

Religious Freedom, Religious Practice, and Discrimination: What Should Religious Freedom Laws Cover?

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I. Introduction. The Religious Freedom Restoration Act (hereafter referred to as the RFRA) was passed by both the House (unanimously) and the Senate (with three Senators voting against) in 1993. The original intent of the RFRA in 1993 seems to be to restore the standard from *Sherbert V Verner* (1963), which was that the government may not ‘substantially burden’ an exercise of religion without showing a ‘compelling interest’¹; and even if government does have a compelling interest in limiting the free exercise of religion, it must advance that interest in the ‘least restrictive’ way possible.² Congress stated in its findings that, since “laws "neutral" toward religion may substantially burden religious exercise as surely as laws intended to interfere with religious exercise”³, the RFRA states that “Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.”⁴ From 1993 until 2015, 20 states passed versions of the RFRA. In June of 2015, in the case *Obergefell v. Hodges*, the Supreme Court held in a 5-4 decision that the fundamental right to marry is guaranteed to same-sex couples by the Due Process and Equal Protection Clauses of the Fourteenth Amendment; after this decision, in the 2015 legislative sessions, sixteen further states proposed RFRA laws.⁵ Of the sixteen proposed laws, only two⁶ (to date) have been passed. One of those was signed into law by Indiana’s Governor Mike Pence on March 26, 2015.

¹ This might include protecting public safety, or, after the Civil Rights Act of 1965, preventing race-based discrimination.

² It is interesting to note that the intent of the original RFRA in 1993 was to protect Native American religious practices, upon which federal courts, in a series of decisions in the early 1990s, allowed the government to infringe by, e.g., withholding unemployment benefits from people who had used peyote.

³ Religious Freedom Restoration Act full text at <http://www.welcomehome.org/rainbow/nfs-regs/rfra-act.html>

⁴ Ibid.

⁵ <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx>

⁶ In Indiana and Arkansas.

The Indiana law was considered to be controversial in that it was, in some quarters, considered to legally sanction discrimination against the LGBTQ community. Specifically, Indiana's Religious Freedom (RF) law, unlike many other RF laws, provides relief for businesses⁷ 'whose exercise of religion has been substantially burdened' even if no 'state or any other governmental entity is a party to the proceeding.'⁸ The intention of the law, at least in part, seems to have been to give business owners a stronger legal defense if they want to cite their religious beliefs as a justification for not serving lesbian, gay, bisexual, and transgender customers.⁹ Further, the Indiana law specifies that individuals 'who have control and substantial ownership of' a business are protected by the law, whether the business is for-profit or non-profit. Finally, under this law, 'exercise of religion' is construed to mean 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'¹⁰ Thus, the first thing one notices about the Indiana law specifically is how broad the protections for business owners seem to be.¹¹ Any sort of business seems to be covered; for-profit or non-profit, individuals, limited liability companies, and 'closely held' corporations; and any sort of religious exercise seems to be covered, whether 'central' to a system of religious belief or not.

⁷ 'Person' in the Indiana law is defined as either 1) an individual, 2) religious organization, or 3) corporation (any entity that 'may sue or be sued'). Full text of the law may be found at <http://www.indystar.com/story/news/politics/2015/03/27/text-indianas-religious-freedom-law/70539772/>.

⁸ Ibid. This wording seems to be a response to the Supreme Court decision *Elane Photography, LLC v. Willock*. In this case, a gay couple sued a photographer who refused to take photos at a same-sex marriage ceremony in New Mexico. The photographer used the state's religious freedom law as a defense. The Supreme Court rejected the defense on the grounds that the New Mexico religious freedom law only protected businesses from government action; that is, it did not protect businesses from lawsuits by private parties. The Indiana law seems to have been written to specifically extend the religious freedom defense to businesses in lawsuits brought by private parties.

⁹ Legal experts seem to differ, as far as I can tell, as to whether the law would consistently operate to excuse such discrimination. It would depend, in part, upon how judges would interpret 'substantial burden' and 'compelling interest'.

¹⁰ Section 5 of Indiana's religious freedom law. Ibid.

¹¹ The Indiana legislature, in the face of protests that the law would allow discrimination against LGBTQ individuals, revised the law to explicitly protect sexual orientation and gender identity from discrimination. One wonders if the law would have been allowed to stand as written if the public outcry had been less vociferous. However that may be, the fact that the Indiana law was modified does not impact the purpose of this paper, which is to clarify which religious beliefs/exercises are reasonably covered by RF laws.

Before I proceed, I want to say a few words regarding what this paper is *not* about. I do not intend any of this discussion to be any kind of referendum on the morality of same-sex marriage, same-sex relationships, homosexuality or transgender individuals. It is also not a referendum on the epistemic standing of religious claims. The arguments offered in this paper are not to be construed as legal arguments; rather, insofar as I am worried about what religious beliefs/exercises ought to be protected, the arguments I will be dealing with will have a moral bent.

The point of RF laws seems to be to carve out exceptions to other laws (e.g., antidiscrimination laws) on the basis of religious beliefs. The purpose of this paper is primarily clarificatory; I wish to construct a (beginning, very rudimentary) taxonomy regarding what religious beliefs/exercises RF laws ought reasonably to protect. It is, no doubt, a difficult question as to how to balance the rights of people to hold religious beliefs and exercise those beliefs in public life, and the rights of others not to be subject to discrimination in the public sphere. Laws like the Indiana law (in its pre-revised form) are troubling to me in that the standards it proposes are too broad and would allow discrimination in cases in which it ought not be allowed. Thus, I wish to provide a preliminary set of standards that will delineate (hopefully) reasonable limits upon which religious beliefs/exercises ought to be protected under the law.

To this end, in section II below I will take up the question of what qualifies a belief as a religious belief, and I will propose that religious beliefs are primarily characterized by the content of such beliefs. In section III, I will suggest a distinction between what I will call ‘primary’ religious beliefs, and ‘non-primary’ religious beliefs. In section IV, I will argue that it is more consistent with the tradition of liberal democracies that the protected class of religious beliefs/exercises be limited to those beliefs that are ‘primary’ religious beliefs, and exercises of

religion that follow upon such ‘primary’ beliefs. While any conclusions that I draw as a result of my clarificatory agenda will be both tentative and incidental, I think that I can show that the pre-revised version of the Indiana RF law (and thus any law that is like the Indiana RF law) is too broad and thus constitutes an unreasonable expansion of religious freedom that is inconsistent with liberal democratic tradition.

II. What Makes a Belief a Religious Belief? Before we can get to a discussion of religious belief, I think that there are some preliminaries we ought to get out of the way. As I wrote earlier, RF laws seems to be an attempt to carve out exceptions to existing laws on the basis of religious belief, such that the successful citation of an appropriate religious belief can serve as a legal (and, presumably, social) defense for not obeying a law that is in conflict with the religious tenet. There are a few observations we can make here.

First, religious beliefs need not be true in order to be legally protected. Indeed, insofar as many of the core beliefs of the different religions are logically inconsistent with one another, I take it as a matter of logical fact that not only can not all religious beliefs be true, it may be likely that the majority of them are false. This, of course, does not seem to be any kind of impediment to RF laws; the long tradition of general freedom of expression and conscience seems to ensure that the truth of the belief is not why we protect them. We protect them, in part, because we have a long liberal tradition that, as long as such beliefs do not cause harm to others (at least), we take it as a basic individual right to express ourselves in the public sphere. So, the truth of a belief seems to have little to do with the protection of that belief.

Second, not all religious beliefs (or, indeed, other types of beliefs) are the appropriate target of protection. For example, if my religion requires human sacrifice, my religious exercise of such beliefs (no matter how deeply or faithfully held) would not be protected, nor should they

be. Why is this? I suggest that our duty not to interfere with the exercise of a religious belief is a *prima facie* duty.¹² If this is right, then the moral reason to interfere with the exercise of religious belief must be at least as strong as the moral reason not to interfere with such an exercise in order for the interference to have a chance of being morally justifiable. So, since the moral reason to interfere with my religious exercise of human sacrifice (namely, the saving of a human life) is stronger than my *prima facie* duty not to interfere with religious exercise (again, based in the traditions of liberalism), then it would be morally permissible to interfere with the human sacrifice. So, 1) religious beliefs need not be true in order to be protected, and 2) not all religious beliefs (true or false, as the case may be) are morally appropriate targets of such protection.

What makes a belief a religious belief? Perhaps the ‘religiosity’ of a belief is located in why the believer believes (i.e., the justification, or warrant, of the belief). One method of justifying religious beliefs is through reason.¹³ Aquinas, for example, thought that reason could lead believers to what he called ‘preambles of faith’ (e.g., he thought that reason could lead believers to assenting to the existence of God) through philosophical investigation. However, articles of faith (included here, presumably, is the notion that God is a Trinity) seem to rest on revealed testimony alone.

Taken as just a method of justifying claims, reason does not seem to be constitutive of religious belief (we can have beliefs that are seemingly not religious that are so justified). So, while a certain sort of reason-justified belief may be religious, it does not seem that the belief would be religious by virtue of being so justified. As for beliefs justified by divine

¹² Roughly, person *S* has a *prima facie* duty to *X* iff *S*’s moral reason to *X* is such that *S*’s failure to *X* is wrong unless *S* has a moral reason to not do *X* that is at least as strong as *S*’s reason to *X*. In other words, the moral reason to refrain from *X*-ing must be at least as strong as the moral reason to *X*; otherwise, to fail to *X* is wrong.

¹³ This method is sometimes referred to as ‘natural theology’.

revelation/scripture, while such beliefs may be religious (by virtue of being so justified), it does not seem that all religious beliefs are justified by revelation. So, it does not seem to be the case that we can define religious belief by the method of justification; justification by reason is neither necessary nor sufficient for religious belief, while justification by divine revelation may be sufficient, but not necessary.

It seems, then, that religious belief is separated from other sorts of belief based on the belief's content. What content must a belief have in order to be a religious belief? Hudson¹⁴ argues that the concept of god 'constitutes' religious belief.¹⁵ So, the questions become: what is the concept of god¹⁶? And how does the concept of god constitute religious belief?

Hudson thinks that god has four characteristics that are "common to all kinds of religious belief."¹⁷ First, god is an object of belief. Even if one wants to make the distinction between 'beliefs-in'¹⁸ and 'beliefs-that'¹⁹, any religious belief will have "an object whose existence is logically distinct from that of the believer."²⁰ Second, whatever is considered to be god must be aware of the believer. Third, whatever is god is conceived as some sort of agency. Finally, god is both empirically transcendent (i.e., has properties, either morally positive, morally negative, or morally neutral that surpass human properties), and logically transcendent:

¹⁴ The following account is found in: Hudson, W. (1977). What Makes Religious Beliefs Religious? *Religious Studies*, 13(2), 221-242. Retrieved from <http://www.jstor.org/stable/20005413>.

¹⁵ I am not claiming that Hudson's account is the definitive account of god or religious belief. It is notoriously difficult to even attempt to characterize religious belief in general. However, I take Hudson's account to be both reasonable and at the very least a starting point for discussion, even though such discussion is beyond the scope of this paper.

¹⁶ Hudson uses 'god' in the lower-case as a catch-all term for the object of religious belief in any religion. He wishes his account to be applicable to many different traditions; thus, God would be god in Christianity, Allah would be god in the Islamic faith, and so on.

¹⁷ Hudson, p. 224.

¹⁸ Normally taken to be affective attitudes or attitudes of desire on the part of the believer; that is, an emotional attitude taken toward a proposition. Hudson, p. 224.

¹⁹ Normally taken to be just those propositions to which the believer will assent. Hudson, p. 224.

²⁰ Hudson, p. 224.

By 'logical transcendence' I refer to a constant feature of the language in which religious belief is expressed. This language always strains ordinary meanings in some respect or other. Consider, for example, those many religions in which whatever god is conceived not to have any physical body and yet is spoken of as acting in the world. How is it logically possible for a being who has no body to act in the physical world? That is the kind of question to which religious language constantly gives rise. Philosophical difficulties about religion always have to do with how much strain ordinary language can bear before the point of unintelligibility is reached; and the philosophical defense of religion is always a matter of showing, in so far as this can be done, that what is said with reference to god is not completely unintelligible. However simple or abstruse the language in which religious belief is expressed, it is always in some respect and some degree logically odd. That is the sense in which I am saying that god is logically transcendent.²¹

In what sense, then, does such a concept 'constitute' religious belief? The suggestion is that there are at least four ways that the concept of god is constitutive of religious belief. First, everything said in religious belief is said with reference to god.²² While there may be a host of other beliefs that are referred to in religious discourse, all such beliefs are religious in that they are beliefs that

[G]od is, or has done, something, e.g. created the world, made all men in his own image, given one a conscience, etc.; or they are beliefs *in god*, e.g., in this shrine as god's dwelling, in one's church as god's people, in one's mission as god's service, etc. When anything is part of the subject-matter of religious belief what makes it so in the eyes of the believer is the connexion which he conceives it to have with whatever is god for him.²³

Second, the existence of god is not something that can be doubted from *within* religious belief. Here Hudson utilizes Carnap's distinction between 'internal' and external' questions. An 'internal' question has to do with the existence of entities within a framework; for example, the question 'is my computer working?' is internal to the framework of ordinary 'thing-language'. A question is 'external' when it has to do with the existence of the framework itself; for example, the question 'does the external world exist?' is 'external' to the framework of things. Hudson

²¹ Hudson, p. 225.

²² Hudson, p. 226.

²³ Ibid.

notes that Carnap observes that it is only philosophers that raise ‘external questions. The point here is that, doubting the existence of god would be a question that is ‘external’ to the framework of religious discourse.

There is, of course, much controversy in religion, but it is not about the existence of god; it is about who, or what, god is. It could no more be a religious—as distinct from a philosophical—belief that god does not exist than it could be a physically scientific one that physical objects do not exist or a moral one that there is no such thing as moral obligation. Since everything said in religious belief has reference to god, the existence of god is the logical presupposition of this whole universe of discourse.²⁴

Third, the definition of god is logically related to what can or cannot be said within religious discourse. For example, it would not make sense to ask ‘what does god want me to do?’ or ‘what is god doing?’ without the concepts of awareness, agency, transcendence, and god’s being an object of belief. Further, the practice of prayer (or other form of communication with the divine) seems to presuppose these properties of the concept of god.

Finally, the concept of god is logically irreducible; that is, when an event is referred to as an ‘act of god’, this notion cannot be reduced to empirical events.

Attempts have been made by some theologians, under the influence of the prevailing empiricism of our time, to say what the doctrine of Christ’s Resurrection ‘really means’ in empirical terms. They offer such accounts of its real meaning as: the Christian Church came into existence and flourished amazingly; Jesus’ disciples experienced certain Christophanies; Jesus in his life and death evinced a freedom from anxiety which stimulated a similar insouciance in his disciples; meditation upon this freedom of Jesus can generate a like psychological condition in contemporary men and women; and so on. All such propositions could conceivably be tested for truth or falsity in such a way that ordinary historical or psychological proposition can and that is their attraction...²⁵ The notion of an act of god cannot be equated with that of any historical or psychological event for the simple reason that when the occurrence of such an event has been stated, the question is always open: ‘Did god do it?’ This is [not] a self-answering question. As words are normally used, to say that an historical or

²⁴ Ibid.

²⁵ Hudson p. 227.

psychological event is an act of god is to say more than simply that it has occurred.²⁶

So, to sum up, the concept of god as an object of belief, aware of believers, an agent, and transcendent is constitutive of religious belief. As such I will take the following principle as provisionally true.

A: A belief B is a religious belief in the case that 1) B is said with reference to god, 2) the existence of god cannot be doubted from the standpoint of B, 3) B relies on the concept of god such that B could not be expressed without reference to the concept of god, and 4) the concept of god contained in B is logically irreducible.

The account sketched above may be taken as an attempt to define the boundaries of the concept of religious belief, but I think it should not be taken as a kind of essentialism. That is, I wish to use the above account to ‘draw a line’, so to speak, between religious belief and beliefs of other types. Therefore, even though there may be problems with the account of religious belief I am using, I will take the above account of the content of religious belief (or something like it) to be a threshold condition that a belief must meet in order to be considered a religious belief. The account in question is an attempt to delineate the common usage of the term ‘religious belief’; no doubt other applications exist, but these will be uncommon. Further, since religious beliefs are the proper ‘target’ of RF laws, meeting something like the above ‘content’ account will serve as a threshold condition for a belief to be appropriately considered for legal protection under such laws. I will take up in the next section what other conditions might have to be fulfilled for a religious belief to be a proper subject for RF laws.

Finally, I have been talking about beliefs themselves as a proper subject for RF laws; however, we must note that RF laws are really focused on religious *exercise*, and not on beliefs. I have spent so much time on religious belief because it seems obvious that any exercise of

²⁶ Hudson, p. 228.

religion would be considered *religious* exercise only if such practices are motivated by a *religious* belief.

III. A Suggestion. As noted before, the point of RF laws seem to be, in part, an attempt to define just when religious believers have a (good?) religious reason to disobey an existing law. I also noted that it does not seem to be the case that *all* practices that might be attached to religious beliefs (e.g., human sacrifice) would be an appropriate target for religious freedom laws. The ‘content’ account given above, while providing a threshold condition for beliefs to be considered religious, does not seem to make this distinction. So the question becomes: if it is appropriate to protect some religious practices and not others, which religious practices ought to be protected, and why?

The first thing to note is that religious freedom arguments occur in the public sphere of our society; if such beliefs/practices were entirely private, then there would seem to be no conflict to resolve. In the public sphere (at least in the United States), the problem is not what churches or religious individuals do privately, but how the allegedly neutral liberal state should adjudicate public matters. The conflict in question almost always seems to be framed under the rubric of rights. On the one hand, those who are religious (in the sense of holding religious beliefs, for whatever reason) wish to (rightly, I may add) assert their right to believe what they wish (which, of course, is not really in question), and to freely exercise those beliefs. On the other hand, there are those whose behavior is considered to be immoral by the lights of a religious belief-system, or whose existence is taken to be an affront to a religious belief-system, and who wish to assert their right to be free from religious constraints in how they live their lives. Once again, these conflicting viewpoints are not an issue when the conflict is private. The public issue arises when public rights come into conflict.

For example, there is the recent case of *Zubik v. Burwell*, in which several religious organizations, including the Little Sisters of the Poor, objected to the application of the Affordable Care Act's contraceptive mandate to religious non-profits. Very briefly put, the Little Sisters of the Poor object to the fact that the ACA requires employers to provide contraceptive coverage. Churches, synagogues, mosques, and other houses of worship are exempt from the mandate; the case is about whether other religiously-affiliated organizations (universities, hospitals, charities, and the like) should likewise be exempt from the mandate. Federal law provides an opt-out²⁷ in which such organizations can fill out a form objecting to the contraception mandate, at which time the Federal government will provide the contraceptive services through a third party. The religious organizations claim that filling out the form is a substantial burden on their religious freedom because objecting in writing would make them complicit in providing contraceptive coverage, which they deem to be immoral. Here we have a case in which public rights come into conflict.

Since we can term both rights *prima facie*, the 'normal' way to decide such conflicts is to determine which right is more morally fundamental. For example, if a religious tradition were to mandate human sacrifice, then we would weigh the right of those to exercise their religion, against the rights of those that were to be sacrificed; I hope that we would come to the conclusion that one's right to continue living would outweigh the right of others to sacrifice humans to observe religious rites. Of course, real-life cases are much more difficult to decide than this one. Part of the problem is that, under the 'content' account of religious belief, potentially *any* belief in fact held by a religious person could count as a religious belief. If this is the case, and if all religious beliefs/practices are appropriate targets of protection under the law (as they seem to be in the Indiana RF law), there would be no public conflicts. Religious

²⁷ EBSA form 700.

belief/practice would win every time. However, if the human sacrifice example tells us anything, it is false that religious practices should win every time. This leads us to a question: is there a reasonable way to limit the exercise of religion in public life?

Obviously, I think that there is. One line of thinking would be to draw a distinction between those religious practices/beliefs that could reasonably be protected in the public sphere of a liberal democratic state, and those which could not be reasonably protected. The distinction I wish to propose is, roughly, that in order to be a protected religious practice, the practice must be attached to (follow from, be based upon?) what I will call a 'primary' religious belief. A 'primary' religious belief is one which one must have in order to be a member of the religion in question. For example, primary Christian beliefs might include beliefs like God exists, that Jesus was the son of (avatar of) God, that Jesus was crucified for the sins of humanity, and was resurrected on the third day, etc. Practices that are attached to primary beliefs will be primary practices, and would presumably include worshipping as one's religion sees fit, observing religious holidays, and so on. The exact details of which beliefs would count as primary, and thus which practices would count as primary, should probably be left up to the theologians of each of the faiths in question. 'Non-primary' religious beliefs and practices would be those beliefs/practices that reasonable adherents of the religion in question could (and do) disagree upon. For example, there are reasonable people, all of whom call themselves Christian, who think that same-sex couples ought to have the right to marry, and there are those who, pointing to a different interpretation of Christianity, maintain that same-sex marriage is immoral.

There is, of course, one obvious problem with the distinction as it stands. What counts as a primary belief not only will change from religion to religion, but might well change from division to division within a religion. What I have in mind here is that, for example, Southern

Baptists may take a different set of beliefs to be constitutive of their particular brand of Christianity than, say, Episcopalians. If this is the case, then there would be a profusion of ‘primary’ beliefs that would have to be covered under the law. I must confess that I do not have an answer for this worry; I can just observe 1) that the philosophical problem of determining which beliefs ought to be protected under the law would not be any worse (and may be better) under the distinction I am proposing than it already is, and 2) that the problem might be headed off by limiting primary beliefs to basic, general beliefs that qualify one to be an adherent of a major religion. This would still leave a problem as to what to do with the religious beliefs of those that are not adherents of major religions. With the bewildering variety of religious beliefs/practices in the world, I do not see this sort of problem being solved any time soon. However, I still take it to be necessary to limit the protection of religious practice/belief in the public sphere. The principle I wish to invoke therefore is:

R: A religious practice *P* of a religion *Q* is an appropriate target of legal protection in a liberal society iff 1) *P* is attached to a primary religious belief *B* such that *B* is both a) a religious belief that meets the requirements of principle **A**, and b) *B* is a primary belief in the sense that the belief that (in) *B* is required for the common definition of *Q*, and a believer must believe *B* in order to be seen as a member of *Q*, and 2) *P* does not violate a right of others in the public sphere that would be more morally fundamental than the believer’s right to *P*.

I think this captures my intuitions regarding the appropriate protection of religious beliefs/practices. There will, of course, be arguments regarding which rights are ‘morally fundamental’ in the public sphere, but it is to be hoped that **R** would allow such arguments to be made, as contrasted with the opposing sides merely shouting at one another.

IV. Application. Perhaps it would be helpful to consider an example. In Denver Colorado in 2013, same-sex couple Rachel and Laurel Bowman-Cryer went to a local bakery called ‘Sweet Cakes by Melissa’ to order a cake for a wedding reception to be held in Denver after the couple

married in Massachusetts. The owners of Sweet Cakes by Melissa, Aaron and Melissa Klein, refused to bake the cake due to their Christian convictions; namely, they said that they have a sincerely-held belief that God “uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman” and that “the Bible forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.”²⁸ Rachel and Laurel Bowman-Cryer sued the bakery.

We would have to admit that the beliefs of the Kleins were clearly religious beliefs by the ‘content’ standard. The questions we would have under the principle I have suggested would be 1) were the Klein’s religious beliefs that were operative in this case primary religious beliefs as defined in the principle, and 2) is the right to the practice that the Kleins claimed more morally fundamental than the right of the Bowman-Cryers not to be discriminated against?

First, one could argue that the Klein’s beliefs, though clearly religious, are not clearly primary. The beliefs that the Kleins profess, while common to the Christian world-view, are arguably not constitutive of Christianity (that is, one can hold the opposite view and still be considered Christian in common usage of the term). While, again, it would probably take experts in theology to untangle the problem, it does not seem to me that the beliefs that the Kleins acted upon were primary in the sense that I am interested in.

Second, we may ask whether the practice in question (which I take to be the baking of the cake) is a religious practice in the first place. While the Kleins obviously took it to be a religious practice, to include baking cakes as a religious practice would, I think, be to extend the concept of a religious practice so far as to make it almost meaningless. At this point, we could ask what

²⁸http://www.oregonlive.com/business/index.ssf/2015/02/what_led_to_the_sexual_orienta.html#incart_story_package

wouldn't count as religious practice if we take the Kleins account seriously. If the purpose of RF laws is to allow exceptions to obeying laws found by some to be objectionable on religious grounds, it does not seem as though we could have a functioning government if we allow just any religious belief/practice to count as an excepting factor.

Third, I take the crucial fact here to be that the conflict of rights occurs in the public sphere. In a liberal and democratic society like ours (at least ideally), to embark upon a public enterprise like running a business carries with it some moral baggage. I would argue that the moral default in running a public business would be to adhere to some form of non-discrimination, unless there is an overwhelming moral reason not to. In the Sweet Cakes case, the question will boil down to: do the Kleins have a moral reason to discriminate against the Bowman-Cryers that overrides the public norm of non-discrimination? Given that the practice in question (baking the cake) does not seem to be on the face of it a religious practice (and if we extended the term 'religious practice' to cover it, we leave ourselves open to extending the concept beyond recognition), and that the belief in question (that same-sex marriage is immoral) does not seem to be a primary belief, then it seems as though it is not plausible in this case to claim that religious liberty allows discrimination.

Some might object at this point that private business owners have the right to refuse service to anyone they wish; this would be related to the property rights of business owners to do with their businesses what they wish. The reply here would be two-fold. First, business owners' property rights are not absolute. Business owners are not allowed to do whatever they wish with their businesses; for example, they are required to follow zoning laws and safety regulations. Second, business owners are not allowed to refuse service to just anyone, there are protected groups (e.g., most non-discrimination laws specify that one is not allowed to discriminate on the

basis of race, gender, sexual orientation, etc.) that business owners are not allowed to discriminate against, and for which religious exemptions would generally not be entertained.²⁹

One possible line of argument for business owners like the Kleins would be to claim that they were not discriminating against the Bowman-Cryers on the basis of sexual orientation, but that they objected to being forced to decorate a cake with a message with which they fundamentally disagreed. This line of argument could have promise; think about the possibilities of requiring Jewish bakers to decorate cakes with pro-Nazi slogans. There are two possible observations to make here. First, one could claim that the Jewish baker objects to the pro-Nazi message on other than religious grounds; that is, anyone that is directly or indirectly threatened by a message need not be forced to decorate a cake with that message on it, and this is independent of religion. Second, in this case it would probably depend upon the specific message requested. ‘Congratulations Rachel and Laurel’ seems to be a different message from ‘Hooray for Gay Marriage’. In this case, refusing the first message might constitute discrimination on the basis of sexual orientation, while the forcing bakers to decorate with the second message might set a dangerous precedent.

Conclusion. The plethora of religious freedom laws passed in the wake of the *Obergefell* decision by the Supreme Court does not, I think, speak well for the makers of public policy in our country. Specifically, I have argued that, as it stands (pre-revision), religious freedom laws like the Indiana law are much too broad. The wording in the law seems to allow almost any sort of religious belief or practice to count as an exemption to existing law. As originally written, the Indiana law would, I think, allow widespread discrimination against any group that any religion deems as immoral, abominable, or otherwise objectionable. As a way of limiting the scope of

²⁹ We should also note here that many of the same type of religious arguments employed against gay and lesbians and same-sex couples were also used to support discrimination against black Americans and mixed-race marriages.

religious freedom laws, I suggested distinguishing between primary and non-primary religious beliefs, and thus between primary and non-primary religious practices. While much more philosophical work needs to be done on this controversial and complex issue, it is to be hoped that we can, as a society, come to a conscientious agreement that will maximally serve the interests and liberty of all parties concerned.