Introduction

The New Generation of Conscience Objections in Legal, Political, and Cultural Context

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I.1 THE NEW CONSCIENTIOUS OBJECTION VERSUS THE OLD

The new generation of conscience-based objections differs sharply from its predecessors in that it involves claims that are interventionist and intrusive as opposed to claims aimed at withdrawal and absence from discrete areas of mainstream collective undertakings. Typical of the past are conscientious objectors who sought to be excused from serving in the military or from going to war,[1] or from pledging allegiance to their country's flag at public gatherings.[2] In contrast, today's most notorious conscientious objectors seek exemption from generally applicable laws requiring employers to provide contraception coverage in the medical insurance benefits they must extend to their women employees;[3] or from providing services offered to the general public, such as cakes or flowers for wedding celebrations or hotel rooms with large beds, to individuals belonging to sexual minorities;[4] or from issuing marriage or civil union licenses in their capacity as state employees to same-sex couples.[5] Moreover, even more traditional conscientious objection claims, such as that of medical personnel refusing to take part in abortion procedures, have acquired a different meaning due to their massive invocation and due to the widening of the activities to which the individual objects. Thus, for example, Italy has recently been condemned by the European Council for

[1] See Chapter 2 of this volume, note 4 and accompanying text.
[2] See ibid., note 3 and accompanying text.
[3] See, e.g., *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S Ct 2751 (2014).
[4] See, e.g., *Charlie Craig and David Mullins* v. *Masterpiece Cakeshop*, 2015 COA 115 (Colorado Court of Appeals, 2015) and *Michael Black and John Morgan* v. *Susanna Wilkinson* [2013] EWCA Civ. 820.
[5] See, e.g., *April Miller et al.* v. *Kim Davis*, 15–5961 (Appellate Div., 6th Cir., 2015) and *Ladele* v. *Islington Council* [2009] EWCA Civ. 1357.

Social Rights because, against the backdrop of a seemingly reasonable conscientious objection clause,[6] its eventual invocation by the overwhelming majority of physicians has de facto hampered the application of the general law that grants women access to abortion services.[7] There has also been a proliferation of cases in which individuals object to activities that do not require them to engage in any direct participation in *acts* that they deem immoral. The UK Supreme Court has recently ruled against such an expansionist approach to conscience claims in a case involving two Catholic Labour Ward Coordinators who objected to performing managerial and supervisory tasks. The court held that the words "to participate in" an abortion procedure mean "taking part in a 'hands-on' capacity" and do not extend to administrative tasks.[8] In the United States, in contrast, since the adoption of the Church Amendment in 1973[9] – which exempted medical personnel from performing and assisting in sterilizations and abortions,[10] and medical institutions from making their facilities available for the performance of such procedures[11] – there has been a proliferation of state and federal laws that have considerably widened the scope of conscientious objection.

> In the 1990s and 2000s, such laws were expanded to include contraception and to cover a much broader range of acts and actors. These laws go well beyond the Church Amendment in order to cover objections to many more forms of conduct, interactions, and associations which the objector asserts would make him or her complicit in the wrongdoing of another person.[12]

Although honoring the requests of traditional conscientious objectors can be, on occasion, costly to non-objectors and to society at large, it very often has a relatively insignificant impact on the latter. Thus, if half of those called to

[6] See Chapter 2 of this volume, note 73 and accompanying text.
[7] *International Planned Parenthood Federation European Network (IPPF-EN)* v. *Italy*, Complaint no. 87/2012 (ECSR, decision adopted on September 10, 2013 and delivered on March 10, 2014).
[8] *Greater Glasgow Health Board (Appellant)* v. *Doogan and Another (Respondents)* (Scotland) [2014] [2015] AC 640, [2015] 2 All ER 1, [2015] 1 AC 640, [2014] UKSC 68 at para. 38.
[9] The Church Amendment was passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 93–45, § 401(b)-(c), 87 Stat. 91, 95.
[10] 42 U.S.C. § 300a-7(b)(1) (2012). [11] 42 U.S.C. § 300a-7(b)(2)(A) (2012).
[12] Douglas NeJaime and Reva B. Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," *Yale Law Journal* 124 (2015): 2516–91, at 2538. For example, the state of Mississippi passed the nation's broadest health care refusal law in 2004, defining "health care service" to include "any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions" (ibid., at 2539).

military service were to object on conscience grounds, honoring their requests could be very costly. But if only a small number of Quakers or Jehovah's Witnesses were to do so, then the effects on military policy and non-objecting conscripts would most likely be minimal.[13] In the context of contemporary conscience-based assertions, in contrast, the resulting clashes often escalate into veritable conscience wars. Indeed, even regardless of how large the number of objectors may happen to be, their claims seem bound to raise dignitarian issues and to pose significant challenges to the very fabric of liberal constitutional democracy. Thus, if a state official refuses to marry a same-sex couple on religious grounds, the latter may feel like second-class citizens – just as an interracial couple would under similar circumstances – even if other state officials happen to be readily available to perform the desired civil marriage. In effect, in this context, the state official does not object to performing a given *act*, as he is perfectly willing to *register* opposite-sex couples' marriages. What this state official does, however, is pointedly refuse to register certain categories of *people*, who are just as entitled to marry under the law, because he abhors same-sex unions. This public act whereby a state official withdraws legally mandated services from an entire segment of the polity has profound social and political meaning. At the same time, from the standpoint of the same-sex couple, their legal entitlement to marriage fits perfectly within the logic of the liberal constitutional state, whereas any recognition or accommodation of religious objections by state officials looms as a serious threat to the integrity of the secular polity.[14] As against this, religious objectors to same-sex marriage may well consider implementation of an antidiscrimination regime that extends full protection on the basis of sexual orientation as proof of increasing state hostility toward religion and as an assault on religious freedom.

I.2 THE REPOLITICIZATION OF RELIGION AND THE CULTURE WARS

A particularly important set of factors for the intensification and proliferation of the conscience wars stems from the combination of the increased presence

[13] In the context of unpopular wars, such as the US war in Vietnam, where widespread opposition resulted in significant conscientious objection coupled with civil disobedience, social and political turmoil can prove disruptive. However, such cases may be best understood as involving above all a bitter political struggle in which conscience-based arguments figure, for the most part, as being parasitic on strong currents of political aversion to official policy.

[14] *M. Frank M. et autres*, Décision n° 2013–353 QPC du 18 Octobre 2013 (Conseil Constitutionel).

of strong and fundamentalist religion with the "repoliticization" of religion and with the rapid erosion of the boundary between the private and the public spheres.[15] Accordingly, a request based on religious conscience grounds for an exemption from a law prohibiting discrimination on the basis of sex by a "depoliticized" religion that restricts access to the clergy to men and that operates exclusively in the private sphere seems much less likely to fuel an intense conscience war than a corresponding request by a religious employer of thousands who is seeking an exemption that would result in the thwarting of the reproductive rights of his women employees.[16] This contrast is of course further exacerbated if we assume that the religious community in the private sphere is made up exclusively of voluntary adherents to the religion at stake, whereas the business led by the religious objector is made up of several secular female employees and of women who adhere to religions that permit the use of contraceptives and that do not require any blanket prohibition of abortions.

Home-grown divisions within the dominant cultural and religious traditions figure prominently in the intensification of the conscience wars as a consequence of the widening divide between the revival already alluded to of strong religion and its repoliticization, on one hand, and the expansion of secular liberalism's fundamental rights to previously broadly excluded or discriminated-against segments of the polity, such as women or LGBT persons, on the other. Here again, it appears increasingly that the center cannot hold as the harmony between liberalized religion largely sheltered from politics and secular democracy's promotion of rights within certain clear limits dictated by tradition tends to unravel. Indeed, reinvigorated and repoliticized religion becomes a vigorous opponent of the expansion of liberal rights sought for purposes of achieving full equal citizenship of previously disadvantaged groups within the polity. Moreover, the more religious fervor and the quest for expansion of rights intensify, the more the gulf between them deepens. Consistent with this, proponents of religion tend to view institutional secularism as increasingly much more anti-religious than neutral as between religion and nonreligious ideologies.[17] For their part, those struggling to achieve full gender and sexual orientation equality confront greater opposition from repoliticized religion, leading to frustration with the inadequacy of institutional secularism for the purpose of fostering the quest for equal citizenship within liberal democracy.

[15] See José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994), 3–6.
[16] See *Burwell* v. *Hobby Lobby*, 573 U.S. ___, 134 S Ct 2751 (2014).
[17] See Jean Baubérot, *Laïcité 1905–2005: Entre passion et raison* (Paris: Edition du Seuil, 2004), 185.

From a legal and constitutional standpoint, all sides within these conflicts are best ultimately viewed as putting forth genuine and, in many cases, mutually exclusive claims based on morals (with religious claims figuring as one set among a plurality of competing moral claims that count with adherents within the relevant polity). To the extent that the constitution or the law must take one side or the other in a particular conflict – for example, same-sex marriage is either legally permitted or it is legally prohibited – the conflict between proponents and opponents of the law will seemingly only involve a moral claim on one side of the divide. Thus, where the law sanctions same-sex marriage, the state official who refuses to perform such a marriage because of his religious beliefs and duties grounds his position on a conscience-based claim. In that same situation, the same-sex couple seeking to obtain a civil marriage does not formally assert a moral claim, but rather a claim to the vindication of a right to which that couple is legally entitled. Upon further inquiry, and from a substantive rather than a formal perspective, however, the refusal to perform a civil same-sex marriage on conscience grounds can quite plausibly be regarded as likely to trigger a moral-based dignitarian claim on the part of those subjected to the refusal in question. In other words, the mere refusal by one state official, even if others are available to perform the sought civil marriage, can be experienced as an affront to dignity that offends one's deeply grounded moral entitlement, much as the legal obligation to perform a marriage that he believes to be divinely proscribed strikes the state official confronting the same-sex couple of our example as conscientiously objectionable.

Conscientious objection calls for a withdrawal from a collective endeavor grounded in law or an institutional practice consistent with the dictates of the objector's innermost normative convictions and commitments. Thus, for the state official of our last example, same-sex marriage is religiously abhorrent, and completely withdrawing from its institutionalization and its spread is an imperative normative command. Similarly, for the same-sex couple seeking to marry, honoring the state official's request for an exemption would signal an official condoning of homophobia – and particularly in the face of a long struggle to overcome criminalization of homosexuality and legal and social discrimination against homosexuals – thus calling for a withdrawal from the institutional establishment that unconscionably affronts their innermost conviction in, and commitment to, full and equal dignity regardless of sexual orientation. Does this last example suggest an inflation in the incidence of conscience claims in recent times? Does it, instead, signal a rhetorical shift, given that it would seem more persuasive both from the standpoint of the conscientious objector's insistence in her cause and from that of society as

a whole if claims for withdrawal and exemption stem from deeply held principles rather than from purely interest-based political disagreement? In order to get a better handle on these and other key questions raised by the contemporary conscience wars, it is imperative to place conscientious objection in its broader historical and philosophical contexts as do several of the chapters that follow.

I.3 THE LEGAL AND CONSTITUTIONAL CONTOURS OF RELIGIOUS CONSCIENCE CLAIMS

Leaving aside, for now, the broader theoretical issues, from a legal and constitutional standpoint conscientious objection claims have been traditionally most closely associated with freedom of (or from) religion claims.[18] Some constitutions explicitly enshrine a freedom of conscience right, usually alongside freedom of speech, freedom of belief, and freedom of religion.[19] Other constitutions, such as that of the United States, do not contain a freedom of conscience right, but such a right has been recognized through interpretation of the right to the free exercise of religion as encompassing it within its scope or, at least, as incorporating freedom of religious conscience.[20] Freedom of conscience claims, as are most other fundamental constitutional rights claims, are inherently limited in nature, although the relevant boundary may vary from one constitutional regime to the next.[21] Consistent with this, judges called upon to set the limits of conscience-based claims most often have subjected these to the proportionality standard. Application of that standard, however, is prone to contestation to the extent that it involves balancing competing rights or interests over which there are often disagreements concerning their relative importance. Moreover, religious conscience claims are particularly problematic from the standpoint of the proportionality standard,

[18] See Chapter 2 of this volume, notes 43–44 and accompanying text.

[19] See, e.g., Constitution of India, Article 25; Constitution of Kenya, 2010, Article 32; Constitution of the Republic of South Africa, 1996, Chapter 2, Article 15.1; and Canada's Constitution Act, 1982, Section 2(a).

[20] See, e.g., *Gillette* v. *United States*, 401 U.S. 437 (1971) and *Parisi* v. *Davidson*, 405 U.S. 34 (1972).

[21] Under the Canadian Constitution Act, 1982, for example, everyone has a right to "freedom of conscience and religion" (Section 2[a]), "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Section 1). For its part, Article 9 of the European Convention on Human Rights provides, "[e]veryone has the right to freedom of thought, conscience and religion … subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

as they are often cast as resistant to all comparative metrics. Thus, for example, how should one weigh a conscience-based objection to all abortions throughout the polity in relation to which the objector might plausibly assert having a legal duty to perform, assist, or becoming complicit (e.g., by paying taxes used even in infinitesimal part to subsidize abortion services) based on an absolute religious prohibition due to an asserted divine decree equating abortion to infanticide? If that assertion is taken at face value by a judge who must balance the aforementioned conscience claim against a reproductive freedom claim insisting on free and fair access to abortion open to all women, would that not raise a plausible argument for a (nearly) complete rejection of abortion rights?[22] Conversely, would not a judicial application of the proportionality standard treating the religious conscience-based opposition to abortion as one relevant ideological position to be weighed against other conflicting and competing ones, thus in all likelihood resulting in a judicial recognition of the legality of at least some abortions, amount, for all practical purposes, to a wholesale rejection of the religious command at issue? To be sure, from the standpoint of liberal constitutionalism comprising the institutionalization of some iteration of state secularism, the balancing of religious against secular claims looms as entirely feasible and has long been routinely performed by constitutional judges across a broad range of jurisdictions.[23] However, in the context of the repoliticization and revival of strong religion, constitutional secularism becomes increasingly contested as pretending to be neutral but in fact inevitably functioning with a strong bias against religion.[24] Accordingly, from the standpoint of strong or fundamentalist religions, there are no legitimate means to weigh any secular interest against any categorical divine command.

Contrast the foregoing example with situations that do not involve religious conscience-based claims, whether the latter relate to conflicts between rights or between rights and interests. Suppose that a journalist wishes to publish an account of the travails of a dysfunctional family involving no public figures, thus pitting a conflict between a freedom of the press claim and a privacy right

[22] Presumably, even accepting this religious conscience claim at face value, a judge could plausibly conclude that proportionality would require authorizing abortion in cases where the life of the mother is in danger, or, at least, in danger in circumstances in which, absent the abortion, neither the mother nor the fetus would survive.

[23] See Susanna Mancini and Michel Rosenfeld, "The Judge as Moral Arbiter? The Case of Abortion," in András Sajó and Renáta Uitz, eds., *Constitutional Topography: Values and Constitutions* (Meppel, NL: Boom Eleven International, 2010).

[24] See Michel Rosenfeld, "Recasting Secularism as One Conception of the Good among Many in a Post-Secular Constitutional Polity," in Michel Rosenfeld and Susanna Mancini, eds., *Constitutional Secularism in an Age of Religious Revival* (Oxford: Oxford University Press, 2014).

claim. Even granting that reasonable judges may disagree on the precise location where the appropriate balance between the rights involved ought to be struck, both of these rights inhere within the same constitutional order and are, accordingly, equally amenable to assessment within a common normative framework. Moreover, the same is also the case where a constitutional right, such as freedom of the press, is subject to being weighed against an important state interest, such as the promotion of national security.

To the extent that use of the proportionality standard necessarily extracts a religious conscience claim away from its own normative underpinnings for purposes of evaluation under the competing normative criteria attaching to the prevalent constitutional order, this will inevitably result in a partial or complete subordination of the religious conception of the good standing behind the religious conscience claim to its secular-constitutional counterpart. In other words, religious conscientious objection claims will not be tackled from within their own religious tradition, but instead from the standpoint of the secular conception of freedom of religion that inheres in the prevailing constitutional tradition. Moreover, as a consequence of this, proponents of religion-based conscience claims are often bound to be frustrated as their claims become framed and (from their perspective inadequately) accommodated pursuant to an understanding of freedom of religion consistent with the dictates of a liberal worldview.

Another reason that suggests that the frame of conscientious objection might not be the optimal one for resolving present-day controversies has to do with the possible distortive effect that the latter have on democracy and the separation of powers. Traditional invocations of conscientious objection (for example, by a Jehovah's Witness who refuses to do military service) were not only minoritarian but also unlinked to endeavors bent on influencing the democratic process. Jehovah's Witnesses claimed exemption from the application of general laws, but did not attempt to change those laws. In contrast, in the current predicament, the same politicized religious actors operate simultaneously as claimants before courts in cases grounded on the individual right of conscientious objection or freedom of religion, and as political agents (often representing majoritarian religious or cultural tendencies) influencing legislation and government action. Moreover, traditional conscientious objection invocations did not challenge the general applicability of the law *outside limited specific cases*. Today, on the contrary, there is a widespread understanding of rules that are deemed morally debilitating on religious grounds as not necessarily applicable to everybody. This attitude is clearly articulated in a lecture delivered in 2008 by the Archbishop of Canterbury, who stressed

> the reluctance of a dominant rights-based philosophy to acknowledge the liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to "activate" this whenever called upon.[25]

There is one alternative to the freedom of religion path available to religious conscientious objectors that seems more promising in several instances. That alternative avails itself of the constitutional jurisprudence relating to equality and to antidiscrimination rights. Ideally, from an equality standpoint, all religious and nonreligious ideologies should stand on the same footing. Thus, for example, if one religion is accepting of homosexuality and another is not, the latter may object to a law prohibiting discrimination against homosexuals on the ground that application of such a law results in discrimination on the basis of religion. Specifically, the religion tolerant of homosexuality is fully accommodated, consistent with the legal protection of homosexuals, whereas the religion intolerant of homosexuality feels thereby disadvantaged, hence figuring as unequal to the first religion. By focusing on the comparative advantages and disadvantages within the operating legal regime of the two religions involved, attention is drawn away from the proper constitutional limits of freedom of religion and turned instead toward endeavoring to avoid or mitigate favoring one religion over another.

The antidiscrimination approach can extend to individuals taken alone as well as to religions taken as a whole. Accordingly, when a state official seeks an exemption from issuing a marriage license to a same-sex couple, she can claim, upon denial of such exemption, that she is a victim of discrimination as compared to her colleagues who have no like objection. Moreover, the discourse of antidiscrimination generally appears more compelling when invoked by a powerless, discriminated-against minority person than when asserted by someone within the polity's mainstream. The *Ladele* case, discussed in many of the chapters that follow in this volume,[26] provides a vivid example of this. Ladele, a black woman with profound Christian beliefs belonging to a non-mainstream Christian church within the United Kingdom conscientiously objected to granting civil union permits to same-

[25] Rowan Williams (Archbishop of Canterbury), *Civil and Religious Law in England: A Religious Perspective* (Temple Festival series at the Royal Courts of Justice, February 7, 2008).

[26] See Chapters 2, 4, 5, 7, 10, 11, 15, 16, 17, and 18.

sex couples in London's Islington district, one of that city's most progressive and gay-friendly communities.[27] Ladele's exemption was denied, and she was terminated in her municipal position for refusal to perform her official duties in cases involving homosexuals.[28] One possible narrative regarding Ladele's dismissal is that her freedom of religion did not extend so far as to permit her to refuse granting a public benefit to persons entitled by law to obtain it. A perhaps more compelling narrative, however, is that a woman belonging to a racial, cultural, and religious minority that is often discriminated against has been treated unequally as compared with her fellow public employees who share the liberal secular views prevalent in Islington and who therefore have no qualms concerning same-sex relationships.

Upon further consideration, the antidiscrimination narrative is often as problematic and as contestable as the religious freedom one when it comes to fair adjudication of conscience-based claims. Returning to the *Ladele* case, what should be deemed more important, her individual circumstances or the broader societal setting carved out by the history of the United Kingdom as a Christian country that has long criminalized homosexuality and discriminated against homosexuals? Depending on one's answer to this question, a judge should presumably favor either Ladele's quest for racial and religious equality or the rights to equal dignity of the homosexual couples who seek to enter into a civil union.

In the last analysis, present-day conscientious objection claims pose vexing problems both for freedom of religion jurisprudence and for its antidiscrimination counterpart. Moreover, as briefly alluded to earlier, the contemporary conscience wars derive from and feed on cultural and political conflicts. Consistent with all this, the divisions over conscientious objection have sharpened and become seemingly ever more contentious. Both thwarted objectors and those adversely affected by the grant of conscience-based exemptions experience increasing alienation and frustration within the legal and political order that they share in common. Today's conscience wars are definitely challenging and potentially highly disruptive. Furthermore, there is significant divergence over how best to institutionally handle the conscience wars. With this in mind, the present collective undertaking aims at a critical and systematic evaluation of the contemporary conscience wars in their historical, philosophical, social, political, and legal/constitutional dimensions.

[27] See Chapter 16 of this volume, Section 16.5. [28] Ibid., Section I.1.