Should the Equality Act be amended to make explicit reference to 'conscience'?

Abstract

This article assesses the case for explicitly including conscience alongside 'religion and belief' to form an expanded protected characteristic under the Equality Act 2010. The function of conscience as a critic and judge of an individual's actions is discussed and the imperative for accommodating conscience thereby established. The current specific statutory protections for conscience at work are considered and it is noted that these are predominantly within the healthcare field and narrowly drawn such that they provide protection for a small number of people in narrowly defined circumstances. The extent to which conscience is protected under Article 9 ECHR is also explored, as a possible model for the Equality Act, and some ambiguities noted. How far the Equality Act currently protects conscience is considered through a discussion of relevant case law and it is observed that conscience is only protected when it overlaps with religion and belief and that protection is qualified to a significant degree. It is concluded that there are likely to be benefits to including conscience explicitly within the Equality Act but those benefits are likely to widen the scope of, rather than necessarily deepen, existing protections, as there is little evidence that conscience would be accorded more weight than religion or belief when balanced against other rights.

Introduction

Following the covid pandemic, the government briefly mandated vaccines for health and social care workers, with narrowly drawn exceptions for those with particular clinical conditions.[1] It was estimated at the time that 80,000 such workers were unvaccinated and their jobs thereby put at risk.[2] The BBC provided several examples in its reporting of this situation including the following concerning a

[1] The mandate came into force on 11 November 2021 (initially for care workers only) and was withdrawn on 15 March 2022, at <https://www.gov.uk/government/news/regulations-making-covid-19-vaccination-a-condition-of-deployment-to-end>, accessed 15 December 2024.

[2] BBC Newsonline, *Covid vaccines: The unvaccinated NHS workers facing the sack* (27 January 2022), at <https://www.bbc.co.uk/news/uk-60104140>, accessed 15 December 2024.

paramedic of the South East Coast Ambulance Service who was reportedly sent an email about 'compulsory' vaccination and said this:

> They've put unless you're exempt for clinical reasons if you haven't had your first jab by 3 February you'll be redeployed or lose your job … I cannot treat any one of my patients without their consent, yet they're asking me to get vaccinated against my will. … I'm relatively young, fit and well. There have been lots of adverse effects linked to the vaccine. If I don't take the vaccine I'm 100% safe from the side-effects. I'm pretty happy with those odds.[3]

This statement captures the dilemma of the person with a strongly held objection to being required to do something; yet if he does not, he is likely to lose his job and livelihood. However, it also highlights one of the challenges associated with putative conscientious objections – is the basis of the objection one which would qualify as 'conscientious'? This particular objection appears to be framed on two bases – the loss of personal autonomy involved in a requirement to allow foreign bodies to be injected into one's own body and also a fear of the consequences of taking the covid vaccine (potential side-effects). Although many might perceive this objection as pragmatic only,[4] there may still be scope to consider it to be conscientious in nature (particularly the first leg of the objection),[5] and indeed the question arises of whether or not it is necessary to state the nature of the objection at all.[6] Furthermore, there are others with the same fundamental objection who advanced it for different stated (and perhaps more obviously conscientious) reasons, including people who believed that the

[3] Ibid.
[4] See, for example, I Leigh, 'Vaccination, conscientious objection and human rights' (2023) 43 *Legal Studies* 201, who distinguishes 'hesitant vaccine users' (who 'apply their understanding, however accurate or erroneous, of the science or medicine') from conscientious objectors (who apply a moral understanding).
[5] The possibility of a conscientious objection to compulsory vaccinations under Article 9 ECHR was considered in *Vavřička and Others v. the Czech Republic*, Applications 47621/13, 3867/14, 73094/14, 19306/15, 19298/15, and 43883/15 (ECtHR April 8, 2021) – the court agreed that such objections were likely to be admissible under Article 9 if they met the threshold – i.e. sufficient cogency, seriousness, cohesion and importance as to constitute a protected belief.
[6] As Leigh notes, a right not to disclose beliefs has been recognised in some contexts – e.g. the right to affirm rather than swear an oath on a holy book (*Alexandridis v Greece* App no 15116/06 (21 February 2008); *Dimitras v Greece* App no 42837/06 (3 June 2010); see: Leigh, 'Vaccination, conscientious objection and human rights'.

covid vaccine had harmful mind-altering properties as part of a deliberate conspiracy by the elite against the population at large,[7] and those with a religious objection to submitting to vaccinations.[8]

This example is thus capable of being framed in the language of conscience and it is of note that neither conscience nor, in its negative construction, conscientious objection, is specifically protected under discrimination law within Great Britain. It is however expressly referred to in Article 9 of the European Convention on Human Rights (ECHR).

The suggestion that religious equality law should be expanded to be inclusive of conscience has been proposed by at least one academic commentator in respect of the USA, largely, though not exclusively, for the purpose of broadening of protection beyond religious freedom per se.[9] This article transplants that proposition, although not necessarily the rationale, to a United Kingdom context in order to assess its justification and its potential for widening legal protections.

The purpose of this article therefore is to consider whether or not there is a case for expanding the reach of the Equality Act so that it is expressly inclusive of conscience. The article will explore what is meant by conscience and what might distinguish it from the current categories of religion and belief under the Equality Act 2010. It will also consider at a theoretical level whether or not conscience might be a stronger basis for claimants to rely on than either religion or belief in situation where there may be a potential overlap. The protections for conscience within the workplace within the healthcare field will be considered and the extent to which these are sufficient will be tested. The discussion will move on to consider the incorporation of conscience into Article 9 ECHR and whether that is an appropriate model for an expanded protected characteristic of religion and belief under the Equality Act 2010. The

[7] T Sturm and T Albrecht, 'Constituent Covid-19 apocalypses: contagious conspiracism, 5G, and viral vaccinations' (2021) 28 *Anthropology & Medicine* 122.

[8] H Trangerud, '"What is the problem with vaccines?" A typology of religious vaccine skepticism' (2023) 14 *Vaccine: X*, 100349. The author notes that, with the exception of Christian Scientists, no major religious group opposes vaccines per se, albeit that subgroups do for various reasons: the rejection of illness as a physical condition; a view that vaccines are out of step with divine will; a view that some vaccines are unethical in the way they were produced; a concern to avoid impurity entering the body; and conspiracy theories with a religious dimension.

[9] R K Smith, 'Converting the Religious Equality Amendment into a Statute with a Little Conscience' (1996) BYU L. Rev. 645.

discussion will then turn to the existing case law under the Equality Act concerning what might be framed as conscience claims in order to explore whether or not there is adequate protection before a final assessment is made.

Conceptualising Conscience, Religion and Belief

Prior to a discussion of the current and proposed legal status of conscience under the Equality Act, it is helpful to briefly conceptualise it to better recognise it, and the demands it may place on its bearer, when it may be in play. The term 'conscience' derives from the Latin *con* (with) and *scientia* (knowledge): thus, conscience can be understood to refer to knowledge, traditionally moral knowledge, which is shared with oneself.[10] In turn, this moral knowledge has an energising quality, informing and directing an individual's conduct. The Oxford English Dictionary encapsulates this, defining conscience as '[a] person's moral sense of right and wrong, viewed as acting as a guide to one's behaviour.'[11]

Conscience is often characterised as a person's 'inner voice' which comments on his conduct and thoughts, in a critical and judgemental way – a 'second self', allowing 'a vantage point from which a person beholds his or her actions'.[12] Kant used the metaphor of a courtroom in which conscience judges the individual's actions; to avoid bias, conscience has to operate from an impartial perspective which led Kant to conclude that a person must consider that judging voice as belonging to a neutral third party, 'someone other than himself'.[13] Whereas Kant's courtroom metaphor may suggest an unusual level of internal objectivity, he is not alone in proposing an external reference point in which to anchor conscience.[14] What might constitute that external reference point is an important question and a number of candidates have been put forward. As Strohm points out, the classical conception of

[10] 'Conscience' in U Nodelman, C Allen, and J Perry (eds), *Stanford Encyclopedia of Philosophy* (1995).
[11] Oxford English Dictionary.
[12] P Strohm, *Conscience: a Very Short Introduction* (Oxford: OUP, 2011), 66.
[13] I Kant, *The metaphysics of morals* (Cambridge: CUP, 2017).
[14] R Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge: CUP, 2009).

conscience afforded that role to public or social opinion.[15] Mediaeval Christian scholars proposed the Catholic Church - to guide conscience to obey the dictates of what Jerome and Thomas Aquinas conceived of as an 'inner spark' (or *syderesis*) implanted by God which inclines the heart towards good and away from evil but which an unaided conscience is capable of ignoring.[16] Luther suggested that conscience to be rightly directed should be grounded in an understanding of scripture.[17] Enlightenment thinkers suggested conscience was a more individual concept; for John Locke, its voice was formed experientially through education, social custom or through social contact.[18] Freud and Nietzche conceived of conscience more negatively as informed by the stresses of unresolved inner conflict.[19] In more recent times, conscience has often been conceived less in terms of an identifiable touchstone to inform it but rather more in terms of individual autonomy and freedom of moral choice. Ahdar refers to this as 'the unanchored conscience' dependent essentially on personal conviction for its force and direction.[20]

Although what constitutes the basis of conscience may be contested, there is a broad consensus on its role, which is to trouble and unsettle an individual when crossed. As Strohm puts it 'its characteristic habit is to goad, prick, wheedle, denounce and harass rather than to mollify or assuage'.[21] This can be experienced with great force such that, as Childress observes, when an individual violates her conscience, this 'would result not only in such unpleasant feelings as guilt and/or shame but also in a fundamental loss of integrity, wholeness and harmony within the self.'[22] Forcing people to act against conscience therefore inflicts on them what McClure and Taylor call 'moral harm'.[23]

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[15] R Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?' (2018) 7 *Oxford Journal of Law and Religion* 124; Strohm, *Conscience: a Very Short Introduction.*
[16] Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion*?*'
[17] Vischer, *Conscience and the common good*.
[18] Ibid., 59.
[19] Strohm, *Conscience: a Very Short Introduction.*
[20] Ibid.
[21] Strohm, *Conscience: a Very Short Introduction,* 2.
[22] J Childress, 'Appeals to Conscience' (1979) 89 *Ethics* 315, 318.
[23] J Maclure and C Taylor, *Secularism and freedom of conscience* (Boston: Harvard University Press, 2011), p 77.

Given the importance of conscience to individual integrity, wholeness and harmony, and the desirability to avoid the moral harm intrinsic in denying conscience, it is perhaps unsurprising that it has gradually emerged as potentially worthy of protection. To this end, John Stuart Mill in his *Essay on Liberty* proposed that liberty of conscience should be permitted as fully as possible, limited only by the requirement not to harm others in the process (the 'harm principle').[24]

For an individual, the dictates of conscience may give rise to a requirement to actively do something (for example, to seek to make converts to a particular religion or worldview),[25] but the term is more normally associated with the desire to object to performing a particular activity. The idea that people might conscientiously object has been most commonly associated with forced military service. This form of objection has a long history. There is evidence to suggest that, under the Roman Empire, Jews were exempted from military service due to their unwillingness to swear the necessary oath to the 'god-emperor'.[26]

Within Britain, conscience was, to a degree, recognised as a basis for law-making from Elizabethan times, with the abolition of the notorious Suppression of Heresy Acts (*De Heretico Comburendo*) in 1559,[27] Queen Elizabeth herself being famously unwilling to 'make a window into men's souls'.[28] Later, specific reference was made to conscience in the text of the Toleration Act 1689,[29] which provided relief from the hitherto strict penalties on dissenting protestants who would not swear certain oaths; this Act was expressly designed to bring 'some ease to scrupulous Consciences' (and over time, religious toleration was extended more and more widely, up to and including the Roman

[24] J S Mill, *On Liberty* (London: Parker and Son, 1859).
[25] See A Hambler, 'Is there 'no place in the work context' for religious proselytism?' (2022) 51 Ind LJ 346.
[26] C Moskos and J Chambers, 'The Secularisation of Conscience' in C Moskos and J Chambers (eds), *The New Conscientious Objection* (New York: Oxford University Press, 1993), 11.
[27] 1400 (2 Hen. 4. c.15); 1414 (2 Hen. 5. Stat. 1. c.7) These statutes were abolished by the Act of Supremacy 1558 (1 Eliz. 1. c. 1) (1559), although the Crown's right to issue a writ for the burning of heretics was finally removed somewhat later, under the Ecclesiastical Jurisdiction Act 1677 (29 Cha. 2. c. 9).
[28] Words traditionally ascribed to Elizabeth I, see: J B Black, *Reign of Elizabeth 1558–1603* (2nd edn., Oxford: Clarendon Press, 1959), 23.
[29] 1 Will. & Mar. c. 18.

Catholic Relief Act 1829).[30] One dissenting group, the Quakers, in recognition of their consciences, were specifically exempted from compulsory enrolment into the local militia under the Militia Act 1786,[31] and subsequent legislation,[32] although they were liable to pay a fine (the cost of a substitute) or, if without means, serve a three-month gaol sentence.[33]

In Victorian times, what can reasonably be described as a conscience clause was included in the Elementary Education Act 1870,[34] which provided that 'any scholar may be withdrawn by his parent from [religious] observance' at school.[35] However, the actual term 'conscientious objector' was first used, in popular discourse, to describe opponents of the compulsory vaccination of infant children.[36] Indeed, the first time a clause making specific reference to 'conscientious objection' was included in legislation in the United Kingdom was to accommodate those objections, initially (rather weakly) in 1898[37] then (more comprehensively) in 1907.[38] Subsequently, the right to conscientiously object was recognised in a military context, subject to the decisions of tribunals, when mass conscription was introduced during the two world wars, and subsequently for National Service, through the provisions of the Military Service Acts of 1916, 1939 and 1948.[39]

Religion and Belief

Having sought to define conscience briefly, the discussion now moves on to consider the concepts of religion and belief. There are significant areas of overlap between the concepts of conscience and

[30] 10 Geo. 4. c. 7. Restrictions on the holding of university offices by Roman Catholics remained, however, until abolished by The University Tests Act 1871 c. 26 (Regnal. 34_and_35_Vict).
[31] 26 Geo. 3. C. 107, s. 26.
[32] Militia Act 1803 (43 Geo. 3 c. 96, s 12); Local Militia Acts 1808 (48 Geo. 3 c. 111, s. 23) and 1812 (52 Geo. 3. c. 38, s. 50).
[33] See discussion in C Braithwaite, *Conscientious Objections to Compulsions under the Law* (York: William Sessions, 1995), 102-120.
[34] 33 & 34 Vict. c. 75.
[35] s. 7(2).
[36] Moskos and Chambers, 'The Secularisation of Conscience'.
[37] Vaccination Act 1898 61 & 62 Vict. c. 49. This Act required two magistrates to state they were satisfied with the 'conscientious objection' advanced by parents before the baby was four months old – if not the vaccines would be administered, objections notwithstanding (s. 2(1)); see N. Durbach, *Bodily Matters: The Anti-Vaccination Movement in England, 1853–1907* (Raleigh, North Carolina: Duke University Press, 2004).
[38] Vaccination Act 1907 7 Edw. 7. c. 31. This law replaced the role of magistrates with a 'statutory declaration' by a parent.
[39] For a detailed discussion, see: Braithwaite, *Conscientious Objections to Compulsions under the Law*.

religion. Religion is however a much broader construct. Most of the time it is easy to identify, particularly in a courtroom, as most claims invoking religious rights are brought by adherents of mainstream religions. However, there may be occasions when a claim is brought by a would-be 'religious' claimant where the nature of the putative religion in question is less certain.

To identify a religion there is potentially a maximalist approach which would recognise anything which a person sincerely believes to be a religion could be accepted as such.[40] Opposing this there is a minimalist approach which would only accept historic religions as legitimate.[41] Neither of these approaches is particularly satisfactory: the former is over-inclusive and as a result 'religion' loses its significance (indeed this definition is perhaps closer to unanchored conscience) and is over-reliant on individual sincerity alone (which may not always be easy to gauge);[42] the latter excludes legitimate new religions from recognition as such.

Between these two definitional extremes, a number of intermediate positions have been proposed.[43] Firstly, there are 'experiential' definitions which seek to identify some kind of individual experience which can be characterised as religious in nature, akin to what CS Lewis referred to as a person's sense of the numinous.[44] Secondly, there exists a content-based definition which considers the substantial basis of the beliefs of a putative religion such as man's awareness of the existence of a deity.[45] Thirdly there is the functional definition within which religion is the institutional medium for meeting the deep spiritual and social needs of an individual.[46] Fourthly, some writers have taken inspiration from Wittgenstein's concept of 'family resemblance'[47] to identify typical features of

[40] For example, in *United States v Kuch* 288 F Supp 439 (1968) an attempt was made to claim recognition for 'the Neo-American Church' (whose key 'sacramental' practice involved collective partaking of marijuana and LSD).
[41] This possibility is recognised by R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (2nd edn., Oxford: OUP, 2013), 111-112.
[42] G Van Der Schyff, 'The Legal Definition of Religion and It's Application' (2002) 119 *South African Law Journal,* 288-294, 292.
[43] Identified and summarised by P Clarke and P Byrne, *Religion Defined and Explained* (New York: St. Martin's Press, 1993), 3-27.
[44] C S Lewis, *Mere Christianity* (London: Geoffrey Bles, 1952).
[45] Clarke and Byrne, *Religion Defined and Explained,* 6.
[46] J Yinger, *The Scientific Study of Religion* (London: Macmillan, 1970), 7.
[47] L Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1953).

generally recognised religious systems in order to assess the claims of 'new' religions based on observable similarities. Audi identifies nine such features, such as: belief in supernatural beings; a moral code understood to have come from the god(s); direct communication with the god(s): a world view concerning the role of the individual within the universe; and a collective organisation bound up with the latter. [48]

Assuming there is a legitimate religion in play, it is likely to involve a belief system which affects an individual's core values, beliefs, identity and their practices.[49] Such practices may be manifested in the external forum, including the workplace, for example through dress, a desire to be absent for religious holidays, an objection to doing anything perceived as displeasing to God, and a desire to proselytise or 'witness to' others.[50]

The concept of 'philosophical belief', when coupled with 'religion', is helpful to extend protection beyond theistic beliefs. Amongst other things, this provides a solution to the issue of recognised belief systems which may not be theistic. The problem with 'philosophical belief' is that it is capable of quite wide-ranging definition and the boundaries of what might be covered by this category are likely to be established within the legal systems which employ it, for example through emerging case law. At a principled level, it is perhaps possible to comment that philosophical beliefs are likely to provide the holder with a worldview, analogous to Rawls' 'comprehensive views',[51] a term defined by Greenawalt as referring to 'overall perspectives that provide a (relatively) full account of moral responsibilities and fulfilling human lives.'[52] This understanding of philosophical beliefs is helpful

[48] R Audi, 'Liberal Democracy and the Place of Religion in Politics' in R Audi and N Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham M.D.: Rowman and Littlefield, 1997), 5. Audi acknowledges that his ideas build on those discussed in W. Alston, *Philosophy of Language* (Prentice-Hall 1964), 88. See also: K. Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72 *California Law Review* 753, 767-768.

[49] For a typology, see P Edge, 'Religious rights and choice under the European Convention on Human Rights' (2000) 3 *Web Journal of Current Legal Issues*.

[50] For an extensive discussion of individual manifestation of religion in the workplace, see: A Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Abingdon/New York: Routledge, 2015).

[51] J Rawls, *Political Liberalism* (New York: Columbia University Press, 1993). Rawls included religious worldviews within this category.

[52] K Greenawalt, *Private Consciences and Public Reasons* (New York: OUP, 1995), 5.

as it potentially excludes beliefs which are narrowly focussed (sometimes called 'single issue beliefs') and beliefs which are not related to deeper issues which address the fundamental questions of the purpose and conduct of human life.

A rationale for legal protection of conscience

When considered alongside each other, there is clear potential for overlap between the concepts of conscience, religion and belief. Conscience may be inspired by deeply-held theistic and non-theistic beliefs (and, from the perspective of a religious actor, conscience may be considered to be informed by God). However, conscience may also be distinguished from commitment to an overall world view, religious or otherwise. It may not always be possible for an external observer to trace an obvious causal relationship between the way conscience manifests itself and a worldview that may inspire it. Indeed, conscience itself may not be informed by a comprehensive world view but may manifest itself unexpectedly in response to factors outside of that world view or in response to a very idiosyncratic understanding of it.[53] It is also possible that a conscience may be unusually sensitive and may be burdened for an individual in circumstances where others, who hold a similar worldview, might be at ease.[54] Thus, at a theoretical level, recognition of conscience has potential to add a further dimension to religion and belief as a group of interlinked characteristics and it should be respected where possible to avoid moral harm.

There is a further theoretical argument to be advanced in favour of protection for conscience and this is based on the observation that the status of religion as a rights-bearing concept is eroding. Undoubtedly, the special status accorded to religious freedom has been widely recognised.[55] However,

[53] This is not to say that highly individualised interpretations of religions and other belief systems might not be recognised by some legal systems under the religion or belief category, see the Canadian decision in *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.
[54] St Paul envisages the possibility of 'someone with a weak conscience' (who might be troubled, and therefore defiled, by eating food sacrificed to idols, which Paul otherwise permits), 1 Corinthians 8 v 9-14 NIV (see also Romans 14).
[55] S Bedi, 'Debate: What is so Special About Religion? The Dilemma of the Religious Exemption' (2007) 15 *Journal of Political Philosophy* 235.

Ahdar notes the 'increasing vulnerability' of this right in recent years.[56] Leiter is amongst those who reject the special status accorded to religious freedom. He applies an analysis of liberal arguments for toleration and concludes that 'there is no principled reason for legal or constitutional regimes to single out religion for protection; there is no moral or epistemic consideration that favors special legal solicitude towards beliefs that conjoin categorical commands with insulation from evidence.'[57] 'Categorical commands' are ones which prescribe certain behaviours as required by God and the insulation from evidence is Leiter's slightly jaundiced characterisation of a worldview based on faith rather than science.

Ahdar posits the argument that as scepticism grows concerning religion as conveying rights bearing status, there is a superficial logic to turning to conscience to supply the deficit.[58] Certainly this is the conclusion of Leiter who suggests that 'the general principled arguments for toleration … do justify legal protection for liberty of conscience, which would necessarily encompass toleration of religious beliefs.[59] Jones agrees, arguing that religious claims should be subsumed within a wider category of claims of conscience, which 'must encompass the entire range of cases in which people reckon themselves to be subject to normative imperatives.'[60] Interestingly, as Jones points out in a slightly equivocal way, this casts doubt on religious claims which rest on non-obligatory requirements (although he appears to recognise some exceptions to this).[61] Adenitire, adopting a broad perspective, argues that a liberal state should grant the right to conscientious objection, to the extent that this does not have a disproportionate effect on the rights of others; however, in the process, it should do so without privileging or disadvantaging any underlying religious beliefs which might be engaged.[62]

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[56] Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?'
[57] B Leiter, Why tolerate religion? (2008) 25 *Constitutional Comment* 1.
[58] Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?'
[59] Leiter, 'Why tolerate religion?'
[60] P Jones, 'Accommodating religion and shifting burdens' (2016) 10 *Criminal Law and Philosophy,* 515-536, 532.
[61] Ibid.
[62] J Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge: CUP, 2020).

Ahdar however ultimately rejects the notion of conscience as an effective replacement to religion as a rights-bearing vehicle.[63] His strongest argument relates to the potential downgrading of claims when they are uncoupled from religion. Horowitz, who Ahdar also relies on, makes the point clearly:

> … it is much easier to disregard a claim that rests on individual conscience than one that rests on absolute truth, or to conclude that such a claim, if it rests on conscience alone, can be outweighed by more immediate and worldly considerations.[64]

Horowitz's point rests not on an expectation that courts would be persuaded by absolute truth claims but rather that they would be more sympathetic to the burden on the sincere religious believer, compelled to act or not act in certain ways because of the dictates of his faith.[65] This is not to argue that conscience should be dispensed with entirely. Indeed, since Horowitz does not address the potential erosion in the rights-bearing status of religion, it would perhaps be unwise to do so in the longer-term. The better approach would be perhaps to include both religion and conscience – a conclusion Ahdar appears to reach too.[66]

Conscientious Objection for Medical Practitioners

It was noted earlier that a putative right to conscientiously object has developed historically in the fields of vaccination and conscription to military service. Neither of these domains has traditionally involved the workplace as such (unless the workplace is construed as including the military in war time), although the short-lived requirement to vaccinate against covid for healthcare workers to remain in employment perhaps marks a point of overlap. It may be argued that the possibility of conscientious objection within what might be identified very broadly as the workplace first arose in

[63] Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?'
[64] P Horwitz, *The Agnostic Age: Law, Religion and the Constitution* (Oxford: OUP, 2011), 184.
[65] Although, in a UK context, it may be optimistic to assume that judges are inclined to imaginatively engage with the religious claimant's mindset in order to better understand her position; see C McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecc LJ 26, 32.
[66] Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?'

relation to medical practitioners in relation initially abortion and later fertilisation and embryology. Within the United Kingdom, there is a specific clause in the the Abortion Act 1967 which permits medical staff to abstain from participation in abortion procedures if they have a 'conscientious objection.'[67] Similarly, under the Human Fertilisation and Embryology Act 1990, there is a conscience exemption which reads thus: '[n]o person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so.'[68] In neither case are any accepted grounds for a conscientious objection specified – although the burden is on the objector to demonstrate that a genuine objection exists.[69] There is a further conscience clause which allows GPs the right to refuse to refer such patients because of a conscientious objection to abortion.[70] For pharmacists, there is some provision (and guidance) to allow what appears to be conditional conscientious objection to the provision of certain services (e.g. contraception and fertility medicine).[71] This is presented in an ancillary document to a binding professional code of conduct.[72]

It is interesting that conscientious objection is currently recognised for medical practitioners but, with very few exceptions, in respect of no other occupations. There is in fact a possible principled position which would restrict the right to conscientiously object to precisely this group. Wicclair proposes a justification for this (by comparing medical practitioners to employees of accountancy firms and advertising agencies).[73] He advances various possible rationales, starting with the traditional self-employed status of physicians (which he quickly discounts as anachronistic). He explores the more

[67] Abortion Act 1967, s 4(1).
[68] Human Fertilisation and Embryology Act 1990, s 38(1).
[69] Abortion Act 1967, s 4(1); Human Fertilisation and Embryology Act 1990, s 38(2). In Scotland, under both statutes, this can be discharged simply by 'making a statement on oath by any person to the effect that he has a conscientious objection'.
[70] The National Health Service (General Medical Services Contracts) Regulations 2004, s 3(e).
[71] General Pharmaceutical Council, *In practice: Guidance on religion, personal values and beliefs* (June 2017), at << https://www.pharmacyregulation.org/sites/default/files/in_practice-_guidance_on_religion_personal_values_and_beliefs.pdf>>, accessed 14 February 2024.
[72] Pharmacy Order 2010 (SI 231/2010). The guidance, phrased with a degree of vagueness, appears to be a watered-down version of the much clearer conscience clause to be found in the previous version of the code of conduct, General Pharmaceutical Council, *Standards of Conduct, Ethics and Performance,* September 2010 [3.4], which stated: 'Make sure that if your religious or moral beliefs prevent you from providing a service, you tell the relevant people or authorities and refer patients and the public to other providers.'
[73] M Wicclair, 'Conscientious Objection in Medicine' (2000) 14 *Bioethics* 205.

promising rationale that 'the stakes are often significantly higher in medicine' – the potential for infringing someone's moral integrity is more serious for physicians not least because the choices and actions made by physicians are of a more serious order than those of employees in other fields. This argument has some force, albeit that Wicclair himself dismisses it with the rather unsatisfactory comparison of an advertising employee who objects to advertising tobacco products because they might lead to illness and death. The point that he does not consider is that the abortion physician believes himself to be directly responsible for extinguishing a voiceless and defenceless human life – the advertising agent is at best indirectly responsible for encouraging people likely to be aware of the risks involved to take up or continue a habit which may have adverse long-term consequences for health. The two are not really comparable. Of course making this point arguably challenges the widely-accepted notion that it is not the content of a putative conscience claim which gives it value – the value relates only to the importance to the individual of the moral impulses underlying the expression of conscience.[74] Wicclair does not quite endorse this in full however, as he locates the rationale for offering conscientious objections to physicians in the notion that medicine is a 'moral enterprise' in the way that finance and advertising are not. As a result, 'physicians should be guided by the goals and values of medicine'.[75] If this in turn leads them to object to involvement in particular clinical procedures then this affords significant moral weight to the objection. It is reasonable to assume that the Hippocratic Oath, with its injunctions not to do harm (and in its original form specifically not to aid a woman to have an abortion)[76] would be in keeping with core values in medicine and so would provide a suitably weighty rationale in support of a conscientious objection.

For proponents of what will here be termed for convenience 'the Wicclair view', conscientious objection should be permitted within the workplace but may be restricted to medical professionals

[74] A Giubilini, 'Objection to conscience: an argument against conscience exemptions in healthcare' (2017) 31 *Bioethics*, 400-8.
[75] Wicclair, 'Conscientious Objection in Medicine', 216.
[76] S Miles, *The Hippocratic Oath and the Ethics of Medicine,* (Oxford: OUP, 2005).

only.[77] Adopting this view, there is no need to introduce conscience into the Equality Act as it is already protected where necessary. It may be assumed that further developments in controversial areas of medicine might also be covered by a conscience clause. Indeed, such a clause was included in an unsuccessful attempt to introduce legislation liberalising physician-assisted suicide.[78] Although, slightly different from a traditional conscience clause, protection has been included in wording of the Terminally Ill Adults (End of Life) Bill 2025, as introduced, which prevents 'registered medical practitioners or other health professionals' from being put under a duty to participate in the provision of what the Bill terms 'assisted dying';[79] it also protects such practitioners from suffering a detriment if they decide not to participate.[80]The Wicclair view is, however, subject to critique. With the exception of the Terminally Ill Adults (End of Life) Bill, as it currently reads, the protections for medical practitioners are narrowly drawn. All medical professionals are required, regardless of any conscientious objection, to participate in abortions in order to save the life of, or to prevent serious injury to, a pregnant woman.[81] General Practitioners who are conscientious objectors, must make 'prompt referral to another provider of primary medical services who does not have such conscientious objections'.[82] As Trigg points out, the potential complicity involved in making such a referral would not satisfy all consciences, akin, he memorably suggests, to a robber shouting 'Shoot him!' to an accomplice who actually pulls the trigger.[83] Moreover, scope to conscientiously object, in the case of abortion at least, is limited to involvement in medical treatment only and not, for example, administrative support[84] or patient care,[85] leaving the consciences of, inter alia, secretaries and midwives unprotected. This would suggest that for some at least the statutory protections for

[77] It should be noted that there is another view that physicians should not have the right to conscientiously object at all; see for example J Savulescu, 'Conscientious objection in medicine' (2006) 332 *British Medical Journal* 294 and Giubilini, 'Objection to Conscience'.
[78] Assisted Dying for the Terminally Ill Bill [HL] 2004, s 7.
[79] s. 23(1) (as of 16th October 2024).
[80] s. 23(2) (as of 16 October 2024).
[81] Abortion Act 1967, s 4(2).
[82] The National Health Service (General Medical Services Contracts) Regulations 2004, s 3(e).
[83] R Trigg, 'Conscientious objection and "effective referral"' (2017) 32 *Cambridge Quarterly of Healthcare Ethics*, 32, 36-37.
[84] *R v Salford AHA ex parte Janaway* [1988] 3 All ER 1079.
[85] *Doogan & Anor, Re Judicial Review* [2012] ScotCS CSOH_32 (29 February 2012).

conscience in the medical field provide inadequate coverage and in theory might be strengthened by its inclusion in the Equality Act.

Some however have sought to downplay the significance of conscience where the objector himself is not intimately involved in the act which offends it (such as the midwife or the medical secretary). Such objectors are found without the medical field of course and the term sometimes adopted for these types of objection are 'complicity-based' conscience claims.[86] MacDougall et al make exactly this point in relation to registrars who might object to professional involvement in same-sex marriages or civil partnerships: 'civil servants do not, by officiating at same-sex marriages, become themselves parties to same-sex sexual relationships or acts, i.e. they do not engage in homosexuality; they simply engage in a function that affords status'.[87] Understood this way an official, or employee, does not personally engage her conscience, religiously motivated or otherwise. As the MP Diane Abbott put it in a parliamentary debate: '[t]he whole point of civil partnerships is that they are legal contracts handed out by the state. They have nothing to do with religion and therefore the religious beliefs of a public servant carrying them out are irrelevant.'[88] Trigg's contention considered earlier is in effect a rebuttal of this argument. Two further points may be added. Firstly, it is not for a third party to judge when conscience should or should not be engaged, however rational the third party considers himself to be. Secondly, such an argument ignores the many areas in which complicity is recognised as carrying culpability, not least in the corpus of the criminal law. In short, there is good reason to recognise conscience outside of the practice of medicine, narrowly understood.

[86] D NeJaime and R Siegel. 'Conscience wars: Complicity-based conscience claims in religion and politics' (2014) 124, *Yale LJ,* 2516.
[87] B MacDougall et al. 'Conscientious objection to creating same-sex unions: an international analysis' (2012) 1 *Can. J. Hum. Rts*, 127.
[88] H White, 'Labour MP Attempts to Remove Religious Freedom of Conscience after Christian Marriage Registrar Vic' Lifesitenews.com (5 August 2008), at: <<http://www.lifesitenews.com/news/archive/ldn/2008/aug/08080503>>, accessed 15 Dec 2024.

European Convention on Human Rights

One practical legal reason to include conscience alongside religion and belief as a protected characteristic would be to clearly align the text of the Equality Act with the European Convention on Human Rights (ECHR). Following the passage of the Human Rights Act 1998, domestic courts are bound to determine cases as compatibility as possible with Convention rights.[89] It is likely to aid courts in this endeavour if conscience is specifically recognised in equality law.

An early view in ECHR jurisprudence was that Article 9 did not apply in the workplace as employees are free to resign in situations where their Article 9 rights conflict with workplace obligations.[90] Clearly under that understanding of the reach of Article 9, conscience at work would have no protection and there would be no imperative to alter the Equality Act to be inclusive of conscience. However, in *Eweida and Ors v UK*,[91] in a very significant shift by the European Court of Human Rights (ECtHR), it ruled that Article 9 applies in the workplace in the same way as it applies in other fora.[92] Although it is possible, post-*Eweida,* for claimants to invoke Article 9 in employment tribunals, and many do, in practice claims under the Equality Act are the most significant and Article 9 arguments are often subsumed into the general analysis.[93] For clarity it would therefore be desirable for the relevant sections of the Equality Act to mirror the categories set out in Article 9. It is to those categories that the discussion will now turn.

Article 9 of the European Convention on Human Rights and Fundamental Freedoms reads as follows:

> (i) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change her/his religion or belief and freedom, either alone or in community with

[89] Human Rights Act 1998, ss 3, 6.
[90] *Ahmad v United Kingdom* (1982) 4 EHRR 126; *Stedman v United Kingdom* (1997) 23 EHRR CD (Commission); *Kalac v Turkey* (1997) 27 EHRR 552.
[91] [2013] ECHR 37.
[92] *Eweida and Ors* [83].
[93] As noted in *Wasteney v East London NHS Foundation Trust* [2016] ICR 643.

> others and in public or private, to manifest her/his religion or belief, in worship, teaching, practice and observance.
>
> (ii) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The text thus invokes conscience alongside 'freedom of thought', 'religion' and 'religion or belief'. At face value, this supports the argument that it might be useful for conscience (and indeed possibly 'freedom of thought')[94] to be included within the Equality Act as an aid to ensuring compatibility between it and the ECHR. However, a closer look at the text reveals that there may be a more complex, possibly confusing picture. It is clear that the categories are not applied consistently. The broadest statement ('the right to freedom') is applied to thought, conscience and religion. However, it is notable that, of these terms, only religion and belief are referred to as the freedoms cited become more specific (freedom to 'change' and to 'manifest').

A literal reading of Article 9(1) might therefore suggest that the right of conscience is established (to hold it within the *forum internum*) but not the right to act upon it (to 'manifest' it within the *forum externum*). Some commentators have advanced this proposition.[95] If it is correct then it follows that conscience is protected to a very limited degree indeed as the *forum internum* protects the right to hold beliefs and, by extension, conscience and not the right to express these in an external forum. Interpreted narrowly, this appears to offer very little protection,[96] and it seems difficult to

[94] Freedom of thought, although outside the scope of this paper, is likely to be exercised within the *forum internum* only – when articulated, it would be subject to Article 10 (freedom of expression).
[95] P Van Dijk, G Hoof and G Van Hoof, *Theory and practice of the European Convention on Human Rights.* (Leiden: Martinus Nijhoff Publishers, 1998); C. Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: OUP, 2000).
[96] Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?', p 129.

believe that this was the intention when Article 9 was drafted.[97] However, such a literal interpretation of the text of Article 9 would also require that holding a belief is not protected, but only the qualified right to manifest a belief – an illogical position!

As the notion that conscience is only capable of protection in the inner forum is both unattractive and unconvincing, commentators have sought to rationalise the situation. Evans attempts to reconcile the inconsistencies in the use of Article 9 terminology by suggesting that 'belief' should be regarded as a subset of 'thought and conscience' which she brackets together.[98] Edge goes further, reflecting that 'it would seem difficult to argue that the change in wording from "conscience and religion" to "religion and belief" is important. … these separate terms are indicative, rather than definitive, of some element common to all the beliefs protected by the Article.'[99] This interpretation breaks down the distinction between thought, conscience and belief and it would logically follow that there is a qualified right to manifest all three.[100]

In their dissenting judgement concerning an Article 9 application, *Ladele v United Kingdom,*[101] Judges Vucinic and De Gaetano did not attempt to conflate the various grounds identified within Article 9, nor restrict conscience to the *forum internum*, but arrived instead at the arresting conclusion that conscience was not only a right in itself but in fact an unqualified right. The judges conceptualised Ladele's application as one bound up with conscience rather than freedom of religion.[102] Freedom of religion in their view is concerned with paying regard to a particular set of prescriptions – dietary requirements, the wearing of particular religious dress and symbols, attendance at places of worship.

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[97] I Leigh, 'The Legal Recognition of Freedom of Conscience as Conscientious Objection: Familiar Problems and New Lessons', in R. Ahdar (ed.) *Research Handbook on Law and Religion* (Cheltenham: Edward Elgar, 2018), 378-396.
[98] Evans, *Freedom of Religion under the European Convention on Human Rights*, 52-53.
[99] P Edge, 'Current Problems in Article 9 of the European Convention on Human Rights' (1996) *Juridical Review,* 42-50, 43.
[100] Interestingly, when the ECtHR eventually recognised conscientious objection to military service as an Article 9 right, it did so on the basis of a 'a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs', *Bayatyan v Armenia,* App No 23459/03 (ECHR, 7 July 2011) [110]. If this formulation was adopted more might it would suggest the possibility of an effective merger of the three categories.
[101] *Ewedia and Ors v United Kingdom*, Partially Dissenting Opinion of Judges Vucinic and De Gaetano.
[102] The legal issues in *Ladele* are summarised in the discussion below.

Acting on conscience, which in their view best described Ladele's situation, was in an identifiably different category, one which, because it is not named in Article 9(ii), is not capable of being restricted in the same way as religious manifestation. The judges concluded:

> We are of the view that once a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector[103]) and negatively (by refraining from actions which punish the objector or discriminate against him or her).[104]

Theoretically, if this reading were correct, two consequences arise. First, conscience is elevated above religion in an emergent Article 9 hierarchy (albeit inclusive of the religious conscience). Secondly, the right to act on conscience is an unqualified right and, as a matter of logic, should take precedence over other rights within the ECHR which are capable of qualification. Such a reading of Article 9 would make the answer to the question posed by this article an uncomplicated and unqualified yes (at least from a religious liberty perspective) – if conscience is an unqualified right, then it should certainly be expressly included alongside religion and belief as a protected characteristic under the Equality Act.[105]

Although Judges Vucinic and De Gaetano may be commended for giving weight to the conscience aspects of Ladele's claim, it is difficult to see how their reading, at least taken to its logical conclusion, is practically possible. It is conceivable that conscientious objection in its negative form, might in theory be made absolute, although there might be costs involved. However, the notion that all forms of conscience-based claim could be protected absolutely would pose significant legal challenges, not least the novel problem of resolving competing absolute claims and it is difficult to believe that the drafters of the ECHR either intended or envisaged that possibility.

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[103] A footnote in the text at this point reads: 'Thereby at the same times ensuring and a practical, and not merely theoretical, way unity in diversity.'
[104] Dissenting Opinion [3].
[105] This would also require an exception to the justification defence to prima facie indirect discrimination - it would not be possible for 'a provision, criteria or practice' to be 'proportionate'.

The most compelling solution would surely be for courts to impute conscience into the *forum externum* such that it is assumed to enjoy the same status as religion and belief but without losing the potentially distinctive characteristic implied by each individual term (i.e. rejecting the Edge solution). This would allow for the possibility of overlapping claims between conscience and religion or belief, but where each claim would be made on a separate footing.[106] This has potential to bring an added dimension to Article 9 jurisprudence which so far has been concerned, at least with regard to the workplace, largely with religion, occasionally belief, and conscience has been, with the exception of the minority judgment considered above, rather overlooked, or as Haigh puts it, in an analogous context, 'protection of conscience is, at best, just a silent partner to religion and, at worst, often ignored or unnoticed.'[107]

If conscience was available, de-coupled from but overlapping with religion, then it is possible another historic limitation on access to Article 9 rights would be removed. That is the two closely related filters of the 'necessity test' and the 'manifestation/motivation requirement.'[108] Either of these, if applied, is capable of cutting off a conscience claim if the expression of conscience is considered either unnecessary to a religious belief system or if it is considered to be motivated by, rather than a manifestation of, a religion or belief. It would not be possible to impose these tests on a conscience claim which is not reliant on a religion or belief system (or where any such reliance is irrelevant to the claim).

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[106] Leigh observes that, within Article 9 ECHR, as currently configured, 'freedom of conscience and religion should be treated as overlapping concepts' such that 'conscience-based actions derived from a religious motivation would be protected within limits'… [and] non religious conscience objections (on a minimal reading) receive no protection, or (on a maximal reading) could not be restricted under any circumstances'. See: I Leigh, 'The Legal Recognition of Freedom of Conscience as Conscientious Objection: Familiar Problems and New Lessons', in R Ahdar (ed.) *Research Handbook on Law and Religion* (Cheltenham: Edward Elgar, 2018), 378-396.

[107] See R Haigh, 'Should Conscience be a Proxy for Religion in Some Cases?' in I Benson and B Bussey (eds), *Religion, Liberty and the Jurisdictional Limits of Law* (LexisNexis Canada, 2017), 203. Haigh's observation relates to his analysis of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[108] The origin of these tests is usually attributed to the decision in *Arrowsmith v United Kingdom* (1978) 3 EHRR 218; the tests are often referred to interchangeably but in fact, as Cumper argues, there is a subtle distinction between them, see: P Cumper, 'The Public Manifestation of Religion' in R O'Adair and A Lewis (eds), *Law and Religion* (Oxford: OUP, 2001), 310–328.

In theory, these tests have been made obsolete by the decision in *Ewedia and Ors* which replaced them with a new and more inclusive one: claimants now need to demonstrate only that there is 'a sufficiently close and direct nexus between the act and the underlying belief', assuming the belief is cogent and important, in order to claim Article 9 rights.[109] However, although the earlier tests have been repudiated, they may still have some influence on the emerging interpretation of the 'close and direct nexus' test, and they may be capable of reasserting themselves, as they did for example in *R (Ngole) v University of Sheffield*,[110] a case involving a social work student disciplined for posting comments on his Facebook page critical of homosexuality, in which the Court of Appeal followed the High Court in rejecting Ngole's claim that his Article 9 rights had been infringed. The Court declared that Ngole's Facebook posts constituted a 'religiously motivated contribution to a political debate' but not a protected manifestation of religion and did not therefore qualify for Article 9 protection.[111]

Equality Act 2010

The discussion will now turn to the Equality Act 2010 and the case law arising in respect of religion and belief from both it and the Employment Equality (Religion and Belief) Regulations 2003 which preceded it.[112] Under the Equality Act 2010, 'religion and belief' is identified as one of nine protected characteristics.[113] It is defined as follows:

> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
>
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.[114]

[109] *Eweida and Ors* [82].
[110] [2019] EWCA Civ 1127.
[111] Although his parallel Article 10 claim was accepted.
[112] SI No.1660.
[113] Equality Act 2010, s 4.
[114] Ibid., s 9.

Although there is no explicit reference to conscience, the Explanatory Notes state that '[i]t is a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights.'[115]

The nine characteristics identified in the Equality Act are 'protected' from 'prohibited conduct' which is defined in various ways, the two most relevant being direct discrimination and indirect discrimination. When direct discrimination ('the application of less favourable treatment')[116] is invoked, 'the essential question is whether the act complained of was done because of the protected characteristic.'[117] Thus, applied to religion and belief, if a claimant has been less favourably treated because he 'holds/and or manifests' a protected belief, then this is likely to be direct discrimination.[118] However, if the claimant manifests his belief in a particular way which could justifiably and objectively be considered 'objectionable',[119] it is unlikely that the claimant will be able to demonstrate any less favourable treatment because of his protected belief (as long as any act of less favourable treatment can be shown by the respondent to be 'a proportionate response to the objectionable feature')[120] – rather, any less favourable treatment is because of the way that belief has been manifested. As a result, direct discrimination has often been difficult to demonstrate as respondents are often able to point to the contentious way in which a belief has been manifested as the rationale for any less favourable treatment, rather than the belief itself (or its innocuous manifestation).[121] Indirect discrimination is potentially a more promising avenue for redress as it recognises as unlawful 'a provision, criterion or practice' which, although generally applied, would put 'persons' at a disadvantage because of a protected characteristic which they share, unless the employer can justify

[115] *Explanatory Notes to the Equality Act*, s. 10 [51].
[116] Equality Act 2010, s 13.
[117] *Page v NHS Development Authority* [2021] EWCA Civ 255 [68] (Underhill LJ).
[118] Ibid.
[119] Ibid.
[120] *Higgs v Farmor's School* [2025] EWCA Civ 109 [175] (Underhill LJ).
[121] Although, as the decision in *Higgs* demonstrates, there are exceptions.

this as a 'proportionate means of achieving a legitimate aim'.[122] Indirect discrimination has the potential to offer qualified protection to whatever is included in the 'religion and belief' characteristic.

Whether religious-based conscience is adequately protected through the application of discrimination law has not always been obvious from the relevant case law. It would seem that Article 9 filtering has strongly influenced the approach taken historically to religion and belief discrimination claims, including those involving conscience-based objections. Perhaps the strongest example of this is in *Ladele v Islington BC*, where a Christian registrar of births, deaths and marriages was forced to resign when her request to be exempted from the solemnisation of same-sex civil partnerships was rejected by her employer. Ladele's objection was based on what could be characterised as her religiously-informed conscience and she phrased it thus in her witness statement: 'I feel unable to directly facilitate the formation of a union that I sincerely believe is contrary to God's law.'[123] When the case reached the Court of Appeal, it found against Ladele and in the process made this observation:

> Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job … Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.[124]

The notion of what practices are considered 'core' and 'non-core' to a religion is very similar to the manifestation/motivation dichotomy and the necessity test.[125] It potentially allows courts and tribunals to adopt a very narrow view of what constitutes a religious practice capable of protection (in the *Ladele* example only 'worshipping' appears to be a recognised manifestation of religion), and this view appears to exclude conscience-based issues (presumably these are simply 'motivated' by religion). Whether secular courts are actually equipped to make this distinction is doubtful,[126] yet there

[122] Equality Act 2010, s 19.
[123] *Ladele v Islington Borough Council* (2008) ET Case No. 2203694/2007 [7].
[124] *Ladele v Islington Borough Council* EWCA Civ. 1357 (CA) [2009]; IRLR 211 [2010] [52] (Neuberger LJ).
[125] Albeit as noted earlier, these two tests are not identical.
[126] McCrudden, 'Religion, Human Rights, Equality and the Public Sphere.'

are other examples of judicial boldness in this area. In *Mba v. London Borough of Merton*, a Christian care worker undertaking residential work in a children's home sought to resist employer's attempts to require her to work on Sunday – which she viewed as a mandatory day of rest. In finding against Mrs Mba the employment tribunal observed that 'the belief that Sunday should be a day of rest was not a core component of the Christian religion'.[127] The Employment Appeal Tribunal (EAT) found justification for this view on the basis of apparent empirical evidence that relatively few Christians held this position although it believed this should limit the weight of, rather than negate the claim. The Court of Appeal disagreed, recognising what it called 'Sabbatarianism' as a bona fide manifestation of the Christian religion – the fact that a small number of Christians believed this was enough to meet the plural test required to recognise indirect discrimination.[128] Although in this case the core/non-core test ultimately favoured the religious claimant, the very notion of such a test was, it may be argued, problematic.

Following the decision in *Eweida and Ors*, introducing the 'sufficiently close and direct nexus' test, it may be that courts and tribunals will now refrain from seeking to arbitrate what is 'core' to, or motivated by, a religion or belief system as a much looser connection is now required. However, for the reasons noted in the discussion above this is uncertain and it is quite possible that these tests might reappear in some form. An example of this can be found in the reasoning of the employment tribunal in *Page v NHS Trust Development Authority* quoted at length by the Court of Appeal.[129] This case involved a claim, and subsequent appeals, by a non-executive director of an NHS Trust against his dismissal following media appearances in which he stated that as a Christian he did not support same-sex adoptions.[130] In it, the tribunal observed that:

> … it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief … . In order to count as a 'manifestation' within the

[127] *Mba v London Borough of Merton* (2012) UKEAT/0332/12 [41].
[128] *Mba v London Borough of Merton* [2013] EWCA Civ 1562.
[129] [2021] EWCA Civ 255.
[130] There was a parallel legal action following his dismissal as a magistrate within the same contextual circumstances: see *Page v Lord Chancellor and Anor* [2021] EWCA Civ 254.

> meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case."

From the text above, the distinction between manifestation and motivation is restated then modified by the *Eweida* test but without clear articulation of the likely result. In the instant case, the tribunal determined that Page's media appearances articulating his views, inspired by his religion, did not constitute manifestations of his religion. The Court of Appeal agreed, expressing the issue thus:

> The primary focus of what the Appellant is saying is his belief about the importance of a child having a mother and a father. The fact that that belief is rooted in his religious faith is part of the context, but the interview cannot be characterised as a "direct expression" of the Appellant's Christianity. The fact that that belief is rooted in his religious faith is part of the context, but the interview cannot be characterised as a "direct expression" of the Appellant's Christianity.[131]

It may be inferred from this that courts and tribunals may still take a narrower view of what constitutes a manifestation than the decision in *Eweida* might have suggested and new tests, like 'direct expression' and 'intimately linked' are likely to appear. It is interesting to speculate whether or not this decision might have had a different outcome if the claimant had been able to rely directly on conscience, without the need for his objection to be recognised as a 'direct expression' of his religious faith. It is quite possible, thought not necessarily certain, that someone's conscience might compel her to use the opportunity of a media platform to advance a cherished belief and that this might be

[131] *Page v NHS Development Authority* (CA) [48] (Underhill LJ).

recognised. What is likely is that a recognition of conscience without a need to be grounded in religion or belief would increase the likelihood of claims being admitted.

Rather than being mediated through a wider framework of religion or belief system, claims based on conscience would be far more difficult to filter out as the 'sufficiently close and direct nexus' between conscience and the 'manifestation' of conscience is likely to be readily identifiable. Conscience at work is usually awakened in quite a specific way, in response to some requirement or act by the employer or another actor. The 'direct nexus' between the underlying position of conscience and its manifestation in practice, in conflict with the employer, is likely to be readily observable. There is little scope for tribunals or courts to succumb to the temptation of seeking to 'validate' claims before admitting them – which is far more likely to occur when those courts and tribunals have an external reference point to consider, such as a recognised framework of religious doctrines. Conscience (when viewed outside of the prism of religious belief), being individualised, is unlikely therefore to be easily filtered out at a definitional stage, and claims are more likely to proceed directly to a merits hearing. This means that claims of conscience would tend to move unimpeded to an assessment of their relative weight in comparison with conflicting claims. It is submitted that, given the burden imposed on an individual by his conscience, this is much to be preferred than summary rejection at a preliminary stage. Whether or not this would increase the chances of overall claimant success is, however, another question – one to which the discussion will now turn.

It is possible to imagine a scenario where an employee's, or potential employee's, conscientious objection became known to an employer. This might be an objection which was not obviously grounded in religion or belief. The employer, perhaps fearing that this objection was misaligned with its 'values' might choose to treat that employee or job applicant less favourably than others without an objection (and directly discriminate against her in the process). Similarly, it is conceivable that an individual might suffer harassment from co-workers because a conscientious objection became known to others. In these situations, the incorporation of conscience into the

Equality Act would have potential to provide a new avenue for redress in situations where conscience was not otherwise protected as a manifestation of religion or belief. However, whether the incorporation of conscience is likely to benefit potential claimants who wish to *manifest* it where other rights are in play is far less obvious, as an examination of the reasoning in *Ladele* demonstrates.

Although on appeal in *Ladele,* the original claimant (now respondent), whilst apparently failing to meet the definitional test, nevertheless had her claims considered on their merits. In terms of indirect discrimination, where Ladele's claim was surely strongest (and had been accepted by the original employment tribunal), the EAT acknowledged that the employer's requirement that all marriage registrars must conduct civil partnerships did put Ladele at a disadvantage, in comparison to others, on the grounds of religion and belief. However, it determined that this requirement was nevertheless 'a proportionate means of achieving a legitimate aim'.[132] The legitimate aim was conceptualised as 'providing the service on a non-discriminatory basis' (rather wider than the practical provision of an efficient service identified by the original tribunal).[133] It was proportionate for Islington to 'require all registrars to perform the full range of services' as 'the claimant could not pick and choose what duties she would perform depending on whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on the grounds of sexual orientation.'[134] The Court of Appeal endorsed this reasoning.

The decision on appeal in *Ladele* has been criticised by some for preferring the employer's more abstract interests over Ladele's more concrete rights,[135] nevertheless it represents a clear direction of travel for domestic courts in similar cases.[136] In response to the question, might Ladele's case have been stronger if it had been made on the grounds of conscience rather than religion?, it

[132] *Ladele* (CA) [95].
[133] *Ladele* (CA) [44].
[134] *Ladele* (EAT) [111].
[135] See, for example, the analysis in I Leigh and A Hambler, 'Religious Symbols, Conscience and the Rights of Others' (2014) 3 *Oxford Journal of Law and Religion* 2.
[136] Similar reasoning was applied in a parallel case, concerning a relationships counsellor with religious objections to a job requirement to counsel same-sex couples in the area of sexual therapy; see *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872.

seems very unlikely, from the strong wording of the judgment, that the assessment of proportionality would have been affected in any material way. There is no reason to suppose that a claimant characterised as wishing to 'pick and choose' her duties on the grounds of her 'religious views' would not be characterised in the same negative way if 'religious views' were substituted by 'conscience'.

In the case of *McClintock v Department of Constitutional Affairs*,[137] a similar issue was addressed in a claim brought by a magistrate who resigned from the Family Bench when his request not to preside over cases involving the possibility of making orders for same-sex adoptions. His position was initially presented as one involving belief, although it later emerged that his objection was religious in nature. Regardless of this, the EAT determined that the employer had a legitimate aim to insist that 'magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws on which *they have a moral or other principled objection*.'[138] It is strongly suggested therefore, from the clear wording employed, that the substitution of conscience, or rather conscientious objection, for religion or belief would have made no obvious difference to the judgment.

The discussion will now consider how far 'a philosophical belief', such as that initially identified by the claimant in *McClintock* as the basis for his objections,[139] is capable of protecting conscience. The criteria used to identify such a belief were set out in *Grainger plc v Nicholson*:[140]

i. The belief must be genuinely held;

ii. It must be a belief and not an opinion or viewpoint based on the present state of information available;

iii. It must be a belief as to a weighty and substantial aspect of human life and behaviour;

[137] [2007] UKEAT 0223/07/3110; IRLR 29.
[138] Ibid. [6] (emphasis, mine).
[139] The Claimant's 'philosophical belief' was conceptualised as his belief in the incompatibility of making adoption orders involving same-sex couples and his obligation to act in the best interests of children (under the Children's Act 1989), ibid [9]. The EAT characterised this as 'an opinion based on some real or perceived logic or based on information or lack of information available' [45] and held that as such it failed to meet the criteria to be considered a bona fide philosophical belief.
[140] [2010] ICR 360 at [24] (Burton J).

iv. It must attain a certain level of cogency, seriousness, cohesion and importance; and

v. It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

There have been several tribunal decisions applying these criteria to determine admissibility under the Equality Act 2010,[141] and some quite specific beliefs have often been the focus of the legal analysis. As a result, *inter alia*, it has been determined that opposition to fox hunting and hare-coursing,[142] a belief in the 'higher purpose' of public service broadcasting,[143] and a commitment to vegetarianism,[144] qualify as bona fide 'philosophical beliefs'; however, a belief in wearing a poppy,[145] or a commitment to veganism,[146] do not qualify.

Considering these criteria, it would seem that most examples of conscience ought to be entitled to putative protection. Holding a position with which others may strongly disagree is unlikely to be entered into lightly so it is reasonable to assume it is genuinely held. Per the earlier discussion, conscience is more than simply a passing opinion or viewpoint, it tends to related to something weighty and substantial concerning the human condition and is likely to be cogent, serious and important. The criterion with potential to be problematic however, is the final one. This test derived from the decision in *Williamson v Secretary of State for Education and Employment,*[147] which was concerned with excluding from eligibility quite extreme examples of illiberal practice, for example one involving 'subjecting others to torture or inhuman punishment.'[148] Yet this criterion, as expressed in *Grainger*, has been shown to be capable of creative reinterpretation to exclude beliefs which might offend others. An example of this was the first instance decision in *Forstater v CGD Europe & Anor*,[149] where the claimant's belief that sex is in all circumstances biologically immutable was described by the

[141] Before 2010, under the Employment Equality (Religion and Belief) Regulations 2003 SI No.1660.
[142] *Hashman v Milton Park (Dorset) Limited t/a Orchard Park* (2011) ET Case No. 3105555/09.
[143] *Maistry v BBC* (2011) ET Case No. 1313142/10.
[144] *Alexander v Farmtastic Valley Ltd and others* (2011) ET Case No. 2513832/10.
[145] *Lisk v Shield Guardian Co and others* (2011) ET Case No. 3300873/11.
[146] *Conisbee v Crossley Farms Ltd & Ors* [2019] ET Case No. 3335357/2018.
[147] [2005] 2 AC 246.
[148] Ibid., [23] (Lord Nicholls).
[149] UKET 2200909/2019 (18 December 2019).

employment judge as incompatible with the human dignity and fundamental rights of others.'[150] It is submitted that this conclusion would not have been open to the employment judge if 'conscience' rather than 'belief' per se was in play. It should however be noted that this decision was reversed on appeal,[151] the EAT concluding that the relevant *Grainger* criterion should be understood 'only to exclude the most extreme beliefs akin to Nazism or totalitarianism or which incite hatred or violence, [and] very few beliefs will fall at that hurdle'.[152] Whereas this decision is, for many, 'a welcome development',[153] conscience may still provide a more secure basis for a claim, not least because the fifth *Grainger* criterion is clearly vulnerable to the potential for wide interpretation,[154] and the decision in *Forstater,* whilst affirmed by a differently constituted EAT in *MacKereth v DWP*,[155] may be revisited in future by a higher court.[156]

Conclusion

The importance of the conscience as a guide to, and often a scourge of, personal conduct is broadly understood and the imperative to avoid where possible the need for an individual to violate his conscience is largely accepted (with a few exceptions), albeit that some add additional requirements before recognising conscience, with reference to, for example, the nature of the content of that conscience or the direct involvement of the individual in the activity which offends conscience.

[150] Ibid., [84] (Tayler J).
[151] *Forstater v CGD Europe & Anor* [2022] ICR 1.
[152] Ibid. [119] (Choudhury J). An example post-*Forstater* of a belief capable of falling at this hurdle is a belief in English nationalism (*Thomas v Surrey and Borders Partnership NHS Foundation Trust & Ors* [2024] EAT 141.
[153] J Hurford, ''Worthy of Respect in a Democratic Society'? *Forstater* and the Expression of Controversial Beliefs' (2021) 26 *Judicial Review*, 277 [39].
[154] Not to mention the implicit value judgement – of what might be deemed 'worthy of respect' rather than merely 'tolerable' in a liberal society (see Hurford, 'Worthy of Respect in a Democratic Society'?)
[155] [2022] IRLR 721 (EAT).
[156] As Patten notes, in his conclusion to a detailed discussion of the judicial application of the *Grainger* criteria, the issues arising *inter alia* in *Forstater* have not yet been considered by the Court of Appeal or Supreme Court (see: K Patten, 'Protected Beliefs Under the Equality Act: Grainger Questioned' (2024) 53 Ind LJ 239). Sheldon J in *Thomas v Surrey and Borders Partnership NHS Foundation* Trust also appeared, in *obiter* remarks, to suggest Choudhury's analysis in *Forstater* might 'may not be the last word on the matter' [102]; see analysis in J Murray, 'The *Grainger* Test Challenged? *Thomas v Surrey and Borders Partnership NHS Foundation Trust'* (2024) 53 Ind LJ, 810.

As ‘conscience’ is specifically cited in the Article 9 ECHR there is a superficial logic to inferring it into the Equality Act on that basis alone, given the obligation to interpret domestic legislation in conformity where possible with the ECHR. However, it has been noted that the separate status of ‘conscience’ in Article 9 is unclear as the term is used only once and without reference to a right to manifest so this imperative is arguably insufficient on its own merits.

In practice, within the Equality Act, conscience receives some protection from ‘prohibited conduct’ if and when it can be shown to be a manifestation of either religion or belief. What constitutes a ‘manifestation’ is not entirely clear – the test which ought to be applied ‘a sufficiently close and direct nexus’ should in theory capture many, although perhaps not all, forms of conscience inspired by a religion or worldview, but courts appear to retain some allegiance to earlier tests, and may not necessarily recognise an expression of conscience if it is only ‘motivated’ by religion or belief. In such cases, consciences may be currently unprotected which is regrettable given the heavy burden which conscience may pose on an individual. Moreover, there may be expressions of conscience which cannot be located in an overall worldview and these too are likely to be unprotected at present. The introduction of ‘conscience’, alongside religion and belief, would allow conscience claims, whether or not they are motivated by religion or belief, to be advanced on the basis of conscience alone and, as argued earlier, this will effectively obviate the need to hurdle definitional tests such as the wider ‘manifestation/motivation’ requirement, or indeed the relatively modest ‘sufficiently close and direct nexus’ itself, and allow claims to proceed, without undue difficulty, to a merits hearing. The expansion of the category of religion and belief to include conscience would have the benefit therefore of widening protection, particularly against less favourable treatment (simply for holding a position of conscience), harassment and victimisation.

However, in terms of that most likely theatre of conflict between conscience when manifested in the workplace, particularly when inspired by religion, it is difficult to see why the inclusion specifically of conscience as a protected characteristic, or part of a protected characteristic, would

carry more weight than religion and belief when weighed against other rights (e.g. when undertaking proportionality analysis to decide if prima facie indirect discrimination is justified). Overall, the benefits to claimants of explicit recognition of conscience are likely to be real but modest in scope.