

12 | Religious Conscience and the Private Market

TED POSTON*

Consider the following case:

Orthodox Baker An evangelical goes to an orthodox Jewish bakery and asks for a cake on which is written in Hebrew “The LORD is great.” The evangelical requests that the words “The LORD” be written using the divine name. The orthodox baker explains that within his religious tradition it is forbidden to write the divine name, and thus he cannot fulfill this request.¹

May the state coercively force the orthodox baker to violate his religious tradition? I take it as a datum that any adequate theory of a religious conscience exemption must capture the judgment that **Orthodox Baker** is a successful case of such an appeal. Consequently, it is not permissible for the state to coerce the baker to write the divine name.

My goal in this paper is to argue for a general view about when a business owner’s appeal to religious conscience exempts her from a law to engage in a private market transaction.² My theory about a religious conscience exemption is restricted to putative laws to engage in private market transactions. I do not consider religious conscience objections to local, state, or national duties that citizens may have because duties of citizenship may trump some religious

* Thanks to Tully Borland, Kenny Boyce, Lara Buchak, Aaron Cobb, Robin Dembroff, Allan Hillman, Anne Jeffrey, Michael Pakaluk, Tim Pawl, Alex Pruss, Dan Speak, Neal Tognazzini, Chris Tucker, Josh Thurow, Kevin Vallier and William Wainwright for helpful comments on an earlier draft.

¹ The modern Rabbinic code *Mishnah Berurah* states:

It is forbidden to read the glorious and terrible name as it is written, as the sages said “He that pronounces the name as it is written has no portion in the world to come.” Therefore it must be read as if it were written ‘Adonai.’ (*Mishnah Berurah* 5:2)

² See K. Vallier, “The Moral Basis of Religious Exemptions,” *Law and Philosophy* 35, no. 1 (2016): 1–28 for a comparable recent account.

conscience objections. Religious conscience objections concerning taxes or military service is different in kind from a conscience objection to rendering a private service because a conscience objector to taxes or military service significantly benefits from the sacrifices of others. There is no similar benefit, though, by opting out of a private market service. Indeed, in the majority of cases the conscience objector requests exemption from a transaction that is momentarily profitable. The issue of exemptions to anti-discrimination laws in the private market has been the subject of recent public debate centering on Arizona's bill SB 1062. This paper is not a defense of SB 1062; rather it is a philosophical attempt to formulate necessary and sufficient conditions for granting a conscience exemption to a law requiring a business to render a paid service in the private market. I take myself to be engaged in a philosophical project of understanding the success conditions for religious conscience exemptions.

I defend the view that a religious conscience exemption succeeds if the act concerns a sacred matter according to an epistemically live religious tradition.³ A tradition is epistemically live if and only if it is believed by a group and it is not common knowledge that it is false. This view will no doubt seem too permissive to some and not permissive enough to others. But we do well as a society when we openly debate controversial issues on the basis of evidence and argument and with respect for those with whom we have profound disagreements. It is shameful that recent public discussion over momentous moral and religious issues appear to proceed on the assumption that the disagreeing party lacks good faith. In focusing on the role of common knowledge, I hope to highlight the fact that some minority communities may suffer epistemic injustice if the majority enacts exemptionless laws that assume the minority community is deluded.

12.1. Conceptual Clarifications

I begin by making some distinctions. The issue before us is the question of the conditions under which a religious conscience objection exempts one from a legal obligation based on law to provide a private service. A *legal obligation* is distinct from a *moral obligation*. One is morally obligated to speak truthfully to one's friends. If one does not speak truthfully to a friend, one's friend can be rightly offended and rightly complain that you ought to have told the truth. However, it does not follow from the fact that one has a moral obligation to speak the truth to one's friend that one also has a legal obligation to do so. A legal obligation empowers the state to impose loss of freedom or property upon those who violate such obligations. In view of the connection

³ There may be other broadly practical reasons to permit a religious conscience objection. If there are no such considerations then the account I offer is necessary as well as sufficient.

between a legal obligation and susceptibility to loss of freedom or property, it is dubious that every moral obligation should be enshrined in law. A state does well to permit some moral failures to be addressed by the social norms of communities.

Just as moral obligations do not imply legal obligations, so too *epistemic obligations* do not imply legal obligations. We have an epistemic obligation to believe in accordance with our evidence. Sometimes we cannot help but believe something contrary to our evidence. One's evidence overwhelmingly indicates that the earth is not flat. Given all one has to go on, one should reject the view that the earth is flat. Yet suppose one believes that the earth is flat in spite of all the evidence. It does not follow that the one ought to be subject to legal liability for a failure to respect one's evidence. Being legally in the clear is compatible with being stupid, unreasonable, and ignorant.⁴

The distinction between, on the one hand, *legal obligation*, and, on the other hand, *moral* and *epistemic obligation* is important. The view of religious conscience exemptions I defend is compatible with the conscience objector being held to account morally and epistemically. That is to say, we may think that the objector cannot sensibly take himself to be under a religious obligation to refrain from performing some act; for we think that his reasoning is based on a false or unreasonable premise or that the objector suffers a moral failing. In **Orthodox Baker** the baker takes himself to be religiously obligated not to write the divine name because his religious tradition explicitly forbids it. But such a justification may assume that there is some such divine being, and we may think that such a justification is unreasonable because no reasonable person can believe that there is a morally perfect being after the horrors of Auschwitz. Even so, in view of the significant value of autonomy, respect for autonomy requires that we do not impose loss of freedom or property because of an intellectual disagreement. Respect for a person's autonomy does not require that the person is morally or intellectually in the clear. If the orthodox baker is making business decisions on the basis of a firm belief in the God of Abraham, Isaac, and Jacob then the atheist can hold the orthodox baker to account both morally and epistemically. But the state ought not take away the baker's business because of this putative moral and epistemic failing. The state may grant an exemption to a law even though it proceeds on grounds that many find morally or epistemically objectionable.

This leads to the final conceptual clarification. Respect for autonomy requires that the success conditions for religious conscience exemptions do not include controversial interpretative positions regarding sacred texts. Suppose the orthodox baker derives his religious objection from a minority interpretation regarding the Hebrew Scriptures. May the state's decision over

⁴ This compatibility claim is true even if in some cases the law imposes penalties for some epistemic negligence. For example, a captain should know whether his ship is seaworthy.

the exemption take a side in a live debate over the proper interpretation of some sacred text? No. The state should allow, as much as possible, differences between interpretative views about how to understand some sacred text. Below I propose a limitation on when the state may discount some religious tradition. In general, though, the question of whether to grant an exemption ought not concern positions on the meaning of some religious text.

This issue is of particular importance with respect to the anti-discrimination laws that are presently being applied to progressive ideals of sexual morality and gender identity. Sexuality and identity are morally and religiously significant, and many epistemically live religious traditions hold views of sexual morality and gender identity that conflict with progressive ideals (e.g., the natural law tradition associated with Aristotle, Aquinas, and the Catholic church). Even so, some progressives are deeply religious and take the sacred texts to enshrine rather than conflict with those ideals. On my view the state should steer clear of such interpretative issues until it is settled by society. It is settled by the achievement of common knowledge.

12.2. Additional Cases

Orthodox Baker teaches us that there are legitimate religious conscience exemptions to providing a private market service. In **Orthodox Baker** the baker ought to be granted an exemption to an anti-discrimination law that would require him to violate his religious tradition.

Consider a different case:

Catholic Photographer A Catholic photographer receives a service request from a non-baptized couple to photograph their wedding ceremony. The Catholic photographer explains that she can do individual photographs but cannot in good conscience photograph the wedding. She explains that she believes that marriage is a sacred matter between two baptized individuals and she will only photograph a wedding that occurs within the confines of canon law within the Catholic Church. She suggests the names of three other photographers in the area who may provide an equally good service for this couple.

Ought the Catholic photographer be held legally liable for refusal of service? One difference between this case and **Orthodox Baker** is that the Orthodox baker can point to an explicit document in his religious tradition that forbids writing the divine name (see footnote 1 above). To my knowledge there is no explicit prohibition within Catholicism against photographing the wedding ceremonies among the non-baptized. In this case, the Catholic photographer has made up her own mind that because of the sacred nature of marriage she cannot in good faith photograph weddings between the non-baptized. In defense of her policy she points to *Codex Iuris Canonici* 1055 which reads:

The matrimonial covenant, by which a man and woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.

The Catholic photographer takes herself to be under a religious obligation with respect to weddings because of the sacred nature of the union between husband and wife.

Does the difference between explicit, written prohibitions in **Orthodox Baker** and **Catholic Photographer** justify the state in holding the Catholic photographer liable but not the Orthodox baker? I don't see that it does. Both cases concern a sacred act: either writing the divine name or participating in a marriage ceremony. The state should, within the confines laid down in the next section, allow for as much personal freedom in the domain of the sacred as possible. The state, thus, should not compel the Catholic photographer to photograph a ceremony she has freely decided not participate in. This is compatible with holding the Catholic photographer to account both morally and epistemically for her decision.

One objection to **Catholic Photographer** is that she is not *participating* in the marriage ceremony; rather she is a paid service provider. So, even though, her religious scruples may lead her to object to a union between non-baptized individuals because she is neither the wedding officiant or any other formal participant she has no recourse to refuse to provide her services.

This objection is misguided. Participation conditions are influenced by the morality of the act. Suppose a photographer is asked to photograph a fraternity hazing ritual in which the pledges are forced to consume enough alcohol to kill a normal person and then are subjected to demeaning acts. It would be a poor defense of innocence for the photographer to claim that she wasn't participating in the ceremony. In fact, if she did nothing to prevent this wrong we would rightly hold her to account. Moreover, her culpability for doing nothing is not diminished even if she thought her objections would be of no consequence.

There is a general argument for a religious conscience exemption in connection with freedom of speech.⁵ An open society legally permits people to assert claims that they may be morally or epistemically blameworthy for asserting. An open society allows that legal permission is wider than moral and epistemic permission. A person may assert that the earth is flat or defend the permissibility of torture. Such a person is intellectually and morally accountable for her acts, but, insofar as she makes assertions in the private sector, the state lacks a compelling interest in holding her legally accountable. Similarly, a person has a right to devote her time and energies as she sees fit in the private

⁵ I am indebted to Alex Pruss for the observations in this paragraph.

market in accord with law. A person may take up the hobby of photography and, after a while, expand it into a business. Suppose her interest lies in photographing Catholic wedding ceremonies. If she is requested to photograph a birthday party she ought to be within her legal rights to refuse. It is an unjust intrusion on private liberty to hold the photographer legally liable to expand her private business services in ways she does not desire to do so.⁶

To stress this point about freedom within the private market to restrict the scope of one's business, consider the following case of the vegan portrait painter:

Vegan Painter Samantha was a philosophy and art double-major in college. She has strong moral convictions, and on the basis of the moral arguments, she's recently become a vegan. After college she gets a job at a major corporation, but, after several years in the business world, she realized her dream and opened an art studio specializing in portraits. A hunter comes into for her business and requests for a portrait commemorating his son's first big kill. She declines, explaining her moral views in terms that she hopes the hunter understands.

This case illustrates that a person has a *pro-tanto* right to restrict her business in ways that she sees morally fit. It strikes me as deeply misguided for the state to take an interest in forcing Samantha to paint a portrait of something she finds morally reprehensible.

We have before us three cases in which the state ought not hold a person liable to perform a private market service. Let us consider a fourth case that pushes in the opposing direction:

Baptist Baker A Baptist baker puts a sign in his bakery window that reads "no service for Catholics." A priest enters the shop and orders a cake. The Baptist baker explains that he has significant theological disagreements with Catholic theology and has decided that he will not serve any baked goods to Catholics. He suggests that there are three other bakeries in town that will offer baked goods to Catholics.

Is this case one in which a religious conscience exemption ought to be granted? My natural judgment is 'No.' The Baptist baker does not object to some sacred matter; rather the objection is to providing a non-sacred service to a group of people for theological reasons. There is an essential difference here for understanding successful religious conscience exemptions. In this case baking bread is not a sacred matter according to Baptist baker. His objection is to providing service to Catholics. His grounds for objecting have nothing

⁶ This constraint on the state's proper authority is compatible with requirements arising from the tax code. For example, if the photographer expands her business the state has the proper authority to hold her legally accountable to provide (e.g.,) proper working conditions for her employees.

to do with the act that he is asked to perform. Rather his objection is that he would be providing a service for someone with whom he has a profound disagreement. The act itself has no religious significance. This can be seen in that he would perform the same act—bake the cake—were he asked by a different person or by a priest in disguise.

There are tricky issues here concerning act individuation. I assume that baking bread is a kind of action but baking bread for Catholics is not a kind of action. I take it for granted that there are natural and social kinds. Water is a natural kind; water mixed with lemon is not. The act of promising is a social kind; promising on Tuesday is not. In addition to social kinds, there are sacred kinds. Baptism, marriage, and confession are sacred kinds. On the view I develop in this paper, a necessary condition for a religious conscience objection is that it concerns an action that is a sacred kind. This explains why it is wrong on my view for a Catholic baker to refuse to serve a homosexual man. There is no sacred kind in the offing. But my view implies that an exemption ought to be granted for an act that involves a sacred matter such as marriage. I believe this properly balances the state's interest in anti-discrimination and its interest in maintaining the dignity of individual conscience.

Baptist Baker highlights a case in which the state's interest in allowing for religious conscience exemptions ought to require that a sacred act is involved. Using religion to justify discriminatory practices is not tolerable. The state does have an interest in anti-discriminatory practices because the rights of minorities can be harmed in the private market. Minorities are harmed by persistent service denials and the state acts justly to prevent such policies. Yet the state also has a right to protect the free speech and religious autonomy of its citizens, especially those in the minority. My position on religious conscience exemptions, developed in the proceeding section, balances these interests.

The role of the sacred kinds is important for understanding the difference between **Orthodox Baker** and **Catholic Photographer** on the one hand and **Baptist Baker** on the other hand. In the first two cases, the service request is to perform or participate in an event that concerns a sacred kind. In **Orthodox Baker** the sacred kind is writing the divine name, which according to Orthodox Judaism is deeply religiously significant. In **Catholic Photographer** the objection concerns the sacred kind marriage. We may still think that the Catholic photographer's appeal to the sacred nature of marriage is epistemically irrational, but insofar as she is moved by religious conscience objections she should not be legally accountable for a refusal to participate. In **Baptist Baker**, though, there is no relevant sacred kind.

Let us consider a final case:

Seminole Sign Company A public debate rages over a sacred Seminole burial ground. One group of people want the land to be publicly protected and another group wants the land to be zoned for a shopping mall. There is one

company in the area that makes signs and it is owned by a Seminole family. They receive a service request to create a large sign touting the virtues of a shopping mall. They deny this request.

Ought the Seminole sign company be held legally accountable to provide service in this case? My judgment is that they ought not be held legally accountable. In virtue of the religious significance of the burial ground, they are well within their rights to deny this service request even though it effectively diminishes the presence of the opposing proposal for the burial ground. The sign company has a right to decide the content of the signs they print. Some acts in the private market infringe on the religious convictions of others. These individuals ought not to be held legally to account for opting out of a private market service. The owners of the Seminole sign company would be contributing to the defilement of sacred grounds.

12.3. An Account

In the following I offer an account of when a religious conscience exemption ought to be granted. From the previous section we learned that the religious conscience exemption must be focused on a sacred act. On my view it is crucial that the conscience objector is able to specify a sacred kind that her action would infringe upon.

Let us start with the following account:

Sacred kind conscience exemptions An act falls under a religious conscience exemptions if the act is of a sacred kind according to a specific religion.

It is compatible with this account that there are many acts that satisfy the conditions but are, in fact, never objected to.

My account requires that the objection is to a type of *sacred* act. A sacred act is one that essentially requires religious terminology to describe and by which acts are set apart as either forbidden or holy. Emile Durkheim recognizes the centrality of the sacred to a religious life. He writes:

A religion is a unified system of beliefs and practices relative to sacred things, that is things set part and forbidden—beliefs and practices which unite into one single moral community . . . all who adhere to them.⁷

On my view, a sacred act is a kind and thus it cannot mention particular people. When a person requests a religious conscience exemption the act that they object to must be a kind. Like other kinds it cannot be gerrymandered to pick out particular events or people. The kind must be general. Standard examples of religious kinds are general: baptism, marriage, confession, etc.

⁷ E. Durkheim, *The Elementary Forms of the Religious Life* (New York: Free Press, 1963): 47.

The kind requirement specifies that the act is suitably general. One objection to granting religious conscience exemptions is that it will allow for discriminatory practices against the marginalized in society. As I explain later in the paper, the kind requirement provides a response to this objection.

Why think this account is true? The account I offer is supported by inference to the best explanation of the relevant cases. It strikes the right balance between the values of individual autonomy and anti-discrimination. It yields the correct verdicts in the cases under consideration. In each case the objected act concerns a sacred matter. In **Orthodox Baker** the baker reasons that on account of the upmost sacredness of the divine name, one ought never speak or write it. In **Catholic Photographer** the conscience objection may be formulated thusly: because of the sacred nature of matrimony one ought not participate in any wedding ceremony among non-baptized individuals. In **Seminole Sign Company** the conscience objection is that: because of the sacredness of this burial ground one ought not print any sign advertising for it to be destroyed.

Baptist Baker is a probative case to think about for my account. Above I registered my judgment that in this case Baptist baker should be held legally liable for failure to provide service. This judgment was based on the ground that the general act of baking a cake is not a sacred matter. But suppose Baptist Baker claims that baking a cake is a sacred kind. What should we say to this response? Is the state in any position to discount the baker's new justification? This is a crucial question because the state's interest in anti-discrimination will, no doubt, conflict with some religious conscience objections. The state has an interest in formal justifications as much as possible. Is there a way forward, a way that preserves the core of religious conscience objections and yet gives the state legitimate grounds to dismiss certain religious conscience objections so that it may ensure anti-discrimination policies? I think there is.

The way forward is to acknowledge a legal role for *common knowledge*.⁸ Common knowledge is distinct from common opinion along several dimensions: it requires truth and evidence. A false opinion widely shared is not known. Further, groundless belief cannot be common knowledge. In the past it was common opinion that the planets orbited the earth, but it was not common knowledge. Common knowledge is special because it is universally shared by all participants. In America, it is common knowledge that one drives on the right-hand side of the street. This knowledge is broadcast and everyone knows that everyone knows this.

Common knowledge is important for social life because it provides the basis for coordinating shared action. This feature of common knowledge is compatible with the fact that there are some people who, at some times, do

⁸ See D. Lewis, *Convention* (Cambridge, MA: Harvard University Press, 1969) for an analysis of common knowledge.

not know to drive on the right side of the road. Young children and drunks fail to know this. So, common knowledge is compatible with small pockets of failed knowledge, if the failed knowledge is easily correctable. Common knowledge is stronger than popular opinion or popular knowledge. Common knowledge functions as both a description—everyone knows and knows that they know—and regulative ideal: the small pockets of failed knowledge must be corrected. To the extent that there are enduring small pockets of failed knowledge this pushes back against the putative common knowledge being the genuine article. If a matter is common knowledge then the pockets of failed knowledge are not resilient. The resilience of minority opinion provides evidence that the matter is not common knowledge but popular opinion or popular knowledge. Popularity is not the correct standard for legal action.

The state may appeal to common knowledge to discount some religious conscience objections. If it is common knowledge that the conscience objector reasons from a false premise and allowing the objection to go through would undermine the state's anti-discrimination policies then the state may deny the conscience objector.

In support of this consider the case of the numerologist grocer:

Numerologist Grocer A numerologist grocer is an adherent of Pythagorean mysticism. The numerologist grocer views the number 3 as the ideal number, being the first odd prime and the number of sides and vertexes of a triangle. The grocer holds that every third business opportunity is sacred and ought to be denied because of the pristine nature of thirds. A person goes to the numerologist grocer to buy his week's food. The numerologist grocer denies this customer service, explaining that his Pythagorean religion requires that he cannot enter into this business transition.

In this case there is a religious tradition that specifies a sacred kind act and it thus forms the basis for a religious conscience objection. But the religious tradition applied is known to be false. Pythagorean mysticism may involve a special reverence for mathematics, but everyone knows that numerology is bogus. Moreover, everyone knows that everyone knows this. Because it is common knowledge that Pythagorean mysticism is false, the state may rule out conscience objections based on such appeals when it conflicts with reasonable anti-discrimination laws.

To capture the role of common knowledge in religious conscience objections we must add that the religious tradition that is invoked by the conscience objection does not conflict with common knowledge. The appeal to common knowledge for the purpose of law is important for balancing the dual goals of religious autonomy and anti-discrimination. The state ought not to discriminate unfairly against minority groups and yet this should reflect epistemic disagreements within communities. This is especially important in the case

of epistemic disagreements over social kinds. In contemporary Western society, there are significant disagreements over the nature of human persons and associated views about the nature of social kinds. It is important that this intellectual debate play out without improper state interference.

My emphasis on the role of common knowledge is closely related to Kevin Vallier's recent emphasis on the *principle of intelligible exclusion*.⁹ This principle states:

The Principle of Intelligible Exclusion: law-making bodies must (i) only impose laws on members of the public that members of the public have sufficient intelligible reason to endorse and (ii) repeal or reform laws that members of the public have sufficient intelligible reason to reject.¹⁰

The notion of an intelligible reason is “ones that members of the public can see as reason for some agent even if they reject those reason for themselves.”¹¹ Vallier observes that reasonable and rational people will often disagree on fundamental matters of what is good, right, and true. The notion of an intelligible reason should be weak enough to capture the idea that an atheist can recognize devout Muslims have intelligible reasons for their views.¹² On Vallier's view a conscience objection ought to be granted only if the subject has an intelligible reason to oppose it. Crucially, the notion of an intelligible reason is that of a *normative reason*. A normative reason is one that justifies a person in thinking as they do. It is different from a *motivating reason*, which are reasons that cause a subject to act as they do. Vallier specifies that the requirement of intelligible reasons rules out conscience exemptions from the insincere, immoral, or blatantly irrational. While people offering such conscience exemptions have motivating reasons, they lack normative reasons. Immoral and irrational reasons do not justify a person in acting as they do.

There is much appeal to the requirement of intelligible reasons. My requirement that a view is epistemically live (i.e., doesn't conflict with common knowledge) is aimed too at ruling out objections from the insincere, immoral, or irrational. Yet, I think the focus on common knowledge is better in two respects. First, common knowledge and its failures are less normatively loaded than rationality. In our current political climate, some people hold that any resistance to progressive ideals of sexuality and gender identity must be irrational. Thus, a requirement of normative reasons for a conscience exemption would not be met by anyone that disagreed with the current political climate. And yet a wide swath of sincere, moral, and educated people adhere to moral and religious traditions that conflict with progressive ideals. So, if conscience

⁹ Vallier, “Moral Basis,” 7.

¹⁰ *Ibid.*, 9.

¹¹ *Ibid.*, 7.

¹² *Ibid.*, 7.

exemptions tracked normative reasons then minority communities would suffer epistemic injustice, the injustice of treating as irrational views that are rational.¹³ Second, facts about common knowledge track facts about where society is intellectually. If there are pockets of contemporary society that do not share majority opinion then applying a popular standard of minimal rationality may not capture their reasons. Yet the standard of failures of common knowledge does track this. It is important that the law does not commit epistemic injustices against minority communities. If some minority communities do not track majority belief then the standard of common knowledge provides an educational opportunity to the majority to teach their ideals to the minority communities. Persistent failures to spread ideals is evidence against those ideals.

The role of common knowledge in the law and especially with respect to religious conscience exemptions raises important questions that are beyond the scope of this essay. One issue is how the state ought to track common knowledge. Common knowledge changes over time, but a defeasible guide to common knowledge in the realm of religion is what counts as a contemporary religious tradition. By any reasonable measure, Catholicism is a contemporary religious tradition. Consequently, policies that explicitly presuppose that the Catholic tradition is false do not provide an adequate basis for denying a conscience exemption.

Is Scientology an epistemically live religious tradition? Scientology is akin to pseudo-science. It involves claims that conflict with common knowledge. Scientology holds that Xenu, the leader of the Galactic Federation, sent billions of people to earth 75 million years ago. Every reasonable person knows that this claim conflicts with our knowledge of the world. It remains true, though, that even if a claim—however outrageous to common opinion—does not conflict with common knowledge then the adherent can be held to account morally and intellectually. On my view, if such a thing happens the state may not use the falsity of that claim as a basis for legal action.

Another challenging issue is how to respect common knowledge so that it is both substantive and not restrictive. It is common knowledge in America that Obama is president. But there are people who don't believe this. These people still recognize, though, that Obama is acting in the office of the president (though illegitimately in their view). Moreover, there are people who are ignorant about the current president. I take it that these pockets of failed knowledge do not threaten common knowledge. What is the difference then between this case and the case of Catholic photographer? One might point to the fact that birthers lack a progressive research program whereas the

¹³ See L. Kantymir and C. McLeod, "Justification for Conscience Exemptions in Health Care," *Bioethics* 28, no. 1 (2014): 16–24 for a similar criticism of a normative reasons account of conscience exemptions in medicine. Thanks to Anne Jeffrey for bringing this article to my attention.

Catholic church has a robust developing research program (e.g., developing a natural law tradition). This suggests that one way to explain the difference is whether a position is pseudoscientific. Given the way science is invoked in contemporary debates this suggestion has some promise, but I leave it for future work to develop an adequate account of common knowledge and its failures.

This gives us the following account:

Sacred kind conscience exemptions An act falls under the religious conscience exemption if the act is of a sacred kind according to an epistemically live religious tradition.

I've argued that this account is confirmed by inference to the best explanation. Our analysis of probative cases shows that the conscience objector must take herself to object to a sacred act according to an epistemically live religious tradition. If these conditions are not met then the objector's conscience does not override the state's interest in anti-discrimination.

12.4. Conscience Exemptions and Discrimination

An important objection to granting conscience exemptions is that it undermines the state's interest in anti-discrimination. In particular, the objection is that my account would permit a segregated private market that would harm minority communities. Is this a good objection? It bears observing the obvious: the private market is already segregated on the basis of religious practices. One does not go to a Halal deli and ask for pork. One does not go to a Christian bookstore and ask for a copy of *The God Delusion*. The state does have an interest that the private market is subject to law: weights and measures must conform to universal standards, theft and dishonest representation and so on are legally punishable. But granting some religious conscience exemptions appears to benefit rather than harm minority communities.

My defense of a religious conscience objection is formed within the background of a firm commitment to a basic liberty principle. John Rawls states the principle thusly: "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."¹⁴ The liberty principle rules out various historical practices that denied basic liberties to groups of people. Even if one attempts to defend denials of basic liberties on religious grounds, the liberty principle does not permit the permissibility of such defenses. Moreover, my specific account is concerned exclusively with religious conscience exemptions to private market services. These are services a seller provides to a buyer. The range of cases that

¹⁴ J. Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1999): 52.

concern my account are therefore distinct from the basic liberties that any just society must guarantee to its members.

Yet even within a firm commitment to the liberty principle, does my account permit religious exemptions that support unjust practices?¹⁵ One does not have to look far into the past to see troublesome cases. The segregated private market in America from 1865 to 1965 is one such case. Business owners routinely refused service to Americans of African descent. Some attempted to defend this practice by appeal to the Bible, claiming that the Bible supports the separation of the races. While the textual support for that claim is slim, it is a regrettable fact that people did offer religiously based justifications for unjust business practices.¹⁶

AQ: Please provide publisher details in note 18.

Does my account imply that religiously motivated segregationist business owners ought to be exempt from a law to provide equal service? On my account, a segregationist objector is required to object to a sacred matter. Defending segregationist business practices on the basis of a generic reference to the separation of races does not engage a sacred kind. Kwame Appiah observes some racist doctrines—extrinsic racism—are defended on the basis of bad science, appealing to a “racial essence.”¹⁷ These kind of objections couched in religious terminology do not gain any shelter from my account because there is no sacred kind in the vicinity. Moreover, even if, there were some sacred kind in the offing in defense of extrinsic racism it relies on bad science, science that is known to be false. So the common knowledge condition provides extra protection against dubious religious traditions. It is worth observing that the vast majority of Christian groups strongly condemned segregationist practices, arguing, in part, that it was inconsistent with revealed religion. It is compatible with a justification being commonly known to be false that some people offer it as a legal defense. My account renders the verdict that in such cases no religious conscience objection may succeed.

There are adequate grounds for thinking that my account does not provide shelter for segregationist business owners. My account requires that a person seeking a conscience objection provide a general sacred kind that the objection is based on. There will be cases in which a person appeals to an epistemically live religious tradition that conflicts with popular opinion. People may find it outrageous that such a person is legally permitted to deny service in such a case. In **Vegan Painter** some people may find it shocking that the portrait painter receive a legal exemption from painting a commemorative work of a son’s first big kill. This denial offends the hunter. Yet in this case the vegan’s

¹⁵ Thanks to William Wainwright for forcefully pressing this objection.

¹⁶ See M. A. Noll, *God and Race in American Politics* (2008).

¹⁷ See K. A. Appiah, “Racisms,” in *Anatomy of Racism*, ed. D. Goldberg (Minneapolis: University of Minnesota Press, 1990): 3–17.

position does not conflict with common knowledge. On my view, a successful conscience objection should protect the interests of minority views when they are epistemically live options.

The alternative view that majority knowledge can enact exemptionless laws creates tensions in the state between those in power and those subjected to power. If an open society permitted simple majority knowledge to impose legal requirements then those in the minority would be disenfranchised from sharing the basis for legal obligations. The requirement of common knowledge prevents this. The presence of common knowledge is immensely valuable and we should make every effort to ensure that knowledge is broadcast as widely as possible. If the majority knows then this knowledge can be dispersed. Given the value of common knowledge, there is a moral requirement to broadcast this knowledge.

The effort to ensure common knowledge for legal action follows from a principle of priority for the worse off. Some epistemic communities are better than others. When there are differences in epistemic communities, those who are better off are morally obligated to disperse their knowledge to the worse off. To the extent the minority view is protected under law, that does not shelter such a view from market forces. The law does not impose obligations on buyers to procure services from minority groups. If the vast majority think that this minority obviously fails a moral or intellectual norm then they have the full recourse to private market action to impose their views.

The core concern with my account is the possibility of an enduring epistemically vicious community.¹⁸ Suppose the virtuous communities have made every effort to broadcast knowledge to the vicious community. Should virtuous communities be prevented from coordinated action in the private market by a religious conscience objection exempting the enduring epistemically vicious community? My view is that insofar as the liberty principle is upheld then my account does specify a sufficient condition for removing a legal obligation from providing a private market service. That an exemption is granted is compatible with economic action against such businesses. We should be wary of resolving every private market dispute by the force of law. By the nature of the conflict between majority ideals and minority objections, preserving minority private market exemptions supports a small market. If the objections are epistemically unreasonable then there is significant reason to think that such communities will gradually assimilate into the larger culture. Granting exemptions in these cases will have a relatively short life. To impose majority opinion by exemptionless laws attempts to accomplish by force what market economics will gradually accomplish by reason.

¹⁸ For example, the anti-vaccine movement.

12.5. Conclusion

Respect for autonomy requires that the state allow for diverse opinions, even when that diversity leads to a failing in moral or epistemic norms. I've argued for a general view according to which the religious conscience objection succeeds. If the objection is to a sacred act according to an epistemically live religious tradition then a religious conscience exemption to a private market service should be granted.