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You Can't Have Your Cake: A Queer-Informed View of Religious Conscientious Exemptions from Equality Law

Review of: John Adenitire *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge University Press, 2020)

*Stella Coyle**

Abstract

This paper offers a Queer-informed challenge to Adenitire's claim that the principle of liberal neutrality can sometimes justify religious conscientious objection to equality law. It begins with a Queer critique of the assumptions behind the rights paradigm of classical liberalism; it will then use the case law as a springboard for challenging the legitimacy of faith-based discrimination in the public sphere, highlighting the limitations of a neutral liberal approach to conscientious exemptions from equality law. Through these arguments, the paper seeks to demonstrate that (i) a neutral liberal approach to this conflict can result in harm to non-heterosexuals; and (ii) Queer theory can play a useful role in challenging some of the normative assumptions in this conflict and in supporting instead a value-based approach.

I. Introduction

This paper offers a response to the argument made by Adenitire regarding conscientious exemption; in particular, to his first claim that a general legal right to conscientious exemption is justified by '[a] plurality of liberal values, including the state's duty of neutral pluralism'.[1] It suggests that Adenitire's version of liberalism, which might be characterised as neutral, but not value-free, ought to go further and accept that discrimination should never be permitted where it is grounded in illiberal and illegitimate values. The critique is offered in the context of the role of conscientious objection in conflicts between religion and sexual orientation. It suggests – perhaps hopefully, and certainly appropriately to the context – that there may well be a perfectionist liberal in hiding in the closet! For example, Adenitire's criticism of the UK Supreme Court's ruling in *Ashers*[2] can be contrasted with the 'balancing of the rights and harms'[3] that he uses to criticise the US Supreme Court in *Elane*.[4] It is submitted that his conclusion in the latter case strains under the weight

* Lecturer in Law, Keele University. My thanks are due to Yossi Nehushtan for helpful comments on an earlier draft.

[1] John Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge University Press 2020).

[2] *Lee v Ashers Baking Company Ltd and others* [2018] UKSC.

[3] Adenitire (n 1) 306.

[4] *Elane Photography, LLC v. Willock* 2013-NMSC-040, 309 P.3d 53.

of applying the neutral approach, whereas his insightful consideration of *Ashers*[5] is more reflective of a value-based liberal approach.

This paper also adds a further layer of analysis to the debate between the neutral liberal model and the value-based, 'perfectionist' model of liberalism,[6] using insights from Queer theory. The conflict between religion and sexual orientation raises many of the central concerns of legal liberalism, which might be summarised as the limits of freedom in the light of harm to equal citizenship. It is also a microcosm of the broader relationship between law, religion, and homosexuality. Queer theory can be used to re-examine the constellation of liberal concerns through the lens of power relations and the resulting claims to truth or knowledge – namely, the norms underpinning the law. This can provide helpful insight into how the norms central to the conflict were created and sustained. Furthermore, while acknowledging the important arguments Adenitire makes regarding these questions of harm[7] and citizenship,[8] insights from Queer theory can illustrate how these arguments need to go further.

This paper thereby offers a Queer-informed challenge to Adenitire's claim that the principle of liberal neutrality can sometimes justify religious conscientious objection to equality law. It begins with a Queer critique of the assumptions behind the rights paradigm of classical liberalism; it will then use the *Ashers*[9] case as a springboard for challenging the legitimacy of faith-based discrimination in the public sphere, arguing that religious claims for conscientious exemption from equality law harm LGB people and limit their sexual citizenship. The *Elane*[10] case will be used to highlight further the limitations of a neutral liberal approach to conscientious exemptions from equality law. Through these arguments, this paper seeks to demonstrate that (i) a neutral liberal approach to this conflict is harmful to non-heterosexuals; and (ii) Queer theory can play a helpful role in challenging some of the normative assumptions in this conflict and in supporting instead a value-based approach.

II. A Queer Critique of Neutral Liberalism

It is tempting to view – as liberalism does – the development of human rights as an inevitable process. The Human Rights Act 1998 is described as being 'rooted in British culture and history… a proud, 800-year-old family tree'.[11] The image evoked of rights having roots grounded firmly in our soil is an attractive one. However, it should not be forgotten that past events left open, diverse paths to the future, rather than paving a pre-determined road towards the current place. Perhaps our human rights are 'best understood as survivors',[12] as they came to prevail mainly through the collapse of previous political ideologies, not unlike the triumph of one combination of genes over another in Darwin's metaphorical 'tree of life'.[13] In the final analysis, this paper is not a Queer dismissal of the liberal approach to rights but rather a critique of certain

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[5] (n 2).
[6] Adenitire (n 1), pp 250-2.
[7] Adenitire (n 1).
[8] Adenitire (n 1).
[9] *Lee v Ashers Bakery and others* [2015] NICty 2.
[10] (n 4).
[11] Liberty 'The History of Human Rights' <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/history-human-rights> (accessed 15 August 2016).
[12] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010), 5
[13] Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (John Murray, 1859), 129 – see Darwin Online <http://darwinonline.org.uk/content/frameset?pageseq=147&itemID=F373&viewtype=text> accessed 15 August 2016.

engagements with rights in the conflict between religion and sexual orientation. Setting the context for this critique invites the reader to picture, not a tree, but instead a house.

1. The 'master's house': law and rights

Audre Lorde observed that 'the master's tools will never fully dismantle the master's house'.[14] For the purposes of this discussion, the master's house can be viewed as an allegory for the legal system. Historically, the legal system was constructed on foundations that are both hetero- and theo- normative.[15] The neutral liberal approach advocated by Adenitire could do more to acknowledge how these normativities have underpinned law's construction. Reliance on neutral liberal rights discourse in the conflict between religion and sexual orientation fails to fully recognise the implications of these normativities for lesbian, gay and bisexual (LGB) people. Lorde's words, therefore, serve to position this work as a critical analysis of the role of rights as a tool in this conflict.

It should be remembered that law is not neutral territory. All fields of law can be understood as the product of power relations and the associated discourses that have constructed truth and knowledge claims – in this context, claims about sexual orientation and religion. Trying to resolve the conflict between religion and sexual orientation using a neutral liberal framework is akin to using the master's tools to effect repairs: plastering over cracks while failing to notice that the whole building is damaged. Queer theory can provide valuable insights into the construction of the master's house. Using a Queer lens, this paper argues that theonormativity and heteronormativity operate in a discursive alliance, together providing a basis for unequal power relations that operate here through religious claims for exemptions from discrimination law. These claims, in turn, operate to harm LGB people by limiting their citizenship.

2. Law through a Queer lens

Foucault's observation that the exercise of power in Western societies 'has always been formulated in terms of law'[16] is a useful starting point for a Queer critique of the liberal approach to rights discourse. This power encompasses both judicial power (the enforcement of behavioural norms) and disciplinary power (the production of identities). Disciplinary power defines people through differences which become conceptualised and concretised in law, so that 'the law is brought in to manage otherness, but in doing so identities become reified'.[17] Disciplinary power also operates to exclude and restrict those people who have been deemed to be "other than" the liberal view of the universal rights-bearing subject – in this case, LGB people.

A Foucaultian approach to rights, then, offers 'an articulation of provocations, critiques, deployments, interventions and deportments'[18] through which a different understanding of humanity and human rights might emerge. Moreover, for the

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[14] Audre Lorde, *Sister Outsider: Essays and Speeches* (2nd ed, Crossing Press 1984), 110

[15] Heteronormativity refers to society's assumptions regarding how men and women should be, physiologically, psychologically, and sexually. Theonormativity refers to society's assumption that religion has a natural place in the legal system.

[16] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (Palgrave Macmillan, 2007), 99.

[17] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995), pp 79-81.

[18] Ben Golder, 'Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights' (2011) Social and Legal Studies 20(3), 283, 286.

purposes of this paper, it helps reveal the 'strategies and tactics[19] deployed in claims for religion-based conscientious exemptions from equality law. Throughout his book, Adenitire provides a considered and persuasive response to such claims. Ultimately, however, his neutral liberal approach does not sufficiently recognise these claims for what they are – as strategies and tactics that would seek to preserve the hetero- and theonormativity inherent in the law's foundations.

3. The role of rights discourse in equality law

The special nature of the conflict in equality law between religion and sexual orientation has two origins: (i) they are both protected characteristics under the Equality Act,[20] and (ii) religion or belief is the only protected ground that can also be used as a reason to discriminate against others. This conflict has revealed the adoption of rights discourse by religious conservatives to support their claims for exemptions to the Act on grounds of conscience, to allow discrimination on grounds of sexuality. Moves towards both secularism and LGB equality over the past sixty years or so have forced religious conservatives to become strategic polyglots; they have largely discarded the language of morality and instead have appropriated the language of rights as a cloak to cover their continuing distaste for homosexuality.[21]

This highlights an important limitation of rights discourse: its susceptibility to being used by religious conservatives to compromise genuine equality and citizenship for non-heterosexuals. The charge of religious appropriation of rights discourse is not hyperbole; rather, it highlights the vulnerability of a rights discourse that is grounded in both universality and neutrality. Here it is important to note that, while human rights are generally accepted as universal by definition, they (and the notion of rights generally) do not have to be grounded in neutrality. Rights do not, of themselves, assume neutrality; neutrality itself needs to be justified. The fault lines in classical liberalism can be revealed by interrogating first, the idea of a universal rights-bearing individual, and second, the law's neutral approach to determining what it means to bear these rights.

4. The first myth of classical liberalism: the "universal human"

Liberal theories see equality and autonomy as the basis of all other human rights. Humans have rights by virtue of being human – and all are considered equal in their humanity. They have rights to enable them to be the (partial) authors of their life, i.e., to exercise their autonomy.[22] The nature and extent of all human rights in the liberal canon, including freedom of religion, is underpinned by the Enlightenment concept of a universal human being. However, this rhetoric of universality largely ignored the situatedness of the human and the social construction of identity and difference. More specifically to the present issue, it does not account for the influence of heteronormativity and theonormativity as prisms through which the universal subject was historically constructed, nor for the consequent constraints on LGB people in exercising these supposed universal rights.

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[19] Foucault (n 16), 216.
[20] Equality Act 2010 section 4.
[21] P Johnson and RM Vanderbeck *Law, Religion and Homosexuality* (Routledge 2014).
[22] Queer theory rejects liberal notions of 'the subject' upon which the idea of autonomy depends. The concept of 'agency' instead recognises that 'choice' can only be exercised in circumstances of constraint, and within historical conditions and contingencies. See Lois McNay, *Gender and Agency: Reconfiguring the Subject in Feminist and Social Theory* (Polity Press, 2000).

A Queer lens shows that rights are not grounded solely in a timeless and immutable human essence; they are also a function of particular formations of power relations and knowledge which combine to configure humanity at any given point. The human is not seen as a transcendent entity; it does not exist outside the networks of power and knowledge in society. An obvious counterargument to this view is that the claim of universality is a moral – rather than legal – claim, which is why human rights are moral rights. This moral argument can be accepted while maintaining that, nevertheless, the political character of rights should not be disregarded. Legal rights claims can be used in ways that reflect their political creation; that show their dependence on the discursive and strategic viability of the claims made, and of the political will to observe and enforce them. Accordingly, legal rights can be made and unmade according to the prevailing political ethos in society.[23]

Rights cannot, therefore, masquerade as 'something of an anti-politics – a pure defence of the innocent and the powerless against power'.[24] Instead, legal rights are better understood as political tools deployed as a means of constructing particular political visions; tools which engage in combat with other rights and other political visions on a shared terrain.[25] Foucault himself used the language of war when discussing rights; a person who articulates a rights claim wields 'a truth-weapon and a singular right' and thereby seeks to insert 'a rift into the discourse of truth and law'.[26] Moreover, if legal rights are the tools of political subjects, then those individual subjects become the "effects" of rights. The shape of their rights is the effect of pre-existing power relations (e.g. heteronormativity, theonormativity, race, class etc) which themselves effect, or create, the individual rights-bearing subject: 'the individual is not… power's opposite number; the individual is one of power's first effects. The individual is in fact a power-effect… a relay: power passes through the individuals it has constituted'.[27] Thus individual rights-bearing subjects are, in law, themselves constructed in and through regimes of rights.

The classical liberal valorisation of universality glosses over the historical construction of the homosexual as "other"; as a species that was excluded from the moral embrace of universal rights. Further, it should be remembered that Western disciplinary power originated in the church – through the operation of 'pastoral power' – before being adopted by other social institutions through the rise of the state and the development of 'governmentality'.[28] In Western society, therefore, it was the discipline of theonormativity – the acceptance of the role of religion in shaping behaviour – that begat the discipline of heteronormativity, dictating how men and women should be, physiologically, psychologically and sexually. These two norms have an historical connection that traditional liberal theory overlooks. This oversight is also manifested in classical liberalism's second limb: neutrality.

5. The second myth of classical liberalism: "liberal neutrality"

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[23] Paul Patton, 'Foucault, Critique and Rights' (2005) Critical Horizons 6(1), 267, 272-3

[24] Wendy Brown, 'The most we can hope for… Human rights and the politics of fatalism' (2004) South Atlantic Quarterly 103, 451, 453.

[25] Jonathan Simons, *Foucault and the Political* (Routledge, 1995).

[26] Michel Foucault, *Society Must be Defended: Lectures at the Collège de France, 1975-76* (David Macey trans) (Penguin, 2004), 30.

[27] Foucault (n 26), 30.

[28] Foucault (n 16). The term 'governmentality' now encompasses not only the administration of populations through the State, but also the techniques designed to govern people's conduct at every level.

Neutral liberalism strives to uphold human autonomy by adopting a neutral stance towards what constitutes a "good" life. However, this neutral approach has been a means by which religious conservatives have sought to argue that their religious conscience – which governs their conception of what is "good" – entitles them to claim exemptions from equality law. In most claims for exemption on grounds of religious conscience, both in the UK and in the European Court of Human Rights, the courts prefer to apply neutral rhetoric over analysis of the content of the conscience. It is true that neutral rhetoric has been deployed to justify progressive outcomes.[29] Nevertheless, the courts do – even if unconsciously – make a (theo)normative judgment that religion is prima facie a valid basis for conscientious objection. As Lord Bingham stated in *Begum*, 'any sincere religious belief must command respect, particularly when derived from an ancient and respected religion.'[30] Indeed, Article 9 of the European Convention on Human Rights (ECHR) protects the manifestation of religious belief, as delineated by the *Williamson* requirements.[31] Consequently they also, perhaps unwittingly, make a (hetero)normative judgment about the type of "other" that can be automatically considered as part of the universal human subject. So the absence of a normative judgment about the "good" life does not necessarily mean that no norms are being played out.[32]

The content-neutral approach, then, is not genuinely neutral because it has been underpinned by a pervasive theo- (and hetero-) normativity. The public sphere is suffused with religious values (and consequent heteronormative assumptions). Even in secular liberal democracies there remains a presumption that religion is a human good. This presumption can affect how the so-called "neutral" liberal state undertakes any supposedly neutral balancing exercise and highlights how even content-neutral considerations are situated in a theonormative society. The courts' emphasis on neutrality therefore sits uneasily amidst a prevalent theonormativity. Even the courts' recognition of the secular state is of limited value if their judgments then proceed on the illusory basis of neutrality. Laws LJ's judgment in *McFarlane*[33] could be viewed as the epitome of a neutral liberal approach:

> The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other…The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; *but the State, if its people are to be free, has the burdensome duty of thinking for itself*.[34]

It could, however, be argued that his final clause comes close to recognising that the state does have a role to play in upholding values – and not merely secular values, but values that should explicitly underpin equality law. Our society is not a theocracy, but it remains theonormative. A theonormative society can be persuaded to take religious arguments at face value because of the assumption that religion is special. The task then becomes to halt and then reverse the process. The state should recognise

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[29] See *Bull v Hall* [2013] UKSC 73; *Ladele v Islington LBC* [2010] 1 WLR 955; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 and *Eweida and others v UK [*2013] ECHR 37.
[30] *Begum, R (on the application of) v Denbigh High School* [2006] UKHL 15, [21].
[31] *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; see also Adenitire (n 1), Chapter 6.
[32] These norms are expressed vividly in the dissenting judgments in *Eweida and others v UK [*2013] ECHR 37.
[33] *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 [24].
[34] ibid (emphasis added).

explicitly that the theo-norm should not unbalance the scales of equality law. Further, the courts' interpretation of the Equality Act should recognise more explicitly a specific hierarchy of rights, according to which principles of equality define the limits of religious freedom in all its manifestations. However, the courts may be reluctant to recognise this hierarchy because of its implications: it would puncture the theo-norm and require the liberal state to remove its mask of neutrality.

Nevertheless, it could be argued that the state has already expressed a view that discrimination against gay people relies on illegitimate values.[35] The Equality Act states that direct discrimination because of a protected characteristic is indefensible, so freedom of religion ends when it expresses itself through unjust discrimination against others.[36] Accordingly, the state *has* set the limits of liberal tolerance by relying on content-based, rather than content-neutral, considerations.[37] It is also true that traditional rights discourse has not, so far, proved fully amenable to religious appropriation; the courts have rejected religious conservatives' pleas for exemptions from equality law on repeated occasions.[38] These are indeed important victories, but the battle for genuine gay equality and citizenship is not yet fully won. Indeed, neutral liberalism's failings were cast into sharp relief by the judgment of the Supreme Court in the *Ashers* case.[39]

III. The *Ashers Bakery* Case

Ashers is a Christian-owned bakery chain in Northern Ireland. In 2014, one of its branches accepted (but then refused to fulfil) an order placed by a returning customer, Gareth Lee, for a cake bearing a slogan in favour of same-sex marriage alongside an image of the Sesame Street characters Bert and Ernie. Lee is a member of QueerSpace, a voluntary group supporting LGBT people in Northern Ireland. The Northern Ireland Assembly had recently rejected (for the third time) the introduction of same-sex marriage, this time by a narrow margin. Mr Lee wanted the cake made for an event marking anti-homophobia week and the growing momentum towards same-sex marriage. Having bought goods from Ashers previously, he knew that he could order a cake incorporating his choice of graphic image.

Ashers' ultimate refusal to bake the cake was, they said, grounded in a religious conscientious objection to any change in the traditional view of marriage. The Equality Commission subsequently began proceedings against Ashers for contravening anti-discrimination legislation.[40] The bakery itself was supported by the Christian Institute,[41] which had placed advertisements in the Belfast press seeking donations to contest the proceedings. Their choice of words is revealing: readers were told that the 'taxpayer-funded Equality Commission' is taking the bakery to court 'for upholding marriage', and the bakery's owners were, like other Christians, 'facing difficulties for

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35 Indirect discrimination may be justified, however, if it is a proportionate means of achieving a legitimate aim: Equality Act 2010 s 19.

36 This is also recognised by Adenitire (n 1).

37 Yossi Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (Hart Publishing, 2015)

38 (n 29).

39 (n 2).

40 The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and/or the Fair Employment and Treatment (Northern Ireland) Order 1998.

41 The Christian Institute has a long history of campaigning against the extension of rights for lesbians and gay men, including the repeal of Section 28, the equal age of consent, same-sex adoption, civil partnerships, the Equality Act, and the Same-Sex Marriage Act.

holding to their religious beliefs in an increasingly secular society'.[42] Echoing the language of the Christians in Parliament group,[43] the bakers were depicted as lonely stalwarts, bravely standing up to increasing challenges from a secular state.

Although same-sex marriage was not legal at the time in Northern Ireland,[44] campaigning for it was not unlawful. Nor did the requested graphic contravene Ashers' terms and conditions. Yet Ashers preferred to disregard earthly law in favour of what they saw as a higher law: 'We consider that it is necessary as Christians to have a clear conscience before God… we must live out our faith in our words and deeds and… it would be sinful to act or speak contrary to God's law.'[45] Further, as Christians, they believed that the business 'must be run by God's wishes'.[46] On the particular matter of same-sex marriage, the defendants stated, 'the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony… No other form of marriage is permissible according to God's law… according to God's law, homosexual relations are sinful…'.[47]

However, it appears that their god's legal wishes on earth were not completely clear. Mrs McArthur, who initially accepted the order from Mr Lee, had discussed the issue with her husband that evening. Mr McArthur 'felt differently than his wife at the time and might have made the cake but, over the weekend, he spent one or two days wrestling with the issue in his heart and mind and came to the same view as his wife that the cake could not be made.'[48] It is worth highlighting here that – as the McArthurs have shown – there is room for 'epistemic discretion' in religious questions, and indeed this is the very idea behind the notion of freedom of religious belief.[49] At this point, it is instructive to examine the content of the McArthurs' religious beliefs and its relationship with conservative political Christianity.

1. Conservative Christianity and law

Ashers' management belongs to the Trinity Reformed Presbyterian Church, whose website illustrates how its views are aligned at the conservative end of the Christian spectrum. The site re-enacts old homophobic tropes, arguing that accepting same-sex desire 'would seem to leave the door wide open to incest, polygamy, paedophilia, bestiality or whatever in an even more "enlightened" future'.

Quoting Leviticus 20:13, we are told that 'If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them'. It is unclear whether the church itself calls for the death penalty for gay men; that is clear is that this Old Testament quote is reproduced without

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42 Lindsay Fergus, 'Gay marriage cake: Christian Institute seeks donations for Ashers Bakery legal battle' *Belfast Telegraph* <http://www.belfasttelegraph.co.uk/news/northern-ireland/gay-marriage-cake-christian-institute-seeks-donations-for-ashers-bakery-legal-battle-30952360.html> (Belfast, 31 January 2015) accessed 7 September 2015.

43 Christians in Parliament, 'Clearing the Ground inquiry: Preliminary Report into the freedom of Christians in the UK' (February 2012) <http://2019.christiansinparliament.org.uk/wp-content/uploads/2019/02/Clearing-the-ground.pdf> (accessed 14 June 2021).

44 Same-sex marriage in Northern Ireland is now legal, following the enactment of the Northern Ireland (Executive Formation etc) Act 2019

45 (n 9), [14].

46 (n 9), [22].

47 (n 9), [15].

48 (n 9), [26].

49 "Freedom of religion" makes more sense to the ear than "freedom of race", for example. For a detailed discussion, see Peter Jones, 'Paying for another's belief: the law on indirect religious discrimination' in *Religion and Law* (Theos, 2012), 43-50.

comment, save for castigating the 'homosexual lobby' for taking umbrage at such statements.[50]

The church also engages in the 'love the sinner; hate the sin' trope: 'It is not enough to simply condemn the practice of homosexuality. We must show love and compassion and seek to minister the grace of Christ to those enslaved by this particular sin.' We are told that 'homosexual practice is disgusting', a 'perversion' and 'an abomination', but then again 'so are many other sins that we commit every single day' because, as human beings, 'our whole self is rotten and needs to be redeemed.'[51] These are strong words. One might recall the view of humanity in the 'state of nature' (in the absence of government) summarised by Hobbes as 'solitary, poor, nasty, brutish, and short'.[52] Whereas Hobbes' solution lay in a civil society governed by a sovereign power, to whom individuals ceded authority in return for protection, and whose realm of control included the ecclesiastical, the Presbyterian Church's solution is to cede all authority to its god. This is a key point. Political Christianity is not just concerned about protecting and/or extending religious rights and exemptions. Political Christianity places itself in direct opposition to positive law, as underlined by its adherence to what it believes is the order created by its god: 'Only God has the right to tell us what we may and may not do with our bodies.[53]

The anti-positive law theme is presented most clearly in the church's statement of its doctrinal position:

> … Reformed Presbyterians give prominence to the kingship of Christ. This has implications for human life in all its spheres. Areas which have received special attention… are worship and politics… The nation is under obligation, once admitted but now repudiated, to recognise Christ as her king and to govern all her affairs in accordance with his will.[54]

However, political Christianity treats different breaches of "God's law" differently, in terms of what it asks earthly law to do. For example, in *Ashers*[55] the court was presented with one of Ashers' promotional leaflets which advertised Hallowe'en cakes. It was put to the defendants that 'the Reformed Presbyterian Church does not approve of Halloween being celebrated at all and certainly doesn't approve of witches'; the defendant (Mr McArthur) responded that he had never thought about it and had never spoken to anyone in the church about it.[56] While the Trinity Reformed Presbyterian Church has not stated its position on Hallowe'en on its website, another branch of the Reformed Presbyterian Church in Northern Ireland has described its own position, which we may take as analogous to Trinity's: 'Halloween is not harmless fun, nor

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50 Sermon outline: 'Is Christianity Homophobic?' Trinity Reformed Presbyterian Church <http://www.trinityrpc.com> accessed 1 March 2016To be fair to the Church, the article also castigates Christians for being 'soft on heterosexual sin while making a huge fuss over homosexual sin'. Quoting Leviticus 20:10, we are reminded that 'If a man commits adultery with the wife of his neighbor, both the adulterer and the adulteress shall surely be put to death.'

51 (n 49).

52 Thomas Hobbes, *Leviathan* (R Tuck ed) Cambridge University Press, 1996 [1651]), 72

53 (n 49).

54 'What we Believe: Doctrinal Position' <http://www.trinityrpc.com/beliefs/beliefs.php> accessed 1 March 2016.

55 (n 2).

56 'Ashers: McArthurs pressed on Halloween cakes' (*The Newsletter,* 27 March 2015) <http://www.newsletter.co.uk/news/northern-ireland-news/ashers-mcarthurs-pressed-on-halloween-cakes-1-6660370> accessed 3 March 2016.

should it be treated as such. The Bible condemns all witchcraft… Christians should have no part in it and should ensure that their children do not either.'[57]

This paper is less concerned with Christian theology per se than in how it operates in the public sphere and in the 'strategies and tactics' it deploys.[58] Nevertheless, it is instructive to recognise how theology is cherry-picked to achieve political aims. Ashers is happy to make Hallowe'en cakes and, presumably, cakes for unmarried heterosexual couples or even birthday cakes for the promiscuous. Therefore, something else is afoot – something other than a simple claim to religious conscience. It is submitted that the voice of conservative Christianity in the public square needs to be challenged, as it represents a challenge to liberal democracy itself. This submission entails, first, a critique of state neutrality on the question of religion in the public square, and then a Queer-informed analysis of the harm to LGB people and the limitations on their sexual citizenship, caused by the assumption that religion has a natural place there.

IV. State Neutrality, Religion, and the Public Sphere

Modern western liberalism envisages everyone being free to live according to their own conception of the 'good life' without state interference.[59] Rawls' hypothetical 'original position' became the basis for his principles of justice: the idea that the state should be neutral among competing conceptions of the good life.[60] On the question of religion's place in the public sphere, Rawls considered that religious reasons could be included in public deliberation of fundamental political questions, provided that non-religious, political reasons were also offered in support.[61] Rawls' proviso of 'proper' political reasons refers to reasons based on values and ideals that he views as the baseline conditions for democracy, such as freedom and equality – what he terms an 'overlapping consensus'.[62]

From a neutral liberal perspective, Adenitire's secular, rights-based reasons for (sometimes) allowing faith-based discrimination on the ground of sexual orientation could be said to fulfil the requirements of an overlapping consensus.[63] It is conceded that this Rawlsian position is to be preferred to that of Habermas, who accords different weight to religious reasons depending on whether the debate is being held at the institutional level or at a wider level. While Habermas accepts Rawls' proviso in the 'formal' public sphere (the institutional level), he would remove any requirement to give corroborating public reasons in the 'informal' public sphere, if such reasons were not available. Individual citizens would have no duty to translate religious reasons into public reasons.[64] On this view, individual citizens would be entitled to justify anti-gay discrimination on grounds of conscience alone.

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57 'Halloween - Harmless Fun or Dangerous Deception?' (*Loughbrickland Reformed Presbyterian Church*, 11 October 2014) <http://www.loughbrickland.org/cms/index.php/articles/15-current-issues/27-halloween-harmless-fun-or-dangerous-deception> accessed 1 March 2016.

58 Foucault (n 15).

59 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977). Dworkin suggested that individual rights operate as trump cards held by individuals against state actions or policies that would impose some particular vision of the good on society as a whole.

60 John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

61 John Rawls, 'The Idea of Public Reason Revisited' (1997) University of Chicago Law Review 64(3), 765.

62 John Rawls, Political Liberalism. The John Dewey Essays in Philosophy (Columbia University Press, 1993), 133-72.

63 Adenitire (n 1), Chapter 9.

64 Jurgen Habermas, 'Religion in the Public Sphere' (2006) European Journal of Philosophy 14:1, 1.

As Lafont affirms in her critique of Habermas, 'what is at issue is not so much whether religious citizens have the right to *include* their sincere beliefs and reasons in the informal public sphere, but whether they have the right *to do nothing more*'.[65] This paper contends that public debate is already compromised by religion's unique insulation from ordinary standards of evidence and rational justification, by virtue of its basis in "faith".[66] This is important when considering the extent to which religious reasons are taken seriously, even in the informal sphere, because of the inherent assumption that religion is special. Even if it is not accepted that there is a special religious compulsion to discriminate against gay people,[67] arguments are made that religion is itself a secular value which contributes to the sum of human wellbeing.[68]

In addition, this paper contends that, if Adenitire's neutral liberal arguments do satisfy the overlapping consensus requirements, then Rawls may also have got it wrong. The state has a democratic obligation to treat all citizens as free and equal, and reasons advanced in support of policy during public debates must be compatible with such treatment. Appeals to conscience to allow discrimination on grounds of sexual orientation are not. As Johnson and Vanderbeck emphasise, faith-based homophobes in the public sphere have learned to cloak their distaste for homosexuality in arguments based on rights rather than scripture.[69] Rawls' overlapping consensus is of limited benefit to LGB people if neutral liberalism does not recognise this as one of the 'strategies and tactics' deployed by religious conservatives to gain freedom to discriminate against them.

There is a view that granting conscientious exemptions could be a tolerant concession in the public sphere, that does not necessarily mean society is endorsing religious homophobia. However, homosexuality does not seek to deny others' legitimacy or exclude their way of life, whereas conscientious objection to equality law has the capacity to exclude gay people, both legally and socially. Furthermore, when the state avoids explicitly condemning homophobia, it can be seen as sustaining it; 'it is not far-fetched to interpret non-condemnation as support'.[70] One could go even further and argue that it also reflects Kendall Thomas's characterisation of individual and organisational homophobia as 'constructive delegation of state power'.[71] Homophobia is a harm; organisational homophobia is expressed in religious exemptions to equality law; individual homophobia is expressed in hate crime but also in faith-based conscientious objections to equality provisions. If the state permits exemptions or objections it is not condemning them, and again 'it is not far-fetched to interpret non-condemnation as support'. The implications of this will be discussed later in this paper, with reference to harm to, and limits on, the sexual citizenship of LGB people.

1. Toleration in the public sphere

The liberal principle of toleration, synthesised from Mill's liberal writings,[72] is that people should be free to forge their lives as they see fit, if they do not harm anyone else

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[65] Christine Lafont, 'Religion and the public sphere: What are the deliberative obligations of democratic citizenship?' (2009) Philosophy & Social Criticism 35 nos. 1-2, 137 (emphasis in original).
[66] Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013).
[67] Adenitire (n 1), pp 265-6.
[68] See for example T Mackelm, 'Faith as a Secular Value' (2000) McGill Law Journal 45, 1; Andrew Koppelman, 'Is it Fair to Give Religion Special Treatment?' (2006) University of Illinois Law Review 571.
[69] (n 21).
[70] Nehushtan (n 37), 154.
[71] Kendall Thomas, 'Beyond the Privacy Principle' (1992) Columbia Law Review 92, 1431.
[72] John Stuart Mill, *On Liberty* (Penguin Classics, 1985 [1859]).

in doing so. Toleration is a deliberate choice not to interfere with the conduct of which one disapproves.[73] In the political sense, toleration is meant to allow for the peaceful coexistence of differences that do not spontaneously combine in harmony.[74] However, tolerance also casts a heteronormative shadow. LGB people are still viewed through a heteronormative lens which renders them – however implicitly – "other". A heterosexist social order is represented as 'equal' and any challenges to that order are seen as attempts to create inequality by upsetting this purported equilibrium.[75] This is why Popper's answer to the liberal 'paradox of tolerance'[76] is important; a society that values principles such as equal citizenship should claim the right not to 'tolerate the intolerant'.[77] Popper's maxim lends support to the value-based liberal approach, whereby the content of the conscience is subject to scrutiny. Moreover, from a Queer perspective, it enables us to recognise the harm caused to LGB people (and their sexual citizenship) arising from a tolerance of religious conservatism.

V. Harm and Citizenship

1. Dignitary harm

Adenitire rightly recognises the dignitary harm caused to LGB people as being more than mere offence or hurt feelings, and to relate it instead to the undermining of social standing – a social harm.[78] From a dignitary harm perspective, religious objectors are not automatically harmed by the courts' refusal to grant exemptions from equality law:

> Even if exemptions are refused to service-providers, with some harm to their conscience, this does not shift the dignitary harm to those that oppose homosexuality by singling them out as second-class citizens. In fact, the law upholds their equal social standing through various fundamental rights.[79]

Notwithstanding the reasoning of the Supreme Court, then, Ashers Bakery would not have suffered dignitary harm had they been required to bake the cake for Mr Lee. Adenitire's forensic examination of the 'four principles' regarding compelled expression bears this out.[80]

Nevertheless, Adenitire's neutral liberal approach leads to the justification of *some* religious claims for conscientious exemption from equality law. The argument in favour of exemptions for some service providers, such as those in the US case of *Elane Photography,*[81] where a photographer refused work for a lesbian wedding, is such an example.[82] Adenitire agues that none of the 'four principles' of compelled expression apply to *Elane*[83] any more than they do to *Ashers*,[84] yet he would still reserve the right of 'a limited class of service-providers (such as photographers who have to physically

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[73] John Horton, 'Toleration as a Virtue' in David Heyd (ed) *Toleration: An Elusive Virtue* (Princeton University Press, 1998), 28-43.
[74]John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) Philosophy & Public Affairs 14, 223.
[75] Chris Brickell, 'Whose "Special Treatment"? Heterosexism and the Problems with Liberalism' (2001) Sexualities 4(2), 211, 213.
[76] Karl R Popper, *The Open Society and its Enemies* (Routledge, 1947).
[77] Popper (n 76).
[78] (n 1) pp 281-7.
[79] Adenitire (n 1), 280.
[80] (n 1), 289 et seq: Adenitire concludes that Ashers' refusal is not justified by any of the principles (No Allegiance, No Publicity, L-RD, and Artistic Freedom).
[81] (n 4).
[82] Adenitire (n 1), pp 281-7.
[83] (n 4).
[84] Adenitire (n 1), 297.

attend pro-homosexuality events)… to be exempted from sexual orientation anti-discrimination norms.'[85] He suggests *Elane*[86] is more than a complicity claim; it 'may also be viewed as a conflict between the core of the right to non-discrimination and the core of the principle of free conscience.'[87]

Adenitire points to the negative aspect of freedom of conscience to support his claim, i.e. 'not being coerced, especially by the state, to participating in a religious rite with moral significance'.[88] However, it is too much of a stretch to view wedding photography as participation in a religious rite. The photographer is not the minister; she may be physically present, but she does not contribute to the ceremony in any meaningful way (or indeed at all). Nor does the case of *Galloway*[89] help Adenitire's argument. It is true that the town councillors in *Galloway*[90] were not compelled to attend the prayer sessions that took place prior to the board meetings, and, as the New Mexico Supreme Court stated, 'government may not coerce its citizens to support or participate in any religion or its exercise'.[91] However, the Court's statement does not force the conclusion that Elane's objection to photographing a same-sex commitment ceremony is the same thing at all. Being forced to pray to a god (or a version of a god) that one does not worship is categorically different from providing a service at a wedding.

The photographers were represented by the Alliance Defending Freedom, who appear to play a similar role in the US to the Christian Institute in the UK, who supported the bakers in *Ashers*.[92] The Alliance website contains statements similar in flavour to those made by conservative political Christianity in the UK:

> During periods of persecution, Christians could escape death if they would only offer a pinch of incense to the statue of Caesar and utter the words, "Caesar is lord"… Who would have thought that in America Christians are now expected to "offer their pinch of incense to Caesar" to avoid punishment?… be assured of this: A government that claims the power to compel you to violate your religious beliefs or pay a fine is not that far away from a government that compels you to violate your religious beliefs at the pain of death. *Religious freedom is given to us by God.* That freedom is protected by the Constitution in the First Amendment…[93]

Again, we see that, for religious conservatives, earthly law comes second to the law of their god. The neutral liberal approach needs to recognise the implications of this for what they are: claims to discriminate against LGB people that deploy arguments from rights or freedom are merely 'strategies and tactics', using secular law to advance their homophobia in the public sphere. Allowing an exception to the 'four principles' on the basis of a photographer's physical presence at a wedding is, in effect, allowing homophobes to say, "Gay people are disgusting and I do not want to be near them". It

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[85] Adenitire (n 1), 306.
[86] (n 4).
[87] Adenitire (n 1), 285.
[88] Adenitire (n 1), 286.
[89] *Town of Greece, NY v. Galloway* (2013) 134 SCt 1811 (Supreme Court).
[90] ibid
[91] *Galloway* 1825-6.
[92] (n 2).
[93] Alliance Defending Freedom, 'Should compelling you to violate your deeply held religious beliefs really be "the price of citizenship"?' October 17, 2017 <https://adflegal.org/blog/should-compelling-you-violate-your-deeply-held-religious-beliefs-really-be-price-citizenship> accessed 26 July 2021 (emphasis added).

represents the same dignitary harm to LGB people, and it is based more on prejudice than any lofty aspirations to freedom. Liberalism cannot maintain a neutral stance when faced with values which contradict fundamental liberal ideals. A content-based liberal approach, in contrast, recognises explicitly that the harm principle itself assumes a moral position.[94]

2. Citizenship

Adenitire recognises that 'LGB persons…are in no less need of access to basic commercial services… If the law allowed services to be denied to LGB persons it would signal that they do not have equal social standing and hence are second-class citizens.[95] As Mr Lee said in evidence in the *Ashers*[96] case, as a middle-aged gay man he was no stranger to homophobia, but Ashers' 'blatant refusal of a service' made him feel like 'a second-class citizen':

> It is not at all nice to think that a business will discriminate in the way that they provide services to me because I am gay or because I have political views about the need for legislation to support gay marriage, or because I did not share their religious views… I was not asking the Defendants to share or support my perceived political views on gay marriage… I was simply asking them to provide me with the service they advertise in their shops.[97]

This is the crux of the citizenship issue. Ashers' refusal of service not only made him feel like a second-class citizen, but it also *rendered* him a second-class citizen – whether or not the objection was to his sexuality or to his support for sexual orientation equality. The heteronormative attitude displayed by the bakery proprietor made the customer an "other", someone whose request could be denied. It is important to recognise that, for a gay person, feeling able to campaign for equal marriage (and celebrate progress in the move towards equality) is part of what it means to be a citizen in a democratic society.[98] In this context, the words 'Queer Space' (the name of the organisation whose event the cake was for) take on a particular significance. This case is very much to do with religious objection to gay people visibly occupying space in society. Ashers' management may indeed be happy to serve gay people in their outlets, but only, it seems, if they are not campaigning to take up more space than is deemed appropriate.

A basic component of citizenship is 'the right to access and use specific kinds of space within a given territory'.[99] People may be excluded as citizens 'by virtue of the boundaries between particular types of spaces, which are sites for the exercise of power and the construction of difference'.[100] The "inappropriate" space, in the current context, is in the wedding ceremony. Married heterosexuals in Northern Ireland may (rightly or wrongly) view their wedding day as the best day of their lives, but it is nevertheless the case that heterosexual marriage is a banal and ordinary occurrence.

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94 Joseph Raz, 'Autonomy, Toleration and the Harm Principle' in *Issues in Contemporary Legal Philosophy*, Gavison R (ed.) (Clarendon, 1987), 112-115.
95 Adenitire (n 1), 282.
96 (n 2).
97 (n 9), [11].
98 This is the case even though not all LGBT people are in favour of same-sex marriage. For further discussion, see for example Ryan Conrad (ed), *Against Equality: Queer Critiques of Gay Marriage* (Against Equality Publishing Collective, 2010).
99 Phil Hubbard, 'Sex Zones: Intimacy, Citizenship and Public Space' (2001) Sexualities 4(1), 51-71, 54.
100 Julienne Corboz, 'Sexuality, Citizenship and Sexual Rights' (2009) Australian Research Centre in Sex, Health and Society, 17. See also David Bell and Jon Binnie, The Sexual Citizen: Queer Politics and Beyond (Polity Press, 2000); Hubbard, 2001 [n 46].

Equal marriage campaigners would like same-sex marriage to be just as ordinary an event. Citizenship is not only about rights (and any correlative duties); it also involves an 'ideal of the citizen', i.e. the 'good citizen'.[101] The view that marriage should remain as the union of one man and one woman is based on one particular interpretation of religious scripture and teaching linked to religious conservatism and its own determination of what constitutes a good citizen.

This is why the harm arising from claims for conscientious exemptions from equality law should override the claimed freedom of conscience – including claims such as the one in *Elane.*[102] Conservative religious attempts to curtail sexual citizenship by refusing services can be said to have the effect of causing gay people to be 'socially dead'.[103] At the very least, they cause LGB people to exist in an unsafe environment because they have been stamped with the "not good" brand of citizenship.[104] As Adenitire acknowledges, the social standing of homophobic service providers is not compromised when their claims are trumped by LGB equality, as their standing is upheld through a series of fundamental rights.[105] But these rights should not be deployed in equality law as 'strategies or tactics' to undermine the citizenship of LGB people.

VI. Conclusion

Like Plummer, I am 'a bit of a humanist, a bit post-gay, a sort of a feminist, a little queer, [and] a kind of a liberal.'[106] This paper's approach to Queer critique seeks to align itself with particular political and ethical principles, echoing some forms of liberalism and challenging others. The tensions between and within Queer and liberal theories are welcome: in the words of songwriter Leonard Cohen, 'there is a crack in everything; that's how the light gets in.'[107] The tensions provide space for insight as to what is happening and what needs to change. Queer's focus on critique and disruption of norms, and its tendency to avoid engaging with normative jurisprudential questions, has meant that Queer has had 'an unduly modest role in legal theory'.[108] Yet, as Zanghellini argues, Queer theory 'can make sound and original normative recommendations that will improve on… legal liberal reforms'.[109]

The continued existence of LGB inequality, and the persistence of theo- and heteronormative attitudes, suggests a need to rethink the neutral liberal approach to rights. The conflict between religion and sexual orientation, and the debate around claims for conscientious exemptions from equality law, have highlighted the shortcomings of neutral liberalism. Adenitire's arguments show signs of edging towards recognising these shortcomings, but they would benefit from a more explicit

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[101] Steven Seidman, Beyond the Closet: The Transformation of Gay and Lesbian Life (Routledge, 2004), 188.
[102] (n 4).
[103] M Blasius, *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Temple University Press 1994).
[104]Chai R Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) Brooklyn Law Review 72(1), 61, 119.
[105] See note 80.
[106] Ken Plummer, 'Critical humanism and queer theory: living with the tensions' in Y Lincoln and N Denzin (eds) *The Sage Handbook of Qualitative Research* (3rd ed, Sage 2005). <http://kenplummer.com/publications/selected-writings-2/critical-humanism-and-queer-theory/> accessed 5 March 2016.
107 Leonard Cohen, 'Anthem' from *The Future* (Columbia, 1992).
[108] Aleardo Zanghellini, 'Queer, anti-normativity, counter-normativity and abjection' (2009) Griffith Law Review 18 (1), 5.
[109] Zanghellini (n 108).

acknowledgement of the insights of Queer theory. Accordingly, 'Queer and liberal theory need to converse with each other',[110] particularly in the current debate where issues of rights, and the state's role in determining these rights, are highlighted. This paper contributes to that conversation through a 'critical and strategic engagement'[111] with the question of conscientious exemptions in equality law.

[110] Zanghellini, (n 108), 14.
[111] Ben Golder, 'Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights' (2011) Social and Legal Studies 20(3), 283, 286.