THE IRRELEVANCE OF RELIGION:

Why the outcome of claims for conscientious exemptions should not depend on the source of the claimant's beliefs

Introduction

Liberal states are facing a critical resurgence of a perennial problem: how to deal with individuals who object to complying with their legal obligations on the basis that those obligations conflict with their religious or moral beliefs. Take the recent US case of the County Clerk for Rowan County, Kim Davies, who refused, based on her religious conscience, to sign or allowed to be signed by her deputies, certificates which would enable same-sex couples to marry. Her request to be exempt from performing her duties as an elected servant of the state was rejected by the Kentucky District Court\(^1\) and, after unsuccessfully seeking from the US Supreme Court (USSC) a stay of the District Court’s order obliging her to sign the certificates,\(^2\) she was imprisoned for about a week for refusing to comply with order.\(^3\)

Several liberal states have now developed tools to deal with such cases of request for conscientious exemptions through what will be here called the liberal model of conscientious exemptions (the ‘Liberal Model’). Under the Liberal Model courts hearing cases of conscientious exemptions follow the following three parameters:

A. The state should generally refrain from passing moral judgment on the content of the beliefs which give rise to a claim for conscientious exemption;
B. The state should neither privilege nor disadvantage religious beliefs over non-religious ones when considering whether to grant a conscientious exemption; and
C. The state should grant conscientious exemptions to claimants who sincerely hold a religious or non-religious conscientious objection which would not disproportionately impact on the rights of others or the public interest.

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1. *Miller v Davis* [2015] Dist Court Civil Action No. 15-44-DLB.
2. *Miller v Davis (No 15A250)* (Supreme Court).
The Liberal Model has been followed in several jurisdictions including Canada, the ECtHR and the UK. It is also exemplified under international law in art. 18 of the International Covenant on Civil and Political Rights (ICCPR) which reads

1. Everyone shall have the right to freedom of thought, conscience and religion (...)
2. (...)
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. (...)

The United Nations Human Rights Committee, the body that monitors compliance with the ICCPR, has interpreted the article thus: ‘Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.’ In relation to conscientious exemptions in the military context it has stated that ‘there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs [whether religious or non-religious].’

It is this last aspect of the Liberal Model, i.e. the lack of differentiation between religious and non-religious beliefs, that has recently come under attack under two fronts from theorists that could not be any further apart in their philosophical outlook. On one front there is Kathleen Brady who fervently defends what is here called the US Model of conscientious exemptions (the ‘US Model’). The US Model singles out religious conscientious objections as more worthy of protection than secular conscientious objections. Under now abandoned jurisprudence of the US Supreme Court (‘USSC’), for example, the First Amendment (‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...’) was interpreted as granting a general non-absolute right to conscientious exemption for religious claims. No similar constitutional protection was granted to secular claims. Such a general non-absolute right was

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5 Eweida v United Kingdom 2013 IRLR 231 [79]; Bayatna v Armenia (2012) 54 EHRR 15 [494].
6 Bull v Hall [2013] 1 WLR 3741 [41]. Here the SC cited the relevant jurisprudence of the ECtHR, in particular Bayatyan, which under s 2 Human Rights Act it is bound to take into account.
7 UN Human Rights Committee, ‘CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion).’
8 ibid 11. See also Yoon and Choi v Republic of Korea CCPR/C/132/1-222004 2006.
10 This jurisprudence started in Sherbert v Verner (526) 374 US 398 (Supreme Court); Wisconsin v Yoder (1971) 406 US 205 (Supreme Court). It was abolished in Employment Division v Smith 485 US 660 (Supreme Court).
eventually recognised in the Federal Religious Freedom Restoration Act of 1993 (‘RFRA’) and similar state-level legislation. Again, these statutes privilege religious claims over non-religious ones.

On the other side of the divide stands Yossi Nehushtan who defends what will here be called the intolerance model of conscientious exemptions (the ‘Intolerance Model’). Under the Intolerance Model the religiosity of a claim is, all things being equal, a reason to refuse to grant a conscientious exemption. The Intolerance Model does not appear to be a popular one. In fact, it is fair to say that none of the liberal states which will be referred to in this essay (US, Canada and UK) subscribes to this model. In fact, they either take a pro-religion stance (US) or a neutral stance (Canada and UK). This makes Nehushtan’s defence of the Intolerance Model all the more intriguing and worthy of close consideration.

This essay partially defends the Liberal Model from the attack of the US and Intolerance models. The defence is partial for two reasons. First, no positive case is made here in favour of the Liberal Model. Rather the attempt here is to defend that model from the bi-frontal attack from Brady and Nehushtan. Secondly, both Nehushtan and Brady have many things to say in their compelling books about the three features of the Liberal Model. For reason of space this essay focuses mainly on one of those features in the hope to defending the Liberal Model’s insistence that the religiosity of a claim for conscientious exemption is, all things being equal, irrelevant for its outcome.

The US Model

Brady seeks to justify the US Model by pointing out what is special about religion and how its distinctiveness confers on it a dignity which non-religious claims only indirectly possess. She says that religious beliefs, unlike secular commitments, involve the relationship of persons with the divine. ‘Religious meaning is derived from the source and origin of all meaning. Religious identity is grounded in the ground of all being’. She claims that all individuals, even atheists, can understand what is at stake in religious claims and it is reasonable for them to remain ‘open to the possibility that the divine can be encountered in a way that is real, meaningful, and salvific’. Given the overwhelming importance of a relationship with the divine for believers and the reasonableness for non-believers to be open to encounter such a relationship, Brady argues that the state, even a secular one, has a strong reason to grant religious conscientious exemptions in a wide range of

12 Brady (n 9) 302.
13 ibid.
circumstances. Secular commitments, while they may be interpreted to engage indirectly with the divine through enquiry with what is right and wrong, cannot be given the same level of protection as religious commitments because they are not an express manifestation of a relationship with the divine.

Furthermore, giving the same level of protection to religious and secular conscientious beliefs would not be feasible for a variety of reasons. Among them: too many claims for exemptions will be made; it would be more difficult for judges to assess the sincerity of secular beliefs without reference, as in religious practices, to comprehensive belief systems which have a communal dimension; secular claims would also be much easier to fabricate; allowing secular claims to be considered alongside religious ones would inevitably lead to much weaker protection of conscientious objectors overall.

Jurisdictions that subscribe to the Liberal Model may be justified in treating Brady’s arguments on the unfeasibility of the Liberal Model with scepticism. First, nowhere in her detailed and heavily referenced book does she provide any evidence that jurisdictions that follow the Liberal Model are less feasible than jurisdictions that subscribe to the US Model. Secondly, she does not acknowledge the reality that, despite jurisdictions subscribing to the Liberal Model allow both religious and non-religious conscientious exemption claims, the vast majority of conscientious exemption claims are brought by religious conscientious objectors. A very unsophisticated search, for example, on the database of judgements of the ECtHR on article 9 (freedom of conscience and religion) reveals that 35 cases have been considered under the branch of that article protecting secular conscience while 417 cases have been considered under the branch protecting religious conscience. No doubt allowing secular claims marginally increases the work of Liberal Model jurisdictions. However, such marginal increase is far from the scare that Brady seems to portray of unruly courts unable to deal with a high number of conscientious exemption claims brought by fictitious secular claimants who throw mud on the entirety of the practice of considering conscientious exemption claims.

Brady’s more serious attack on the Liberal Model therefore rests on the justification she provides for the US Model. That justification rests prominently on the overwhelming importance she places on

14 ibid 305–306.
15 ibid 307.
16 ibid 307–308.
17 ibid 309–310.
18 The database is available at http://hudoc.echr.coe.int/eng#"documentcollectionid2":"["GRANDCHAMBER","CHAMBER"]"}
the value of religion (the relationship of persons with the divine). It is not here disputed that religion can have the distinctive value she ascribes to it or a similarly compelling value. The issue is that Brady’s account does not provide reasons to think why that value should be accepted by a liberal state as so important so as to exclude the other values that militate in favour of granting exemptions to non-religious conscientious objectors. In fact arguably the best moral justification of the practice of granting conscientious exemptions is likely to draw on a plurality of values. Even if there was a distinct value which only underscores religious conscientious exemptions, it is not clear that this value can cancel out the other values that underscore the Liberal Model. And what might those other values be? Brady herself identifies some of those values in her survey of the literature.

She states, for example, that ‘for the secular individual, violation of deeply held moral beliefs may involve just as much suffering and emotional distress as the violation of religious conviction does, and it is just as destructive to human dignity’. She continues by recognising that ‘secular beliefs, especially secular moral beliefs, can have the same ultimate importance in the lives of those who hold them. (...) Indeed, [those beliefs] can themselves be ultimate in the way that God is for the believer’. Again, she states that ‘it is difficult to argue that freedom of religious conscience is more vital to human liberty than freedom for secular moral conscience. Whether conscience is secular or religious, obeying it is important to human dignity and autonomy.’

Given her recognition of the many values (well-being, dignity, personal integrity, freedom and autonomy) that equally underscore religious and non-religious conscience, it is not clear why she concludes her book by stating that ‘reserving the strongest protections for religion is not unfair’. Nowhere in the book does she provide a justification for the view that the distinct value she identifies for religion is so overwhelming that it cancels out the other values (such as liberty and

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19 See for example the value ascribed to religion Timothy Macklem, *Independence of Mind* (Oxford University Press 2008) 140. He argues that religious faith is valuable to the extent that for certain people faith in the beliefs that form the content of religious doctrine is critical to the achievement of well-being, for their character is such that their well-being requires them to commit themselves to what, again for them, is and must remain unknowable (...) It follows that religious faith serves the well-being of religious believers if and to the extent that religious beliefs have the capacity to inspire commitments that are capable of contributing to well-being. In such circumstances religion may be critical to well-being and so worthy of fundamental protection. Otherwise there is simply no value in religious faith.

20 Brady (n 9) 57–69.

21 ibid 58.

22 ibid 59.

23 ibid 60.

24 ibid 322.
autonomy) which, at least for a liberal state, are foundational. No such argument is provided by Brady arguably because such an argument would not be valid.

Brady’s argument may be saved not to argue for better treatment of religious conscience over non-religious conscience. Rather, the lesson that Brady can teach the Liberal Model is that this model should not subsume, as some have argued, the protection of religious conscience under other generic liberal rights of belief, thought, expression, privacy, association, conscience, and so forth. This is because, as Brady teaches, the justification for protecting religious conscience can be distinct, albeit, that distinct justification cannot cancel out the values that justify protecting secular conscience. Because the justifications can be distinct the Liberal Model ought to continue protecting freedom of secular conscience separately from religion.

**The Intolerance Model**

Brady’s argument in favour of the US Model should be contrasted with Nehushtan’s argument in favour of the Intolerance Model. This argues that the religiosity of a claim should be, all things being equal, a reason to refuse to grant a conscientious exemption, i.e. religious claims for conscientious exemptions should not be tolerated. Nehushtan threatens the Liberal Model by, in effect, privileging non-religious beliefs over religious ones. He argues, relying on empirical studies and theoretical claims, that ‘there are meaningful, unique links between religion and intolerance, and between holding religious beliefs and holding intolerant views (and ultimately acting upon these views)’. Embracing the liberal perfectionism of Raz, he argues that a liberal state should discourage intolerant views (broadly speaking views which undermine the liberal commitment to civil and political rights) and therefore, given the links between religion and intolerance, the liberal state should discourage religious practices. This entails that whenever a claim for exemption is made by a religious conscientious objector, ‘the religiosity of a legal claim is normally a reason, although not necessarily a prevailing one, to reject that claim’.

Nehushtan’s attack on the Liberal Model ought to be rejected if the Liberal Model, with its equal treatment of religious and non-religious claims, is justified by a plurality of values that equally support religious and non-religious beliefs. Nehushtan’s attack may be deflected by showing that he

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26 Nehushtan (n 11) 3.

27 He makes his main argument in ibid chapter 3.

28 Ibid 3.
has not done enough to prove his claimed link between religion and intolerance. His main argument is an empirical one, though he does adduce some theoretical explanations to sustain the empirical arguments. Some of these theoretical arguments for the intolerant nature of religion are that religious groups tend to keep a distinct community and thereby exclude others; religions claim that their world-view is the absolute truth and thereby persecute heretics; the divine nature of religious commands stifles the possibility of criticism and prompts the religious person not to tolerate non-compliance.\(^{29}\) No issue will be taken here against Nehushtan’s theoretical arguments. He himself admits that his theoretical arguments ‘might appear too sketchy. Indeed, some of the following assertions and generalisations rely on the assumption that these generalisations are, by definition, mostly true or generally accurate’.\(^{30}\)

Given that these theoretical arguments cannot by themselves show that religion is inherently (or conceptually) intolerant, Nehushtan’s main arrow is his empirical argument. He relies on a number of sociological/psychological studies which he interprets as proving his point. He cites various studies spanning over a considerable number of years the constant conclusions of which are best described, he says, by a review undertaken by Hunsberger and Jackson. But on closer analysis this review does not in fact prove that, as a matter of conceptual necessity, religious people are intolerant. Rather, it proves that certain religious attitudes are more prone to lead to certain kinds of prejudice towards certain groups than others. Indeed, some religious attitudes actually lead to less prejudice towards certain groups, such as homosexuals and some racial groups.

Hunsberger and Jackson’s review (and the studies it is based on) proceeds on the basis of four attitudes to religion, namely the intrinsic orientation, the extrinsic orientation, the quest orientation and religious fundamentalism. Hunsberger and Jackson explain these four categorisations as follows:

An intrinsic orientation was considered to be more mature, stemming from an internalized, committed, and sincere faith. The extrinsic orientation was associated with religious immaturity, involving an externalized, consensual, utilitarian orientation to religion (...) the quest orientation involves a questioning, doubting, open, and flexible approach to religious issues (...) religious fundamentalism (RF) focuses on closed-mindedness, the certainty that one’s religious beliefs are correct, and the belief that one has access to absolute truth\(^{31}\)
On the basis of these categorisations the review concludes that

Our review of studies published since 1990 clearly supports the idea that the target of prejudice is important when considering prejudice-religious orientation relationships (...).

The Intrinsic scale was consistently negatively related to self-reported racial/ethnic intolerance (4 of 4 studies), but it was positively related to intolerance of gay men and lesbians (7/9 studies) and possibly to authoritarianism and to intolerance of Communists and religious outgroups, though there are few relevant studies. The extrinsic orientation was sometimes positively related to racial/ethnic (3/4) and gay/lesbian (4/8) intolerance. Quest showed a weak tendency to be associated with tolerance for racial groups (2/5); a much stronger effect appeared for gay/lesbian persons as targets (7/9). Finally, [religious fundamentalism] was consistently related to increased prejudice against gay/lesbian persons, women, Communists, and religious outgroups, as well as authoritarianism (39/39 findings in total), but its relationship with racial/ethnic intolerance is less clear-cut (5 positive relationships, 6 nonsignificant findings). 32

Rather than proving Nehusthan’s claim that religious beliefs lead to intolerance/prejudice, the study actually proves that certain religious attitudes may lead to certain kinds of intolerance/prejudice. The study does not however tell us how many religious people hold what religious attitudes. If the vast majority of religious individuals held the religious fundamentalism attitude then Nehusthan’s claim would hold true as a quick generalisation (while still falling below the conceptual claim he makes). However, if it is shown that a vast majority of religious individuals actually hold the quest religious attitude then perfectionist liberal states, in their endeavour to combat prejudice and intolerance, would do well to promote religion. Arguably, the latter is not a conclusion which Nehushtan would be happy to reach.

Nehushtan’s anti-religion approach may be more generally criticised for trying to overreach his thesis by relying on evidence which falls below the necessary standards. He himself admits that the empirical studies he relies on are very limited in scope. He says that ‘most if not all of the reliable empirical findings and conclusions are limited not only in terms of the target group (mostly Christians) and geographic area (mostly North America) but also the relevant era (late twentieth Century)’. 33 There is a significant difference between claiming, as he does, that ‘religion is inherently intolerant’ 34 and claiming, as the more accurate picture might suggest, that there are meaningful

32 ibid 812. Nehusthan cites this passage at Nehushtan (n 11) 88.
33 Nehushtan (n 11) 92.
34 ibid 200.
links between prejudice and certain religious attitudes which exist in late twentieth Century North
American Christian communities.

Furthermore, and importantly, not all claims for religious exemptions are based on prejudice. The
Christian B&B owners in the case of Bull v Hall\textsuperscript{35} who refused to provide a double bedroom to same-
sex couples were arguably prejudiced against homosexuals and their act of refusing a bedroom was
arguably an intolerant one. However, not the same can be said about a Sikh man claiming an
exemption from the legal duty to wear motorcycle helmets in order to be able to wear the Sikh
 turban.

Nehushtan, quite rightly, acknowledges the fact that a claim for exemption by a religious objector
may not be based on intolerant views. However, he responds by re-affirming his anti-religious
stance. He states that

Religious claims (...) for exemptions may not be tolerated or accepted even when they do
not directly rely on intolerant values (...) This is so because religion is inherently intolerant
and because the liberal state should not support or endorse, directly or indirectly, intolerant
ideologies or sets of beliefs.\textsuperscript{36}

However, as argued, Nehushtan has failed, either empirically or theoretically, to show that religion is
inherently intolerant so that support should not be provided by the liberal state, directly or
indirectly. The better view, as affirmed under the Liberal Model, is that religious claims for
exemptions should not be treated less favourably than non-religious claims. Rather, as happens in
jurisdictions which subscribe to the Liberal Model, the reason for denying an exemption should be
based on the disproportionate consequences granting the exemption would have on ‘public safety,
order, health, or morals or the fundamental rights and freedoms of others’.\textsuperscript{37} As such the fact that a
claim for exemption is based on religious beliefs or secular beliefs should be seen as irrelevant.

\textbf{Conclusion: In Defence of the Liberal Model}

Much else needs to be said in order to justify the Liberal Model as the viable model for dealing with
conscientious exemptions. In particular, critics may be sceptical about the Liberal Model’s insistence
that the granting of an exemption should depend on the outcome of the proportionality analysis.
This would entail balancing, on the one hand, the values that sustain the practice of conscientious
exemptions (we have seen that there is a plurality of values) and, on the other, those values that

\textsuperscript{35} Bull v Hall (n 6).
\textsuperscript{36} Nehushtan (n 11) 200.
\textsuperscript{37} Article 18 CCPR.
sustain conflicting public interests or the rights of others. How can one balance the right of Kim Davies to object to allowing same-sex marriages to be performed against the right of same-sex couples to marry? Brady would insist that we should not balance such rights. Instead we should give priority to the religious conscientious objector, at least in situations where same-sex couples could find someone else to celebrate their ceremony without too much inconvenience. 38 Nehushtan may well be sympathetic towards proportionality analysis, 39 but the scales of the balancing exercise would be for him heavily weighted against the religious objector for the reasons illustrated above. The Liberal Model cannot be viable until we can find a convincing way to justify using the proportionality analysis and can also show that the insistence of proportionality analysis leads to solving hard problems like those raised by the case of Kim Davies.

Despite much work needed to be done on justifying the Liberal Model, this essay has cast some doubts on the viability of the two competing models provided by Brady and Nehushtan. The US Model suffers does not explain why a distinct value (relationship with God) should be treated in a liberal state as more important than autonomy, conscience, well-being, freedom etc.; the Intolerance Model is unable to explain why religion is inherently intolerant and should therefore be discouraged.

Nevertheless, despite the flaws of these competing models, those that seek to uphold the Liberal Model would do well to engage very closely with both books. Nehushtan is crisp, analytical and straight to the point. He is also original, albeit unsuccessful, in relying on the empirical literature to sustain his normative conclusions. Brady is at times repetitive and her book would benefit from Nehushtan’s succinctness. However, her knowledge of the literature is impressive and so is her ability to shift aptly between, on the one hand, philosophical analysis and normative arguments and, on the other, doctrinal analysis of US constitutional law. Both books deserve high praises for advancing the debate on how liberal states should solve the perennial problem of conscientious exemptions. We must however await another work, one that comprehensively defends the Liberal Model, to show us how that problem ought to be adequately resolved.

38 Brady (n 9) 246–249.
39 Nehushtan (n 11) 44–48.