that typing a letter referring a patient to a hospital with a view to a possible termination fell within the right to object to participation in treatment.⁷³ More contentious was the 2014 case of *Doogan*, where the petitioners, who were co-ordinators on a labour ward in a Scottish hospital, claimed that their right to conscientious objection extended to permitting them to refuse to book in patients for terminations, allocate staff to such patients, and provide guidance, advice and support to such staff. The Scottish Inner House, in upholding their claim, framed its judgement entirely from the perspective of tolerance for the religious adherent.⁷⁴ However, the Supreme Court overturned this decision.⁷⁵ Instead, it held that the statutory reference to a refusal to ‘participate’ in treatment referred only to hands-on involvement and not to the ancillary, administrative and managerial tasks associated with it.

Similarly, in *Grinmark v Sweden*, as has been seen above, the ECHR rejected a complaint by a nurse that she had been turned down for positions as a midwife because she objected to assisting in abortions. The Court emphasized that she had no right to the position, since the Convention does not guarantee a right to be promoted or occupy a post.⁷⁶ In applying for these positions, the applicant had known that this would include assisting in lawful abortion

⁷³ *R v Salford Health Authority, Ex p Janaway* [1989] AC 537 (HL).

⁷⁴ *Doogan v NHS Greater Glasgow & Clyde Health Board* [2013] ScotCS CSIH_36 (Scottish Court of Session) para 38.

⁷⁵ *Doogan v Greater Glasgow and Clyde Health Board* [2015] AC 640 (UK Supreme Court).

⁷⁶ *Grinmark v Sweden* n96 above [22]

cases. Moreover, she was not left unemployed as a result of the refusal, but continued to work as a nurse in the position she then occupied.⁷⁷

This can be contrasted with the US case of *Burwell v Hobby Lobby Stores*,⁷⁸ where the disadvantage to the affected women was given little weight. In *Burwell*, two companies refused to abide by a federal requirement to provide health insurance coverage for their employees that covered contraceptives. The companies argued that this would make them complicit in employees purchasing forms of contraception (abortifacients) which they regarded as sinful. This included intrauterine devices (IUDs). In the words of Justice Alito, they believed that ‘it is immoral and sinful ... to intentionally participate in, pay for, facilitate or otherwise support these drugs.’⁷⁹

The requirement had been instituted by the Affordable Care Act (Obamacare), which made it obligatory to include the full-range of contraceptive methods in health insurance coverage. During the legislative process, the Senate had voted down a ‘conscience amendment’, which would have enabled an employer or insurance provider to deny coverage based on its asserted religious beliefs or moral convictions.⁸⁰ Nevertheless, a slim majority of the Court held that the requirement to provide such health insurance breached the Religious Freedom Restoration Act of 1993 (RFRA). The RFRA prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless such action is the least restrictive

⁷⁷ Ibid. [26]

⁷⁸ *Burwell v Hobby Lobby Stores* 134 S. Ct 2751 (2014) (US Supreme Court).

⁷⁹ Ibid., 2765

⁸⁰ Ibid., 2789

means of serving a compelling government interest. Justice Alito, accepted that Congress had a compelling interest in ensuring women's free access to contraception. However, he took the view that there was an alternative means which sufficiently protected employees' interests in contraception. Thus the requirement to provide health insurance including contraception was not narrowly tailored to achieve that compelling interest.

Justice Kennedy framed the question in terms of tolerance: 'Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling'.⁸¹ However, a closer look reveals a clear hierarchy in values. In finding that the proposed accommodation balanced these interests well, the Court displayed very little real engagement with the real costs to the women employees whose access to contraception was made considerably more difficult, or why they should be required to pay the cost of others' religious beliefs. The Court's alternative means has been shown to be inordinately expensive and unlikely to be adopted in practice. The Court asserted that 'the most straightforward alternative would be for the Government to assume the cost of providing contraceptives ... to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections.'⁸² However, directly funded contraception under Title X of the Public Health Service Act is only available to lower-income women, and does not cover all forms of contraception. If it were to be enlarged to cover all employees affected by the wider exemption endorsed in *Hobby Lobby*, significant

⁸¹ Ibid. 2787

⁸² Ibid. 2780

extra funding would be needed..⁸³ Yet it is not politically feasible in the current climate to expect such extra funding to be allocated by government. To the contrary, Title X funding has been halved since its inception in 1974.

The Court also held that the exemption for religiously affiliated hospitals, universities and social service organizations⁸⁴ could be extended to closely-held for-profit employers. This requires the employer's third-party health insurer, or, if self-insured, its plan administrator to supply the contraceptives at no additional cost to employees, dependents or the objecting employer. However, such an extension expands the pool of potential religious claimants dramatically. Employees of religious non-profit businesses constitute a tiny percentage of total employment in the US. By contrast, closely-held for-profit businesses employ between one-half and four-fifths of all employees, and constitute about 90% of all employers in the US.⁸⁵

The scale of the cost to women was clearly articulated in Justice Ginsburg's dissent. She argued powerfully that First Amendment accommodation should not cover cases in which the free exercise of religion significantly impinges on third parties. Any proposed alternative placed a very heavy cost on thousands of women employed by the two companies, who did not share the corporation owners' religious faith. Nor could the claim be sustained under the RFRA. As she put it, 'A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can

⁸³ F Gedicks, 'One Cheer for Hobby Lobby: Improbably Alternatives, Truly Strict Scrutiny, and Third Party Employee Burdens' (2015) 38 Harvard Journal of Law and Gender 153.

⁸⁴ C.F.R. § 147.131(a)-(b) (2013).

⁸⁵ Gedicks, n122 above, 159 – 60.

adhere unreservedly to their religious tenets.⁸⁶ On the other hand, religious adherents who believe that the use of contraception which might include abortifacients do not suffer material loss. This is particularly so since any complicity the latter claim to have is highly attenuated, both in that the applicant was a corporation and in that the causal chain from insurance for contraception to the purchase of abortifacients was not clearly established.

The refusal of the majority in *Hobby Lobby* to recognize the cost to women employees of conscience-based exemptions to contraceptive coverage can be contrasted with the decision of the US Court of Appeals in *Pennsylvania v The President*.⁸⁷ This case concerned rules promulgated by the Trump administration to expand the categories of employers permitted to invoke the religious exemption from the contraceptive requirement to all non-profit, for-profit and publicly held companies. They also made the process completely voluntary, responding to the concern by some employers that the need to file a certification itself made them complicit.⁸⁸ The Court upheld a preliminary order enjoining the rules' enforcement nationwide.⁸⁹ It referred to the government's own impact analysis which stated that nationwide, between 70,500 and 126,400 women would lose their contraceptive coverage when their employers invoked the Religious Exemption. Some would seek out state-sponsored programs, requiring significantly increased expenditure from the State. But many may fail to

⁸⁶ *Burwell v Hobby Lobby Stores* n107 above, 2802.

⁸⁷ *Pennsylvania v President United States of America* Nos. 17-3752, 18-1253, 19-1129, 19-1189, July 12, 2019 (United States Court of Appeals for the Third Circuit)

⁸⁸ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018); 45 C.F.R. § 147.132

⁸⁹ *Pennsylvania v President United States of America* n116 above

qualify for State services. Some women would forego contraceptive use, and the resulting unintended pregnancies will be costly, not only financially, but also emotionally and physically. Indeed, for some women, pregnancy can be hazardous and even life-threatening.⁹⁰

(ii) Addressing stigma, stereotyping, prejudice and violence

The second dimension of substantive equality requires attention to be paid to the stigma, stereotyping, prejudice or violence arising from complicity claims. Contrary to the claims of Nehushtan and Coyle that refusal to provide contraception or abortion does not result from an adverse judgement about others because of their identity,⁹¹ the recognition harms suffered by women who need to find alternative means to achieve their rights can be substantial. This was explicitly recognized by the Ontario Court's finding that patients confronted with an objecting physician could well suffer from stigma and shame, particularly when the physician made their own views of the sinfulness of the behaviour clear. There was a reasonable expectation that this might impede their access to the requested medical services.⁹²

This was even more firmly endorsed by the ECHR in *P v Poland*, which concerned a 14-year old girl who had become pregnant after being brutally raped.⁹³ Although she had an

⁹⁰ Ibid.

⁹¹ Nehushtan and Coyle n 45 above

⁹² *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario* n47 above, [133]

⁹³ *P v Poland* n87 above

undoubted right to an abortion under Polish law,⁹⁴ the doctor at her local hospital refused to conduct the abortion. Equally seriously, she was subject to sustained pressure not to terminate her pregnancy and her case was exposed to wide publicity on the internet, spearheaded by the Catholic Information Agency. Eventually, she was driven 500 km to Gdansk to obtain the abortion. The case came against the background of widespread refusal by health-care professionals to carry out abortions even if they are lawful under Polish law. Many doctors who invoke the statutory conscience clause refuse to follow the legal requirement that they should refer the patient to another hospital. Moreover, the conscience clause is frequently invoked by entire healthcare facilities, including public ones.⁹⁵ In upholding the claim, the ECHR took the degrading treatment to which P was subjected very seriously, finding a breach not just of her rights under Article 8 (respect for private and family life) and Article 5(1) (right to liberty and security) but also of the prohibition of torture or inhuman or degrading treatment or punishment in Article 3.⁹⁶

Particularly noteworthy is the way in which the Court set the recognition harms to the young woman against those claimed by the religious objectors. On the one hand, it held that harm to the young woman reached the level of severity required to constitute a breach of Article 3. On the other hand, the Court reiterated that although Article 9 gives everyone the right to manifest their religion or belief in ‘worship, teaching, practice and observance’, the word ‘practice’ does not denote ‘each and every act or form of behaviour motivated or inspired by a

⁹⁴ The Law on Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination), 1993 Act, Article 4(a)1 (5).

⁹⁵ *P v Poland* n87 above, 59

⁹⁶ *Ibid.*

religion or belief...’ For the Court, States are obliged to organize their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.⁹⁷

One important consequence of explicitly paying attention to stigma and stereotyping is that, unlike a commitment to neutrality, messages which are stigmatic and prejudicial are distinguished from messages which are not. This is demonstrated by the US Supreme Court case of *Masterpiece*, which concerned the refusal by Phillips, the proprietor of Masterpiece Cake Shop, to bake a cake for a same-sex wedding, claiming it infringed his right to freedom of religion. The Colorado Commission issued a ‘cease and desist order’ under Colorado’s public accommodation law, which provides that it is unlawful discrimination to deny to an individual on grounds of sexual orientation the full and equal enjoyment of goods and services available to the public generally. This finding was overturned by the US Supreme Court.⁹⁸ By a 7– 2 majority, the Court held that Phillips’ rights to free exercise of religion had been breached. Justice Kennedy foregrounded the principles of tolerance and neutrality, holding that the Free Exercise Clause required the Commission to proceed in a manner ‘neutral toward and tolerant of Phillips’ religious beliefs’.⁹⁹ For Justice Kennedy, neutrality and tolerance entailed that government had no role ‘in deciding or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate’.¹⁰⁰ However, the State could not be neutral, and tolerance could not function on both sides of the

⁹⁷ Ibid., 106.

⁹⁸ *Masterpiece Cakeshop v Colorado Civil Rights Commission* n89 above

⁹⁹ Ibid. 1731

¹⁰⁰ Ibid. 1731

equation: by accepting Phillips' right to deny his services to a gay couple, the court was legitimizing his right to inflict dignitary harms on gay couples. Conversely, if the Court had accepted the Commission's view, it would be endorsing the right of gay couples to tolerance and respect. Indeed, Justice Kennedy himself eloquently articulated the 'recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth'.¹⁰¹ The metric of neutrality and tolerance does not resolve the issue; it merely disguises the outcome.

A similar approach was taken by Lady Hale in *Ashers*, which, as we have seen, arose out of the refusal by Ashers bakery to proceed with an order placed by Lee for a cake decorated with the headline caption 'Support Gay Marriage'.¹⁰² The proprietors, Mr and Mrs McArthur, regarded gay marriage as sinful and against God's law. The bakery was found to have discriminated against Lee on the grounds of sexual orientation under the relevant Northern Ireland legislation, FETO.¹⁰³ It challenged this decision under Article 9 ECHR, the right to freedom of religion and belief. The UKSC upheld the challenge. Lady Hale did not expressly use the terminology of neutrality or tolerance. However, there are important ways in which her conclusions are underpinned by a background assumption that the State should remain neutral as between viewpoints and in favour of tolerance. 'By being required to produce the cake, they were being required to express a message with which they deeply disagreed'.¹⁰⁴ Importantly, she refused to distinguish between content that was demeaning and content that

¹⁰¹ Ibid. 1727

¹⁰² *Lee v McArthur & Ors* [2016] NICA 39 (24 October 2016) (Northern Ireland Court of Appeal).

¹⁰³ Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006

¹⁰⁴ *Lee v Ashers Baking Co Ltd* n91 above, 54

was not. ‘In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake—support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant...’¹⁰⁵ As in *Masterpiece*, this reflects an assumption that the State should not prefer one viewpoint over another. Such ‘content’ discrimination would be anathema to the idea of State neutrality as between individual citizens’ differing world views.

This is not to say that genuinely demeaning messages should be accepted. It is only through the lens of neutrality that it appears difficult to distinguish between demeaning messages and others. The second dimension of substantive equality requires stigma, stereotyping and prejudice to be redressed, not perpetuated. This can be seen in the dissenting opinion of Justice Ginsburg in *Masterpiece*. The majority opinion placed significant weight on the fact that the Colorado Commission had permitted other bakers to refuse to place demeaning messages on their cakes, which was held to be evidence of the Commission’s lack of neutrality. Rather than ascribe to a notion of neutrality, Ginsburg J was prepared to contemplate drawing distinctions based on the recognition harms triggered by the content of the message. Specifically, she held that there is a legitimate distinction between the refusal to bake a wedding cake for a same-sex couple, and a refusal to place a demeaning message on a cake. In line with the second dimension of substantive equality, her approach can be built on to distinguish between messages which are intolerant and demeaning, and those which affirm equality and dignity.

¹⁰⁵ Ibid. 55

Masterpiece and *Ashers* can be contrasted with *Trinity Western University*,¹⁰⁶ where the Supreme Court of Canada expressly applied a hierarchy of values to give priority to the recognition harms afforded by complicity claims. In this case, Trinity Western University (TWU), an evangelical Christian post-secondary institution, sought to open a law school that required its students and faculty to adhere to a religiously based code of conduct prohibiting ‘sexual intimacy that violates the sacredness of marriage between a man and a woman’. The Covenant applied even when students were off-campus in their own homes. This led the Law Societies of British Columbia and of Ontario, which are responsible for determining the entry requirements to the legal profession in their provinces, to declare that the proposed law school was not an approved faculty of law. TWU and a prospective student challenged the decision as a violation of freedom of religion. In rejecting the challenge, the Supreme Court of Canada clearly recognized the problematic demeaning consequences of complicity claims. As the Court emphasized, the Covenant enforced a religiously based code of conduct not just on the believer but also on others: ‘Being required by someone else’s religious beliefs to behave contrary to one’s sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion’.¹⁰⁷

The Court did not ignore the recognition harms that might ensue to the Evangelical Christian decision-makers at TWU: it accepted that the Law Societies’ decisions constituted a limitation on the claimants’ sincere belief that studying in an environment in which members follow particular rules of conduct furthered their spiritual development. However, the Law Societies’ decisions did not deny any Evangelical Christian the right to practice their religion

¹⁰⁶ *Law Society of British Columbia v Trinity Western University* (2018) SCC 32 (Supreme Court of Canada). See also *Trinity Western University v Law Society of Upper Canada* [2018] SCC 33 (SCC).

¹⁰⁷ *Ibid.* [101]

as and where they choose. At the same time, members of the TWU religious community were not free to impose requirements on fellow law students leading to recognition harms.

Notably, both *Ashers* and *Hobby Lobby* involved complicity claims by corporations. Courts have frequently seen corporations as no more than the mouthpiece of the religious adherents behind them. It is submitted that this is fundamentally misguided. Allowing individuals to express their intolerance through corporations magnifies its impact. Equally problematic, it is difficult to see why the corporate veil should be dropped in such cases, nor how a corporation can convincingly argue that it has a right to freedom of religion in its own right. As Justice Ginsburg put it in *Hobby Lobby*: ‘In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.’¹⁰⁸ Nor, in her judgement, did the RFRA permit such a broad exemption: it covered ‘a person’s exercise of religion’ which made no sense to apply to corporations, which have no conscience, beliefs or feelings, and which employ people with a wide range of beliefs. She acknowledged that religious non-profits might fall within the Act. However, she stressed, ‘Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations.’¹⁰⁹

In *Ashers*, by contrast, the McArthurs’ right to religious freedom was conflated with that of their company, Ashers Bakery Ltd. According to Lady Hale: ‘To hold the company liable

¹⁰⁸ *Burwell v Hobby Lobby Stores* n107 above, 2787

¹⁰⁹ *Ibid.* 2796

when the McArthurs are not would effectively negate their Convention rights. In holding that the company is not liable, this court is not holding that the company has rights under article 9; rather, it is upholding the rights of the McArthurs under that article'.¹¹⁰ This is a surprising conclusion, given that an equivalent argument was expressly rejected by the ECHR in *X v Switzerland* and *Kustannus v Finland*, which held that limited companies could not rely on Article 9(1) to resist paying church taxes.¹¹¹ In the *Kustannos* case, to which Lady Hale referred briefly, a limited liability company had been created by the Freethinkers Association, which became its majority shareholder. The company was founded with the primary aim of publishing and selling books promoting the aims of freethinkers. The European Commission of Human Rights held that an association with religious and philosophical objects can possess and exercise the right to freedom of religion, because any application such a body would make is in reality made on behalf of its members. However, a limited liability company, given the fact that it is a profit-making corporate body, cannot rely on nor enjoy Article 9(1) rights. The Commission specifically rejected the applicants' argument that a finding to the contrary would limit the Article 9(1) rights of the Freethinkers' Association and their members. Domestic law did not prevent the freethinkers from exercising their rights or their Association from publishing books.¹¹²

Ashers is an even clearer manifestation of this principle. It was set up as a commercial bakery, and did not present itself as protecting the religious interests of its owners. While it might be arguable that the McArthurs themselves should not be compelled to bake cakes with

¹¹⁰ *Lee v Ashers Baking Co Ltd* n91 above 57

¹¹¹ *X v Switzerland* (Application No 7865/77), Decision of 27 February 1979; *Kustannus Oy Vapaa Ajattelijä Ab v Finland* (Application No 20471/92), Decision of 15 April 1996

¹¹² *Ibid.*

messages they disapproved of, it is both against European jurisprudence and against common sense to accord religious rights to a company which has no express religious purpose or affiliation. In fact no-one was preventing the McArthurs from holding their anti-gay marriage beliefs, nor were they being compelled to express support for gay marriage. Instead, the outcome of the case permitted them to use their commercial bakery, which did not hold itself out as a religious organization, as a vehicle to deny the right to others to advocate for an equality value which was central to their own identity.

(iii) Facilitating voice and participation

The third dimension of substantive equality requires attention to be paid to the effect on equal participation and the voice of those affected. Here too the contrasts are evident. No mention was made by the majority in *Hobby Lobby* of the need to take account of women employees' views or religious beliefs. By contrast, in *P v Poland*, while the Court did not rule out the possibility of conscientious objection by medical professionals, it held that the legal framework for lawful abortion should ensure that all the different legitimate interests are adequately taken into account.¹¹³ At the very least, in the context of access to lawful abortion, the relevant procedure should guarantee to a pregnant person the right to be heard in person and have her views considered.¹¹⁴

A very different balance was drawn by the US Supreme Court when confronted with the question of the extent to which intolerance expressed by anti-abortion protestors should be

¹¹³ *P v Poland* n87 above, 99

¹¹⁴ *Ibid.* 99

tolerated. This issue arises acutely when anti-abortion protestors claim the right to approach women outside abortion facilities, attempting to dissuade them from having abortions. State legislatures have addressed this by keeping anti-abortion protests at a little distance from abortion facilities. This was the case in *McCullen v Coakley*,¹¹⁵ which concerned a Massachusetts statute which made it a crime to stand on a public way within 35 feet of an entrance to an abortion facility. The law was designed to provide effective protection for individuals who did not want to engage with people attempting to discuss their decision with them. The petitioners claimed that this prevented them from engaging in ‘sidewalk counselling’ to dissuade women from having abortions. They challenged the statute as a breach of their rights under the First Amendment, which provides for freedom of speech, religion and assembly.

The US Supreme Court upheld their claim. Chief Justice Roberts held that the buffer zones imposed serious burdens on petitioners’ speech, making it difficult to initiate “the close personal conversations that they view as essential to ‘sidewalk counselling.’”¹¹⁶ He was particularly solicitous of the right of petitioners to communicate on a one-to-one basis on the ground that their chosen mode of expression was through quiet conversations, rather than through shouted protests. Yet, despite the emphasis on the importance of protecting ‘petitioners’ wish to converse with their fellow citizens about an important subject on the public streets and sidewalks’, nothing is said about the rights of the ‘fellow citizens’ not to have others’ beliefs foisted on them. In effect, women making their way to abortion facilities were required to tolerate the intolerance of others at a particularly vulnerable time in their

¹¹⁵ *McCullen v Coakley* 134 S. Ct 2518 (2014) (US Supreme Court).

¹¹⁶ *Ibid.* 2535

lives. The concurrent opinion of Justice Scalia is even more explicit. He held that the provision was invalid for the very reason that it was ‘indisputably meant to ... [protect] citizens’ supposed right to avoid speech they would rather not hear... Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.’¹¹⁷ For him, the restrictions breached the duty of the State to be neutral as to the content of speech: a provision could not be content neutral if it concerned listeners’ reaction to speech. Yet it is difficult to see how this can pose as a neutral approach. The harm to the participation rights of those pressurised to listen in these circumstances must be greater than the harm to protesters required to stand at a little distance and respect others’ privacy.

(iv) Celebrating difference and affecting structural change

The fourth dimension of substantive equality grows out of the recognition that inequality extends beyond individual acts of prejudice. It is also a consequence of social structures and institutions, which perpetuate inequality. This was expressly recognized in the Supreme Court of Canada’s decision in *Trinity Western*. In upholding the Law Society’s refusal to accredit TWU, the Supreme Court of Canada expressly referred to the structural implications of permitting TWU to maintain its policy. The public interest, the Court held, included supporting diversity within the bar: ‘The [Law Society]’s decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU’s proposed law school. It also

¹¹⁷ Ibid. 2546

maintains public confidence in the legal profession, which could be undermined by the [Law Society]’s decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.’¹¹⁸

Perhaps the most enduring social structure perpetuating women’s inequality has related to pregnancy and parenthood and the related assumption that women retain the primary responsibility for child-care and house-work.¹¹⁹ The right to substantive equality for women requires fundamental change in these social structures, enabling women to choose whether and when to have children, and to share the responsibility for child-care equitably with men and society more broadly. The effect of widely available contraception has been of central importance in furthering substantive equality for women, permitting women’s reproductive role to be valued and measurably decreasing the associated costs. In 1900, the average European woman could expect to spend 25 years out of a life expectancy of 50 years in raising children. By 1970, the average woman would be spending only 18 years in child-rearing, and her life expectancy had risen to 75 years.¹²⁰ This trend has continued in Europe and the US. Yet only Justice Ginsburg recognized, in her dissent in *Hobby Lobby*, that ‘the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.’¹²¹ From the perspective of

¹¹⁸ *Law Society of British Columbia v Trinity Western University* n135 above [103]

¹¹⁹ S Fredman, *Women and the Law* (Oxford Monographs in Labour Law, Oxford University Press, Oxford 1997), chap 1.

¹²⁰ *Ibid.* 129 - 131

¹²¹ *Planned Parenthood v Casey* 505 US 833 (1992) (US Supreme Court), 856.

substantive equality, then, the negative long term structural consequences of accepting claims by religious adherents of the right to impede women's access to contraception can be seen to outweigh the consequences to religious adherents of denying these claims.

III. Conclusion

How far and in what ways intolerance should be tolerated raises acute dilemmas, especially in relation to religion, where the adherent regards herself as bound by norms higher than the law of the land, and potentially subject to other-worldly penalties. This paper has argued that, in the context of complicity claims, where the accommodation of the religious adherents' manifestation has the potential to harm third parties whose behaviour they regard as sinful, neither tolerance nor neutrality can determine what weight to be given to the conflicting interests. Indeed they operate to disguise background value judgements. Instead, the proportionality analysis should be based on a clear hierarchy of values which openly locates itself in substantive equality. Applying a four dimensional framework of substantive equality to these complex questions illuminates the relative weights to be given to religious equality and gender and sexual orientation equality in the context of complicity claims. In this way, we can move beyond the paradox of tolerance.