



What's Wrong with Homophobic Bakeries? A Critical Discussion of Discrimination and its Interaction with Political Freedoms and Religious Conscience, Drawing on the Asher's Bakery Case in Northern Ireland and Kasper Lippert-Rasmussen's Theory of Discrimination

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Abstract

The Asher's Bakery case raises questions around discrimination against political causes and freedom of religious conscience. Using the Asher's case, this essay builds on Kasper Lippert-Rasmussen's work to develop a theory of discrimination which accounts for discrimination of political causes. The essay explores the normative implications of this account including the rights members of salient political causes, and discusses various objections; in particular, how discrimination claims should be balanced against freedom of religious conscience in a liberal society and how religion's 'specialness' can be defended. By offering a critique of the Asher's case, the essay aims to provide a framework for dealing with similar cases where claims of discrimination from political groups meet claims of religious discrimination.

Keywords Politics · Political theory · Philosophy · Law · Jurisprudence · Discrimination · Ethics · Gay rights · LGBT · Christianity · Religious freedom · Liberalism · Freedom of conscience · Freedom of speech · Freedom of expression · Kasper Lippert-Rasmussen · Asher's bakery · Northern Ireland · Legal rights · Liberal · Liberal rights · Freedom · Equality · Equality studies · Equal rights · Discrimination law · Equalities

1 Introduction

In May 2014, gay activist Gareth Lee ordered a cake with the slogan 'Support gay marriage' from Asher's Bakery in Northern Ireland. Asher's refused his order on the

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grounds that the slogan disagreed with their Christian beliefs and were charged with discrimination in October 2016. Judges concluded that Asher's had no religious conscience defence, since "icing a message does not imply supporting that message." (BBC News 2016).

Using this case, I will develop a theory of discrimination which accounts for the social salience of political groups, their right to free expression, and freedom of conscience of those who discriminate. The Asher's case raises important questions about the interaction and potential trade-offs between three key liberal values: freedom of conscience (of the bakers), nondiscrimination (affecting the customer) and freedom of expression (of both the customer and the LGBT community). The case takes place at the nexus of these values, and can therefore hopefully tell us something about how these values interact more generally, so that conclusions can be applied to other cases.

Despite religion's overall decline in the West, this debate remains highly relevant to modern liberal societies. First, because increasingly multicultural communities provide more opportunities for different religions to interact with secularism, and many religions have more 'conservative' values, particularly around sexuality and gender. Second, the LGBT community has increased its political influence, whereas religious minorities have generally lost some of their previous privileged status. This makes it harder to assess which groups are more disadvantaged. Third, nondiscrimination - in both law and political theory - is increasingly considered a key liberal value. Understanding discrimination's interaction with religious conscience and political expression is therefore an important question for today's political theorists.

2 Part One

2.1 Discrimination

2.1.1 Did Asher's Discriminate?

In the aforementioned case, Asher's Bakery treats Lee differently to other customers in a way which disadvantages him in some respect. This is 'generic' discrimination, in the sense that it involves differential treatment towards individuals in virtue of some characteristic. (Lippert-Rasmussen 2013, 14-22) However it is not necessarily morally important: paying talented workers more, banning rude customers or punishing naughty children all involve differential treatment, but we would hesitate to call these instances wrongful discrimination. I will use Lippert-Rasmussen's account of discrimination to assess whether Asher's actions constitute morally relevant discrimination.

2.1.2 Lippert-Rasmussen's Account

Lippert-Rasmussen (2013, 45-46) puts forward a conception of discrimination which does not assume that acts of discrimination are necessarily wrongful, but is equally narrower than 'generic discrimination'. His conception describes differential treatment which disadvantages people on the basis of characteristics pertaining to their membership of a socially-salient group. He defines this in the following way:

“A group is socially salient if perceived membership of it is important to the structure of social interactions across a wide range of social contexts.” (2013, 30)

These social contexts include things like shared history, culture and identifiability. For example, ‘Catholics’ or ‘Uighurs’ qualify, whereas ‘blonde people’ or ‘September babies’ do not - though there is room for debate about what constitutes salience.

Lippert-Rasmussen uses social salience to justify excluding cases of differential treatment which are not intuitively discriminatory. For example, we would not generally call it discriminatory (though it might be unfair) if a company arbitrarily refuses to employ individuals whose surnames begin with the letter ‘J’. Lippert-Rasmussen argues that this is because discrimination is group-targeting, often borne out of dislike of particular people groups who have identifiable, shared features.

2.1.3 Salient Group Vs Message

Asher’s claims that their decision did not discriminate against a person in virtue of their membership of a salient group, such as the LGBT community, but rather the message on the cake. This would imply that on Lippert-Rasmussen’s conception they did not discriminate. Asher’s claim implies that if the *same* customer were to request a *different* cake, they would be served, and if *another* customer (gay or straight) were to request the *same* cake, they would not be served. Many gay customers buy cakes without pro-LGBT messages, and many pro-LGBT activists are heterosexual. As there is no necessary or sufficient link between sexuality and the cake’s message, we should accept Asher’s claim that they did not directly discriminate on the basis of Lee’s sexuality - the most obvious salient characteristic (though whether or not they have *indirectly* discriminated is another matter).

However, we may doubt Asher’s claim that they would not make the cake for a different person. Consider the following example:

2.1.4 ‘Ironic Cake’

A conservative Christian friend of Asher’s owners requests an identical cake with the same message in support of same-sex marriage, however this message is intended to be ‘ironic’ as the cake will be mockingly destroyed at an anti-gay-marriage rally.

Since Asher’s are motivated by their opposition to gay marriage, it is not implausible that they might make this ironic cake: although the cake is the same, its use does not support gay marriage. If Asher’s makes the cake for gay marriage opposers, but rejects gay marriage supporters, they are rejecting a type of person: members of a particular political cause.

It might be objected that the message on the ironic cake is not the same as the message on the original cake, since it will be used for a different purpose. However it seems that the message on the cake is the same on at least one level - if it were not, then it would not be ironic.

Causes are arguably less idiosyncratic, in terms of their relation to socially salient groups of people, than other characteristics that may correlate with salient groups, such as how certain hair colours might correlate with the salient group of ‘Scottish people’. This seems especially true for causes grounded in identity politics, or which represent a particular minority group. We might think it discriminatory for a newspaper to reject an article submitted in favour of gay marriage, regardless of the writer’s sexuality. The article’s writer is not discriminated on the basis of her sexuality, but her views.

Customer profile	Cake message	Served?
LGBT	Support Gay Marriage	No
	Other	Yes
Non-LGBT	Support Gay Marriage	No
	Other	Yes
Gay marriage supporter	Support Gay Marriage	No
	Other	Yes
Anti-gay marriage activist	Support Gay Marriage	?
	Other	Yes

The table illustrates Asher's claim that they are not discriminating against a particular type of person. If each customer profile is served or rejected according to the message on the cake, then no customer is treated *according to* their profile. (In this case, there still may be charges of indirect discrimination, though this essay focuses on direct discrimination.) This hinges on the question mark: the ironic cake example implies that Asher's would accept certain customers. Subsequently, supporting gay marriage is necessary but not sufficient (since supporters would be served normal cakes) for being refused. Although Lee was not refused on the basis of his sexuality, it was because of his political views.

2.1.5 Social Salience

Our conception of discrimination requires us to establish whether those who support gay marriage constitute a socially salient group. Without knowing Asher's exact motivations, it is plausible that they refuse to serve both activists using the cake to publicly promote gay marriage, and supporters using it 'privately' to celebrate gay marriage (perhaps at a wedding). Both groups are distinct from the gay community, and although we might expect significant overlap, their salience should be independently grounded. Since gay marriage supporters are a political group of a certain kind, we should consider whether other political causes constitute socially salient groups.

The term 'gay marriage supporters' refers to an identifiable, complete political group. Social salience demands more than mere identification, and political groups range from close-knit and well-defined to broad and generic. Some have clear links to preexisting salient groups: 'Birmingham Labour Working Men's Club', for example, might both represent a salient community while also possessing a political dimension. On the other end of the spectrum, 'anti-globalisation supporters' are less salient, due to the diversity of the group and the vagueness of its goals. If a Conservative-voting baker refuses a customer requesting a cake celebrating the Birmingham Labour Club's anniversary, this is more group-targeting than a free-trade baker who rejects an anti-globalisation cake - and therefore potentially more discriminatory.

I suggest that gay marriage supporters fall on the more salient end of the spectrum, for three reasons. To go back to Lippert-Rasmussen's definition, being perceived as a gay marriage supporter affects social interactions "across a wide range of different social contexts." (2013, 30) This is for a number of reasons. First, supporters of gay marriage are likely to self-identify as a group uniting behind a cause and be seen in that way by outsiders, especially in a more conservative society like Northern Ireland. Second, because of their role in the broader LGBT rights movement, which has characteristics of salience, such as: clubs, events and traditions that help to cement their group identity, including Pride marches or LGBT month. This is supported by Miller's (1997) thesis that collective acts can help define national identity, and group acts may play a similar role. Third, gay marriage supporters represent a particular socially salient

group - the LGBT community. Supporting gay marriage is therefore a particular kind of political cause, pertaining to groups and identity, rather than merely shared beliefs; we even call this 'identity politics'. (Heyes 2016) Lastly, there is a strong historical tradition of LGBT oppression and later activism which both contributes to the aforementioned identity-forming conditions and is a condition in itself. Thus we have good reason to believe that the gay marriage supporters constitute a socially salient political group, and can be victims of discrimination. This argument implies that distasteful but salient political groups, such as Nazis, can be victims of discrimination. This is dealt with in Part Two, with reference to Rawls (1996).

2.1.6 Conclusion

The Asher's case challenges previous conceptions of discrimination to account for socially salient political *causes*. The 'ironic cake' example illustrates that what matters is not the words on the cake, but the cause it supports. Political causes can be salient, particularly when these causes are closely attached to certain identities or communities. Asher's actions were therefore discriminatory, on a non-moralised definition, against members of a salient political cause.

3 Part Two

3.1 Political Expression

Part One established that Asher's actions were discriminatory, since their actions targeted members of a salient political cause. This section will explore why that matters, and gives reasons for why discrimination against political causes damages values we might consider important - such as freedom of expression.

3.1.1 Discrimination's Wrongness

The Harm Account Lippert-Rasmussen (2013, 183) argues that the wrongness of discrimination lies in the harm suffered by victims. This has intuitive appeal. Defenders of this harm account ask, why should we care about actions which are not bad *for* anyone? This is a rationale behind 'person-affecting' ethical theories, that calling something wrong means identifying people who are affected - perhaps by experiencing pain or being made worse off on some objective measure. The harm account can explain why some archetypal discrimination cases are wrong: when a university arbitrarily rejects a female applicant, or a cafe refuses to serve a black customer, these individuals are made worse off: they cannot go to a university or buy a coffee.

Slavny and Parr (2015) similarly argue against the harm account in their 'Cambridge University' example. They imagine a Cambridge tutor who rejects applicants on the basis of their race, but ensures that they secure a place at Oxford. The victims of this discrimination are no worse off since they attend an equally good university, and yet we intuit that there is still wrongful discrimination. Slavny and Parr strengthen their example to meet claims that the applicants are made worse off, by imagining that applicants have an equal desire to attend Oxford, would otherwise have no opportunity to do so, equally enjoy Oxford, never hear about the tutor's discrimination, the tutor's actions do not encourage similar behaviour, etc., to demonstrate wrongful discrimination without harm.

An Adjusted Harm Account Defenders of the harm account must therefore look beyond experiential factors to establish how the victims are harmed. They could argue that being disrespected constitutes a kind of harm, and that the Cambridge applicants have been disrespected, or argue that they were denied rights to a fair application procedure which exists regardless of individual experience.

However, Slavny and Parr argue that the appeal of harm accounts lies in their ability to identify wrong-making features independent of moral assessment. For example, we can identify suffering without moralising it. A theory of harm which includes being ‘demeaned’ (or some other non-experiential harm) lacks these advantages, since wrongness is not located within an individual’s experience. An adjusted harm account, based on a system of rights, might deal with Slavny and Parr’s case.

For example, the Cambridge applicants might possess a right to be treated equally to other candidates, and are harmed if this right is violated. Applicants have a right not to have characteristics that are irrelevant to education - such as race - taken into account, perhaps especially when these characteristics pertain to membership of a salient group. There are other cases where we might think individuals are harmed by unequal treatment: when a worker is paid less than another for the same job (even if both contracts are consensual) or when parents show favouritism to a child. To use Ian Carter’s (2011, 550-560) notion of “opacity respect”, these cases are similar in the sense that agents are not treated in a way that reflects their equal moral personhood, since they are treated on the basis of irrelevant characteristics.

Furthermore, there is intuitive appeal to the idea that individuals possess rights to some level of equal treatment. Corvino et al. (2017, 72) defends ‘dignitary harm’, where one is harmed by being treated as inferior to others. We want to go further and say that an individual is wronged whenever they treated as inferior, even if they do not experience this inferiority. Slavny and Parr’s case highlights how individuals can be *wronged* in some way even if they are not *harmed* - that is, even if their wellbeing is not impacted in any way.

Applied to Asher’s Although Lee is harmed by Asher’s decision, insofar as he is denied a service that he had a *pro tanto* right to expect, the above discussion implies that the morally important feature of discrimination is that Asher’s actions undermined Lee’s right to equal treatment. Asher’s would protest that Lee has a right to be treated equally in relation to his sexuality, but that they do not have an obligation to treat all political causes equally. They might argue that not all political causes are equal, and some do not deserve cake, such as in the case that follows.

Nazi Cake It is intuitively permissible for Asher’s to refuse to ice a Nazi message on a cake. We might think that this is because the views of Nazis are intrinsically distasteful. However, what most citizens think about Naziism may not be vastly different to what some fundamentalist Christians think about gay marriage - that it is morally wrong, bad for society, etc.. From a political theoretical perspective, it is important to be able to distinguish between anti-Nazi and anti-gay marriage sentiments beyond stating that one is good and the other bad; especially as in a pluralist, liberal society, people will disagree on these matters. One option is to distinguish between ‘reasonable’ and ‘unreasonable’ views, as Rawls (1996, 100-1, 137) does. Namely, ‘unreasonable’ views are fundamentally at odds with political liberalism: for example, if they oppose the equal moral worth of all citizens or toleration of certain groups, as Nazism does.

We know that Asher’s disagrees with gay marriage, in the sense that they presumably think that it is immoral in some way, and further, that the law ought not to allow it. However these

are distinct from the claim that gay marriage is fundamentally at odds with the political liberal framework. We might think such a claim would be unreasonable, and it is indeed not the claim which Asher's (or indeed anti-gay marriage campaigners in general) attempt to make. When Parliament passed legislation allowing gay marriage, many across the country presumably continued to believe that gay marriage is wrong and / or that MPs ought not to have voted against the Bill. However it would be quite a different claim to say that the Bill was at odds with our basic political liberal structure; in the same way that it would be a very different claim to say that the Bill was 'undemocratic'. Unlike Nazism, gay marriage is not fundamentally at odds with political liberalism, and neither is this a claim Asher's attempts to make. Asher's are therefore not permitted to adopt the same kind of bias most have against Nazism.

This leads us to conclude that the permissibility of discrimination, in the case political causes, is affected by whether or not the causes discriminated against are at odds with basic liberal principles, notably basic notions like the equality of persons. This conclusion perhaps controversially implies that bakers would be wrongfully discriminatory (pro tanto) not to accommodate messages which are consistent with the liberal framework: the conclusion is that there is at least *something* wrong with 'Remainer' bakers refusing Brexit cakes or Democrat bakers refusing pro-Trump cakes. However, as explored later on, the pro tanto wrongfulness of this discrimination may be outweighed by other factors - including matters of conscience and reinforcing social injustice. In other words, although discrimination against political causes which are consistent with the liberal framework is a reason to think the action might be wrong, it is not the sole determinant of wrongfulness, and other factors must be considered.

3.1.2 Political Expression

Positive Duties Both the LGBT community and evangelical Protestants are minority groups with an interest in political expression, and both have a sense of 'identity politics' (Heyes 2016). Both groups' views are 'legitimate' in the sense that we expect society to tolerate them. Lee assumes that this allows him to request cakes expressing his views. Asher's claims that, as a matter of conscience, they are permitted to reject messages with which they reasonably disagree. I will explore this conscience claim in the next section, but first examine Lee's freedom of political expression.

Lee's right to expression does not imply a right for it to always be substantiated. Lee is permitted to speak on Hyde Park Corner, but he cannot force anyone to listen. He is permitted to write to the local paper on gay marriage, but they are not required to publish it. Freedom of expression is generally understood to be 'negative', in the sense that Lee's freedoms preclude interference of others. However, it is not clear how freedom of expression would be possible or meaningful without requiring more than noninterference - it entails positive duties too.

Political expression requires the cooperation of others in society and in law enforcement. The freedom would be meaningless if police allowed gangs to beat up LGBT speakers on Hyde Park Corner, or if no one is willing to sell you pen and paper to write to your MP. Jeremy Waldron argues that if wealth is a barrier to exercising a freedom, society has positive duties to ensure free public spaces, or redistribution.¹ Similarly, freedom of expression assumes that individuals are performing these positive duties, and not discriminating against on the basis of

¹ Waldron (1993) uses the case of a homeless person who lacks the resources to urinate to argue that he is therefore is not free to urinate, and that this bestows positive duties on society to provide resources for exercising freedoms.

political views. The question is whether Asher's have a positive duty to aid Lee's expression by making his cake.

1. *Political cake*

Personalising a cake is an unconventional means of political expression. We may take very seriously LGBT activists' freedom of expression, but think that the responsibility for securing it does not lie with bakeries. If Lee were prevented from writing to his MP or tweeting, this would be more serious than being denied a political cake. We can imagine cases where cake *would* be important: if a village hosted an annual political event where different communities were each represented in a cake competition, then it could plausibly be an issue for political expression if the gay community were unable to submit their cake.

We might still think the onus is on Asher's to justify why they rejected Lee's message even if there are other more conventional channels for expressing his view. Their reason for rejecting it was not 'bakeries should avoid politics', but that they disagreed with the message: they are willing to enable the free expression of others, such as in the 'ironic cake' case, but deny equal treatment to Lee. This damages Lee's political freedom.

2. *Availability of alternatives*

Asher's could argue that if what matters is Lee's political expression, then the availability of similar bakeries is sufficient to ensure that Lee is not made counterfactually worse off. However, as the Cambridge example shows, it is possible to suffer wrongful discrimination even if one is not made worse off. This applies to political rights: it would not be permissible for a state to block gay people from voting, even if they were able to easily vote in another state. Similarly, the availability of alternative social media sites does not necessarily permit Twitter to ban legitimate causes from tweeting. The presumption is that bakeries, universities and other institutions honour Lee's rights to expression. Unless Asher's can defend a conscience argument, it seems that they have a duty to make the cake.²

3. *What should the state say?*

The state, and other institutions including bakeries, has political duties beyond upholding free expression. On many theories justice requires more: Rawls (1971) includes distributional elements in his theory of justice, such that public institutions (whose "first virtue is justice") promote the wellbeing of the least well off. On other theories, justice entails special obligations to minority groups, which may mean supporting some political causes over others, to encourage particular 'public values.'

Applied to Asher's The question is whether a bakery like Asher's has obligations to assist political expression in a way that we might expect a newspaper or university to. Bakeries might be seen as a form of 'public accommodations', to use a model in US law,³ which by virtue of the public nature of service they provide are expected to treat different groups equally.

² Availability of alternatives is important to some conscience cases; for example, doctors who object to treating patients on conscience grounds are sometimes obligated to find alternative care for patients.

³ I would like to thank an anonymous reviewer for suggesting reference to the US 'public authorities' model.

Although cake may be an unconventional form of political expression, one can imagine a situation where refused service could undermine a legitimate political cause, such as the aforementioned village bake sale. To use an imperfect analogy, getting a taxi is in itself not an act of political expression, but it may be politically important if one is getting a taxi as the only means to get to a polling station to vote. A taxi company which refused to drive Conservative voters to polling stations might, like Asher's be guilty of obstructing an avenue of political expression.

To conclude this section, Asher's seems to have failed some of their positive political duties to enable free expression (albeit an unusual form of expression) of minority groups, having rejected a group on the basis of their views.

More broadly, discrimination can harm victims by undermining their right to free political expression. This does not account for the wrongness of discrimination in general, however it does account a special wrongness of discrimination against socially salient political groups, as explored in Part 1.

4 Part 3

4.1 Conscience

This section explores the rights of the discriminator: specifically, Asher's religious conscience claim. I defend religion's 'special status' with regards to conscience claims, but ultimately argue that Asher's does not have a strong conscience claim due to the unreasonable link between faith and their actions.

4.1.1 Conscience in Ethics

Asher's claim their Christian faith means that, as a matter of conscience, they cannot service Lee's request. The court ruled that while their consciences allow them to disagree with the message on the cake, icing a cake is not the same as supporting a message.

Conscience claims are often used in law, but their philosophical nature is unclear. A legitimate conscience claim does not entail ethical permissibility: a Christian magazine may legally refuse to run an LGBT advertisement on conscience grounds, but this does not mean their decision is morally permissible. However, the lack of a necessary link between conscience and permissibility does not mean there is no link at all. Intuitively, there is at least something undesirable about an individual having to perform an action which they deeply oppose. Arneson (2010, 1015) notes that freedom of conscience is often framed in terms of a 'moral' freedom and Ahdar and Leigh (2013) argue that there is a trade off between public interest and private conscience.

Overriding someone's conscience means forcing them to do something they don't want to do. However conscience claims are about more than mere preference. Asher's are not just saying 'we don't like gay marriage' or even 'we morally disagree with gay marriage'. Their religious beliefs mean that gay marriage is inconsistent with a core part of their identity, worldview and emotions, as well as their morals. For political liberals, such an encroachment on one's private life must be justified. Liberals of all hues have some guiding principle for state intervention, like Mill's harm principle or Locke's proviso.

4.1.2 Religion's Specialness

Religious conscience claims imply that religion is in some way special to deserve exemption from the normal rules. Sapir and Statman (2005) argue against the “assumed symmetry” between religious and nonreligious views, and claim that accommodating religious practices (such as restrictions on Sabbath road usage in Orthodox Jewish neighbourhoods) does not undermine the liberty of nonreligious people, whereas restricting religious practices *does* undermine the liberty of religious people. Religious reasons can strongly alter our intuitions about certain cases. For example, we think a firm should make more exemptions in its uniform for a Sikh man who wishes to wear a turban, than an atheist woman who enjoys wearing large hats.

Countering this Corvino et al. (2017) argues against religious conscience on the grounds that the law ought to be applied equally, and religious reasons for action should not trump secular motivations. When discussing the use of peyote, a drug used by Native Americans in religious practice, Corvino says “if peyote isn’t dangerous, it shouldn’t be against the law. If it is dangerous, religious beliefs do not change its potency.” Religious reasons are therefore irrelevant.

However, although Corvino is right that religion does not alter the potency of a drug, this does not mean that the law should not distinguish it. The dangerousness of guns is not altered by whether the shooter is (a) a woman who falsely believes her husband is a dangerous intruder, or (b) a terrorist; but our legal treatment of these cases will rightly differ. The question is whether religious belief is an important enough motivation that it should be treated differently from either desire or, say, moral beliefs, or whether it is a peculiar sort of ‘expensive taste’. I will put forward two reasons for why we may want to treat religion as special.

1. *Religious morality and commitment*

If a Jew eats pork, this not *only* violates his moral beliefs, but also affects a very important relationship of his - his relationship with God - and undermines a commitment he has made to someone. Since this person is God, we might treat it with added importance. In Jewish tradition, God is seen as a creator, benefactor, father figure, political-rule giver, and infallible guide.

Furthermore, this commitment is important regardless of whether God exists. If someone has made a commitment to his long-lost wife, whom he reasonably believes to still be alive, this commitment is still important even if she has in fact died.

Some ethical creeds have constructed religious-like pledging in order to add an extra moral layer to what is already a moral decision. The effective altruist movement encourages adherents to sign a public ‘pledge’ promising that they will give a proportion of their income to effective causes. Although effective altruists already agree on the moral benefit of giving effectively, the pledge acts as an extra morally significant motivator. It would be wrong to fail to recognise the importance of these commitments in assessing religiously-motivated actions, though it is worth noting that not all religions involve commitments to supernatural beings.

2. *Non-normative beliefs and coercion*

Religion involves not only moral beliefs but also non-normative beliefs about life and the world. Christianity does not just outline moral precepts but also makes descriptive claims, such as ‘Jesus is the Son of God’ or ‘the punishment for sin is death’. This is true of some political

ideologies: Marxism includes a normative imperative of hurrying the communist revolution, but also non-normative elements, such as historical materialism and the predetermined demise of capitalism.

These non-normative beliefs matter because they can appear to the believer as threats or offers which have a 'coercive' effect on their actions. A Jew's obligation to avoid pork might come with perceived threats (in this life or after death) which are not present for an atheist vegetarian. The Jew might also believe he will be rewarded for obedience, or at least that he has not displeased a powerful deity.⁴

To some extent, those with firm religious convictions must be treated as people encumbered with beliefs that are somewhat 'coercive' on their action. Corvino's religious peyote user might believe there are threats or offers attached to using peyote, and we would treat coerced drug users differently from recreational users.

This matters even if the religious threats and offers do not exist; it only requires religious adherents to reasonably believe in them. There is precedent for this approach in ethics and law. If a woman shoots her husband on the basis of a sincere and reasonable (but false) belief that he is a murderous intruder, then we would consider her actions more likely to be permissible than if she did not have this belief. Religious reasons can put adherents in a similar position to the woman, since they have a strong *perceived* threat or offer motivating their actions. We should consider this when assessing conscience claims, subject to the threat's severity, the belief's reasonableness and the impact of actions taken to mitigate threats. In the case of the woman who shoots her husband, the severity of the threat (a murderous intruder) is high; the reasonableness will depend on all sorts of factors which motivate her belief; and the actions taken are quite extreme (shooting the intruder).

Generally, the same cannot be said for those motivated by non-religious belief. Atheist opposers of gay marriage cannot cite the offer of paradise, the threat of Hell, or the disapproval of a divine figure as a motivating factor. Religion is special because it motivates actions differently compared to non-religious moral choices, due to the role of threats, offers and beliefs about the future.

4.1.3 Reasonable Religious Belief

An objection to this argument cites examples of sincere religious belief which encourage inexcusable actions. For example, a Jihadi terrorist might sincerely believe that he will be rewarded in Paradise for killing innocents, and that failing to do so would lead to severe punishment. Yet clearly this does not permit his behaviour.

There are two responses to this objection. First, although sincere beliefs might affect how we ethically assess an action, this does not mean that actions are justified. On most moral creeds, the threat of danger or the promise of reward does not give individuals the right to do what they like: obligations not to kill innocent people remain.

Second, we might think that the terrorist's beliefs are not only immoral, but unreasonable. In the earlier example, the woman's actions are excusable only if she has good reason to believe that the intruder is an attacker, and not her husband. Analysing the terrorist's actions

⁴ Even in religions without Heaven and Hell, perceived obligations to a specially important/divine person might be considered somewhat 'coercive' on individuals' actions. Note that this argument loses some of its force for religions which do not have divine agents and for those who are 'culturally' religious, who might not believe in the actual existence of such persons.

requires establishing whether he acted on the basis of sincere and reasonable religious belief, or whether religion was a mask for political or selfish motivations. Furthermore, we should consider whether the individual is of sound mind and capable of forming rational beliefs, whether their actions are derivable from their beliefs, and whether their beliefs cohere with the doctrine or theology of their professed faith. As discussed at the end of Part 1, a liberal state intends to allow a variety of religious beliefs which are considered ‘reasonable’. But this does not require it to legitimise all beliefs, especially those which undermine liberal principles. This deals with cases where a religious extremist may have ‘reasonable’ belief that God is commanding them to do heinous actions (in the sense that they are correctly following the evidence available to them), but that does not mean their action is ‘reasonable’ (in the sense of being consistent with liberal principles to which a political community ascribes).

We can establish conditions for assessing a religious conscience claim which incorporate the ‘reasonableness’ of the claim and the ‘severity’ of not honouring the claim. A Christian teacher who believes God would be mildly upset if he were to teach Muslim children performs badly on the ‘reasonableness’ test, assuming there is nothing in Christian doctrine or tradition about teaching Muslim children. Not all ‘religious’ claims are derivable from religious doctrine, and this forms part of the reasonableness test. Ahdar and Leigh (2013) discuss this effect when assessing Amish tax exemptions. This case also performs badly on the ‘severity’ test, since the cost of ignoring his claim is low (God is mildly displeased), while the cost of respecting it is big (a child is denied education). On the other hand, consider the case of a Muslim boy who believes he will not enter paradise if he participates in prayers at his Christian school. This case performs better on the reasonableness test, since prayer is one of the Five Pillars of Islam, as well as devotion to Allah above any other god. Furthermore, the child may have good reason to trust his Muslim parents’ teachings on faith and paradise. The case also performs better on the severity test, since the cost is being denied entrance to paradise, and the benefit of a Muslim boy joining Christian prayers seems small. These examples illustrate how reasonableness and severity tests can be used to assess conscience claims.

4.1.4 Applied to Asher’s

The above discussion implies that it would be unfair and illiberal to disregard *a priori* Asher’s religious motivations. If Asher’s actions follow reasonably from their sincere religious beliefs, we are compelled to factor in the moral commitments they believe they have made to God and the threats or offers associated with their behaviour when assessing their conscience claims.

In terms of the reasonableness of Asher’s claim that their religion prohibits them icing the cake, Asher’s can point to a tradition of opposing gay marriage within Christianity, and in particular, Northern Irish evangelicalism. However it is not clear that their actions follow directly from this position. What is prohibited (both within orthodox Christianity and arguably the Bible), is gay marriage - not icing a cake with a pro-gay marriage message.

Asher’s could more plausibly argue that their faith prohibits them from *supporting* gay marriage, and therefore they cannot ice a pro-gay marriage cake. The court held that ‘icing a cake is not the same as supporting a message,’ which sounds plausible. But this does not entirely defuse the conscience argument. For example, ‘speaking’ is not synonymous with ‘supporting a message’, but this does not mean that there are no issues of conscience when Christians are forced to verbally renounce their faith, or dissidents forced to declare loyalty to a dictator (Newman 2016). Christians may not *actually* renounce their faith when they say they are, but demanding certain spoken words reasonably goes against their conscience.

Defining 'support' broadly also has implausible implications. If action *x* supports cause *y* whenever *x* increases the probability of *y*'s success, then conscience exemptions could apply to an implausibly broad range of cases, e.g. a Christian teacher could refuse to teach a Muslim student on grounds of conscience if the student's education would indirectly support Muslim causes which the teacher opposes. This seems unreasonable.

On one end of the spectrum are specific acts which are prohibited by one's religion, and on the other end are acts which indirectly, causally promote a disagreeable cause. Religious conscience claims concerning actions on this former part of the spectrum seem more serious. Defenders of Asher's will point to the similarity between icing a message and writing or speaking words, and argue that the claim should be taken as seriously. However, if what matters is the *literal act* of icing the message, this precludes icing the same message on the 'ironic cake' discussed earlier. If Asher's are willing to ice the 'ironic cake', the conscience claim does not concern the act of icing a message but the cake's in supporting a cause. This seems to be on the weaker end of the spectrum, since it is not a specifically prohibited action within Christianity.

To conclude, it seems that Asher's does have a conscience claim against behaving in ways which might causally aid a cause that disagrees with their religion. However, the indirect nature of this support makes their claim weak, and gives us reason to prioritise the other considerations discussed in this essay. It is worth noting that, for a liberal state, matters of conscience need to be balanced against other rights and objectives. An example of this is where Canadian authorities had to balance religious conscience against health and safety concerns when deciding whether Sikhs wearing turbans should be exempt from laws requiring motorcyclists to wear helmets (Hopper 2016).

The general conclusion from this section is that there are good reasons to afford religion 'special status' when assessing conscience claims. This is because of the unique ways in which religion (a) concerns commitments individuals have made to important persons, and (b) often includes non-normative beliefs. Both these aspects of religious belief can have a 'coercive' effect on adherents' actions, in a way that might lead us to treat them differently, both ethically and in law.

5 Conclusion

In this paper I have built on and adapted existing theories of discrimination to account for three additional concerns; first, the social salience of political groups and their claims as objects of discrimination. Second, political expression of these groups forming a part of the wrongness of discrimination. Third, the role of religious conscience in countering discrimination claims.

1. *Discrimination*

Part 1 concerns our *conception* of discrimination. Lippert-Rasmussen's social salience account of discrimination rightly identifies its group-targeting nature. However, his conception does not fully account for our intuitions about the Asher's case, since it is not the LGBT community (or any salient group) which suffers discrimination. Neither is it merely the 'message' that is discriminated against: the 'ironic cake' case demonstrates that it is the cause supported by the message which is targeted.

I develop this argument further by pointing to more obvious cases where political groups might be discriminated against, such as a printing company refusing to print campaign literature for one particular party. It seems that political causes, especially when they are closely related to group identity (such as the LGBT community and LGBT activism), form a

socially salient group which qualify as objects of discrimination. Lippert-Rasmussen's social salience account should therefore be expanded to include such groups, with a definition of socially salient political groups modelled on his: "A political group is socially salient if perceived membership of it is important to the structure of social interactions across a wide range of social contexts."

2. *Political Expression*

Parts 2 and 3 concern how discrimination interacts with two core liberal values: freedom of (political) expression and freedom of (religious) conscience, which are both present in Asher's case. These concerns are related to the *wrongness* of discrimination, since (a) impact on religious conscience and freedom of speech might increase or decrease the wrongness of discrimination in specific cases, and (b) the effect of discrimination on religious conscience and freedom of speech may constitute part of the general wrongness of discrimination. Either way, if discrimination interacts in a *statistical* sense (that is, how discrimination concerns are increased or lessened when they co-occur with other important threats to liberal values), then this is of importance to liberals who hold dear the three values discussed: nondiscrimination, freedom of political expression and freedom of religious conscience.

Part 2 looks at the rights of the discriminatee; in this case, Lee - and the wider LGBT community's - right to political expression. Bakeries do not have the same positive obligations to enable political expression as other institutions such as newspapers or universities. However, we expect bakeries to be apolitical, unlike political parties or churches which might have views on gay marriage. Thus, the LGBT community's rights to political expression form the basis of the wrongness of discrimination in this case, due to the salient *and* political nature of the group. However, our intuitions about the 'Nazi cake' case show that there are limits to which groups qualify. Although a liberal state may tolerate Nazis, it is appropriate to publicly denounce their views as illegitimate and at odds with liberalism. It seems reasonable to draw a similar distinction when assessing discrimination: while legitimate viewpoints can expect accommodation and icing on a cake, others can be rejected.

3. *Conscience*

Part 3 concerns the rights of the discriminator and freedoms arising from religious conscience. Following Rawls, I argue that in a pluralist, liberal state certain religious views must be considered 'reasonable'. However, sincere religious belief can have a 'coercive' effect on individuals' decisions through posing threats and offers. In ethics and in law, the presence of 'coercive' beliefs encourage us to make allowances and even exemptions for individuals' actions. Similarly, sincere religious belief and its 'coercive' effect leads us to assess normally wrongful discrimination differently.

I make a parallel argument from special relationships, such as obligations to God, which are often a key part of religious belief. Sincere belief in the existence of these relationships motivates certain actions which are qualitatively different from secular motivations due to the relational aspect. This might excuse religiously-motivated discrimination in some cases. Although I do not conclude that Asher's has a strong conscience claim, there are good reasons established for taking religious conscience seriously.

5.1 Application

Given the conclusions above, Asher's case challenge us to adopt a new approach, or at least an adjusted framework, for assessing discrimination. First, it gives us reason to include political causes in our profile of legitimate socially salient groups, particularly those which are strongly linked to salient groups. It is important that our conception of discrimination tracks how groups understand themselves, including shared political motivations. Shared political experiences and objectives are a fundamental part of certain groups' identities, and these groups can be objects of discrimination.

Another application is in evaluating discrimination's moral permissibility. Asher's case highlights how discrimination can affect political expression in addition to other harms associated with discrimination, such as unfairness or wellbeing. Part One shows how political groups can be victims of discrimination qua their political nature, and free political expression is why it this matters. On some theories of justice (including Rawls' and Dworkin's), political rights are lexically prior to wellbeing and distribution: justice requires respecting political rights before considering individual wellbeing. Asher's case motivates us to broaden our theory of discrimination's permissibility to account for rights to expression. This in turn informs and develops correct application of justice, with legal implications.

Although I am not the first to propose that conscience claims should be weighed against discrimination (see Corvino et al. 2017). I put forward my own argument for why religious conscience matters, grounded in the 'coercive' nature of sincere religious beliefs and their commitments. When religious views prohibit particular discriminatory actions, it is important to have a robust theory of if and when this warrants exemption from charges of wrongful discrimination.

This paper therefore builds on Lippert-Rasmussen's conception of discrimination to account for political groups, while also offering frameworks for dealing with the ethics of discrimination in cases where political expression interacts with sincere religious beliefs. In today's pluralist world of identity politics and religious multiculturalism, a liberal framework for balancing conscience claims against charges of discrimination is more needed than ever before.

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