Equality Act 2010: Law, Reason and Morality in the Jurisprudence of Robert P. George

Submitted by James Peter David Gould, to the University of Exeter as a thesis for the degree of *Doctor of Philosophy* in Law, in *April 2016*.

I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

(Signature) ……

Thesis Abstract

Title: Equality Act 2010: Law, Reason and Morality in the Jurisprudence of Robert P. George

This thesis provides a critical application of Robert P. George's views to English equality law. The research question is what George, with his view of religion as a basic human good, might think about the religious liberty cases taken under the provisions of the Equality Act 2010.

In addressing this question, it will be necessary to look at those - to some eyes - irreconcilable tensions which have emerged between laws protecting religious freedom. A number of legal claims have been brought by employees who have been instructed to carry out new legal obligations which they have been unwilling to perform. Questions have arisen regarding the current state of reasonable accommodation and proportionality analysis within indirect discrimination law. To examine these questions, this thesis will be in two parts: first, it will consider Robert George's distinctive contribution to new natural law theory (NNL) and critically analyse George's NNL approach that arises from this. To do so the key themes: a) practical reason and b) natural rights, will be considered in George's work. Second, by reading George's views on practical reason in line with his approach to natural rights, from this position this thesis will give an applied example of NNL, displaying George's critique of the relevant equality law and arguing for an innovative understanding and approach to religious equality law. This is in an effort to find whether George's theory is useful in exploring English religious equality law. By doing so this will reconstruct George's NNL approach through using religious equality law as an applied example.

This thesis argues that at a time when religious liberty often loses out in a balancing of rights, legitimate interests and protected characteristics, a superior way to approach equality law in this area may be through an application of a modified version of George's NNL thought presenting religion as a public good. This will emphasise the priority of the good in religious conscience over legal rights within law viewed by George as a public morality. Viewing religion not only as a basic human good but also as a public good could provide the basis for future accommodation towards freedom of religious conscience and solve the tensions regarding the protection of religion or belief at work. Religion and religious freedom will be shown to be a form of flourishing within an understanding of the public good.

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Definitions

Aristotelian – refers to the work of, or work carried out in the tradition of, Aristotle.

Basic human goods (also referred to as ‘basic goods’) – self-evident ends that provide basic reasons for action as they are constitutive aspects of human flourishing.

Consequentialism (Antonym: Non-Consequentialism) – a class of normative ethical theories holding that the consequences of one's conduct provide the ultimate basis for any judgement about the correctness of that conduct.

EAT – Employment Appeal Tribunal.

ECHR – European Convention on Human Rights, 1950 (officially titled The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950).

ECJ – European Court of Justice.

ECtHR – European Court of Human Rights.

Epistemology – the philosophical theory and study of knowledge.

Equality Law – numerous array of Acts and Regulations, which formed the basis of English anti-discrimination law protecting against discrimination in employment on the grounds of religion or belief, sexual orientation and age. The relevant law is now to be found in the Equality Act 2010.

ET – Employment Tribunal.

Freedom of Religion – a principle that supports the freedom of an individual or community, in public or private, to manifest religion or belief in teaching, practice, worship, and observance. The concept is generally recognised also to include the freedom to change religion or not to follow any religion (Art 18 Universal Declaration of Human Rights, 1948).

First Principle of Morality – an ethical principle that one always ought to choose and otherwise will in a way that is compatible with integral human fulfilment.

First Principle of Practical Reason [FPPR] – the intrinsic, basic goods that render human choices intelligible by providing ultimate reasons for action. The first principle is: ‘good is to be done and evil is to be avoided’.

Grisez School – a group of scholars, initially consisting of Joseph Boyle, John Finnis and Germain Grisez.

HRA – Human Rights Act 1998.

Human Flourishing (*Eudaimonia/Eudaimonaiea)* – The ultimate good for human beings.

Hume’s Law – a meta-ethical problem identified by David Hume, this highlighted the problem of moving from a normative statement on the basis of a descriptive statement.

Incommensurability – the inability to weigh one good against another.

Incommensurability Thesis – a device within NNL which prevents comparison between the basic goods.

Integral Human Fulfilment – an ideal that guides the standards by which choices under the first principle of morality are made.

Legal Positivism – the position that law and morality are not intrinsically linked. This often involves the rejection of any moral consideration within the law and law making.

Naturalistic Fallacy – G.E.Moore identified the problem of a philosopher attempting to prove a claim about ethics by appealing to a *definition* of the term "good" in terms of one or more *natural* properties. (Also see Hume’s Law for other common use of the Naturalistic Fallacy.)

New Natural Lawyers – natural lawyers following in the tradition of the Grisez School.

NNL – New Natural Law theory.

NLNR – John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980).

Phronesis – Ancient Greek word for wisdom or intelligence/the virtue of practical thought. It is often translated as ‘practical wisdom’.

Practical Reason – the philosophical use of reason to decide what to do and how to act.

Prudentia – See *Phroenesis*

Public Reason – a common mode of reasoning used by members within a society to reach a majority consensus. It was developed by John Rawls in *A Theory of Justice* (Harvard University Press, 1971).

Political Liberalism – philosophy set out in John Rawls, *Political Liberalism* (Columbia University Press, 1993). The theory of public reason derives from political liberalism.

Scholasticism – a system of theology and philosophy arising from medieval sources, based on Aristotelianism. Thomas Aquinas is considered to be a leading figure within scholasticism.

Rawlsian – work conducted by, or following in the theory, of John Rawls.

Religious Liberty (see Freedom of Religion).

Self-evident – is known to be true by understanding without proof or argument.

Speculative Reason – a form of reasoning that involves the intellect acting in a hypothetical mode to guide the practical reasoning.

Synderesis – the natural capacity or disposition (*habitus*) of the practical reason to apprehend intuitively the universal first principles of human action.

Theoretical Reason – see *Speculative Reasoning*.

Thomist Moral Realism – a form of moral theology following that of Saint Thomas Aquinas.

Thomist/Thomism – the theology of Saint Thomas Aquinas or of his followers.

UDHR – Universal Declaration of Human Rights 1948.

Virtue Ethics – a theory that sees the primary focus of ethics to be the character of the person rather than that person's actions or duties.

Chapter 1 – Introduction

1.1 **Aims and objectives**

This thesis uses Robert George's new natural law (NNL) thought to analyse the right to religious freedom in the Equality Act 2010 and related cases. With George's view of religion as a basic human good,[1] can this thought be useful to critique the religious liberty cases taken under the provisions of the Equality Act 2010? Although George develops his account of NNL reasoning in the context of US law, my claim is that his work can be used to help resolve problems and tensions within English equality law, particularly the insufficient weight given to religious liberty. To achieve this aim, George's thought is applied to the Equality Act 2010 in this thesis. George's work is not without problems, however, and modification of George's thought is necessary in order to mount a telling critique of the place of religious liberty within equality law.

George embodies a natural law tradition that has always resisted moral relativism and defended certain moral absolutes.[2] George has, for example, contributed to ethical debates surrounding abortion, human cloning and sexual morality.[3] This has provided a notable exposition of the practical legal implications within NNL. In this thesis I will not explore the practical outcome of these debates because as outlined below they are focused upon US law. Rather, the integration of philosophy, theology and jurisprudence in George's work will be the key focus for this thesis. It is these areas - in particular his treatment of practical reason and a non-theological designation of natural rights jurisprudence - that will receive criticism in order to provide an approach that can successfully be transferred to English law, so as to provide an effective critique of the right to religious freedom within equality law. This is because George's contribution to religious and ethical

[1] See R P George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Isi Books, 2013) 119.

[2] For example: J Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1983); G Grisez, *Way of the Lord Jesus: Christian Moral Principles* (Franciscan Press, 1983); and J Finnis, *Moral Absolutes: Tradition, Revision and Truth* (The Catholic University of America Press, 1991).

[3] For instance, see: R P George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (DPhil Thesis, University of Oxford, 1986) 354 [sexual ethics]; R P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press, 1994) 112-114 [abortion]; R P George, *The Clash of Orthodoxies: Law, Religion and Morality in Crisis* (ISI Books, 2001) 72-73 [human cloning]; and R P George and P Lee, *Body-Self Dualism in Contemporary Ethics and Politics* (Cambridge University Press, 2007) 118 [abortion].

debates make him the ideal scholar through whom to analyse the right to religious freedom within a legal context.

Outline

This introductory chapter begins by presenting the broad outline of the thesis. This chapter will, first, provide a short introduction to Robert George; second, introduce the methods employed in this thesis; third, introduce the tensions surrounding the right to religious freedom, by way of an introduction to religious liberty and equality law; fourth, this introduction will outline the individual chapters and summarise anticipated outcomes which detail the way that the tensions surrounding religious freedom will be analysed.

As mentioned George's critique of US discrimination law is not without its flaws. This thesis will *inter alia* attempt to trace these through a critique of George's approach regarding the natural rights discourse present within his work and his departure from Thomas Aquinas' understanding surrounding practical reason, through George's use of practical reason in his own work.[4] These themes will be addressed in further detail in chapters 2 and 3. Despite these problems, however, the central claim is that key features of George's NNL reasoning can be improved upon and usefully applied to cases on religious liberty. This will be utilised because the development of a new classical theory of natural law has presented a contentious theologically-informed, systematic philosophical explanation for human life and action. It is one that can offer an integrated account of law, practical reason, and morality.

By critically analysing George's work, this introduction and then wider thesis provides an opportunity for research which seeks to analyse problems that straddle philosophy and law, for instance, problems impacting religious freedom and equality legislation. In this way a modified natural law perspective will be developed, one which is then applied to equality law in chapters 4 and 5. The earlier critical analysis of George's theoretical work thus reinforces the later jurisprudential critique. In other words, the critical analysis of George's work informs the modified natural law account advanced in this thesis which is then applied to English equality law in order to shed new light on freedom of religion.

[4] For example, see George, *Making Men Moral: Civil Liberties and Public Morality* (n 3) 39; George, *In Defense of Natural Law* (OUP, 1999) 3; R P George, *The Clash of the Orthodoxies* (ISI Books, 2001) 195.

This will address problems identified both within George's jurisprudential thought and problems impacting religious freedom within equality law. It is in this way that George's thought will be argued to provide a justification for the greater protection of religious freedom.

To this end, the thesis examines a range of problems associated with religious liberty present in English religious equality law. For instance, legal claims have been brought by employees who have been required to carry out new legal obligations which they have been unwilling to perform.[5]

Claimants alleging religious discrimination have often lost their case in religious liberty litigation. For example, the vast majority of the cases brought with reference to the religion clauses of the European Convention on Human Rights 1950 (ECHR) have failed in English domestic courts.[6] It is not that there is not respect for religion,[7] but that when balanced against other competing rights and considerations it tends to lose out. As such, in a human rights context, the problem with proportionality analysis involving religion is that religious freedom loses out within indirect discrimination law. It loses out in the balancing of human rights in a conflicted rights discourse. Religious freedom further loses out in adjudication concerning the protected characteristics listed in the Equality Act 2010. Therefore, insufficient weight is given to religious freedom. Below will detail the irreconcilable tensions which have emerged between laws protecting religious freedom.

By way of modifying George's thought to present a critique of religious liberty, this thesis will thereby solve tensions facing freedom of religion that arise in the application of the EqA 2010. It will do so by addressing problems such as reasonable accommodation and proportionality analysis in indirect discrimination law.

In order to meet this central thesis, the overarching research question is: how can George's thought provide a justification for the greater protection of religious freedom in English law? In other words, with George's view of religion as a basic

[5] For instance, see: *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 and *Mc*F*arlane v Relate Avon Limited* [2010] EWCA Civ 880. These cases will be introduced and analysed in section 1.3.
[6] J Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 320.
[7] For instance, the right to freedom of religion is secured by Article 9 of the ECHR.

good, is this thought capable of helpfully being modified in order to critique the religious liberty cases taken under the provisions of the Equality Act 2010? In order to answer this central thesis I will address the following specific research sub-questions which are divided into two categories. First, in the earlier chapters: how does George contribute to NNL jurisprudence? This will require an examination of whether his work is largely derivative and whether he correctly reads the work of key natural law figures such as Thomas Aquinas. Further, George's contribution will be analysed by considering whether he stands in a natural law tradition that narrows natural law jurisprudence towards a natural rights discourse?

Next, in the later chapters it will be considered whether George's natural law theory helps to provide a solution to the identified tensions and problems facing religious freedom within English equality law? Does George's approach to US law provide a set of transferable criteria and concepts that are capable of presenting a coherent understanding surrounding contemporary religious liberty? This requires analysis of how George's understanding surrounding this notion engages with anti-discrimination and religious equality law. Is freedom of religious conscience also currently a problem for equality law? The answers to these questions will establish if the application of George's NNL views can successfully provide a critique of the current interaction surrounding law and religion in order to analyse the right to of religious liberty?

These questions will form the spine of the discussion in the following chapters. By addressing them, this thesis will provide analysis surrounding NNL jurisprudence. The analysis will show how George's thought can provide a justification for the greater protection of religious liberty. Therefore the presentation will be one that is focused primarily on the contribution of an individual, and one that provides contributions in both practical case law application and analytical legal theory, in order to analyse the right to religious freedom within equality law.

Introduction to Robert George

It will be argued in this thesis that George has made a distinct contribution to NNL as both a lawyer and legal philosopher. Throughout George's work he seeks to provide a 'sound exposition of the natural law tradition and of the new classical

theory'.[8] George views NNL as a theory that he seeks to 'defend and apply'[9] and one that he has 'been able to contribute to the development of some aspects of the theory'.[10] As such, George acknowledges NNL scholarship but boldly claims that he is consolidating and advancing natural law jurisprudence.[11]

George here seems a little hesitant. I suggest that this is because he is not the creator of the New Natural Law Theory. NNL was originally formulated and pioneered by the theologian Germain Grisez.[12] The term 'New Natural Law Theory' was instead coined by Joseph Hittinger.[13] Although the Grisez School was started by Germain Grisez, it was subsequently developed through collaboration with Joseph M Boyle and John Finnis.[14] These theorists, together with George,[15] have been termed the Grisez School.[16] The natural law jurisprudence provided by the Grisez School allows a starting point to assess and engage critically with George's thought throughout this thesis.

The natural law jurisprudence that George advances is an account of basic human goods and reasons for action that they provide.[17] There is a central focus upon practical reason in his work,[18] which is a clear reflection of the centricity of practical reasoning to the Grisez School.[19] That being said, it can be identified at the outset that while George's work is closely related to others in the Grisez School, his work is not 'consistently at one' with the others.[20] This is an important observation for work that follows criticising George's thought in this thesis. Consequently my analysis will point to a concern for justice,[21] human liberty[22] and

[8] George*, In Defense of Natural Law* (n 4) 229.
[9] Ibid 1.
[10] Ibid.
[11] R P George, *Natural Law, Liberalism and Morality* (Oxford University Press, 1996) 5.
[12] George, *In Defense of Natural Law* (n 4) 1.
[13] R Hittinger, *Critique of the New Natural Law Theory* (University of Notre Dame Press, 1988) 5.
[14] George, *In Defense of Natural Law* (n 4) 1.
[15] George was supervised by John Finnis during his DPhil studies and this likely established the long-standing academic connection.
[16] The Grisez School will be introduced and their contribution will be analysed in chapter 3.
[17] George, *In Defense of Natural Law* (n 4) 229.
[18] See George, *Making Men Moral: Civil Liberties and Public Morality* (n 3) 39; George, *In Defense of Natural Law* (n 4) 3; George, *The Clash of the Orthodoxies* (n 4) 195.
[19] G Grisez, 'Natural Law, God, Religion and Human Fulfilment' (2001) 46 Am. J. Juris 3, 12-14.
[20] D N Robinson, '*In Defense of Natural Law*: Robert George's Jurisprudence' (2000) 45 Am. J. Juris. 117, 120-121.
[21] George, *In Defense of Natural Law* (n 4) 130.
[22] George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (n 3) 219.

ultimately protection against the state in George's work.[23] For instance, George is very clear in that he draws from a 'tradition of natural law thinking about morality, justice and human rights'.[24] It is these factors that substantiate the central claim that key features of George's NNL reasoning can be improved upon and usefully applied to cases on religious liberty. A function of legal thought can be to stabilise and resolve ambiguities.[25] As such, a display of law and practical reason will address the lack of weight given to religious freedom within equality law.

Two important observations need to be made about George's work at the outset. First, George's public law contribution can, broadly speaking, be solely found in a US context. This is to be expected, George is a US citizen working from a US University engaging with the US legal system. He therefore focuses upon US constitutional law. Second, as a Roman Catholic jurisprudential scholar (and member of the aforementioned Grisez School) this helps to explain his adherence to Roman Catholic ethical thought in his writings. In particular, George has adhered to the Second Vatican Council and like Grisez and Finnis engages with Thomistic ethics.[26] George is a committed Thomist.[27] Nevertheless, chapter 3 will criticise the way that George interprets Thomas Aquinas. It will later be argued that the prevalence of Roman Catholic thought in his writings has further significantly impacted George's work.

1.2 Methods

This thesis incorporates elements of both jurisprudence and equality law to analyse the right to religious freedom through Robert George's NNL reasoning. George's work is not without problems, and neither is equality law, and so this thesis will *inter alia* attempt to employ methods best suited to critique the identified flaws and tensions. The methodological challenge presented by

[23] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal* Secularism (n 1) 114.
[24] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 4) 51.
[25] R Adhar & I Leigh, 'Post-Secularism and the European Court of Human Rights: or How God Never Really Went Away' (2012) 75(6) MLR 1064, 1098.
[26] N Bamforth and D Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge University Press, 2008) 167; S Coyle, 'Natural Law and Goodness in Thomistic Ethics' 30(1) *The Canadian Journal of Law and Jurisprudence 77.*
[27] See R P George, 'Kelsen and Aquinas on "the Natural Law Doctrine"' (2000) 75 Notre Dame L. Rev. 1625; George, *In Defense of Natural Law* (n 4) 38; George, *Conscience and its Enemies: Confronting the Dogmas of Liberal* Secularism (n 1) 75.

critiquing George's thought (which is mainly focused on US law) and applying this to English equality law is a real one. The methods that I will use to analyse the right to religious freedom in the EqA 2010 are those appropriate to the broad discipline of jurisprudence. The focus upon jurisprudence in this thesis is a very deliberate choice. While theological and philosophical texts will be analysed throughout, I will not be presenting this thesis as a theologian, historian or philosopher. Rather, I will objectively be focusing upon jurisprudence,[28] which denotes a lawyer using philosophy to come to conclusions about the law, as opposed to legal philosophy – a philosopher who uses law to come to philosophical conclusions. That said, it is certainly the case that a jurisprudential approach will involve consulting a wider variety of interdisciplinary texts. In my case, these will include legal philosophical, theological and moral philosophical texts in order to successfully modify George's thought to provide an effective critique surrounding the right to religious freedom.

As I seek to address my research questions, I will draw upon an array of both primary and secondary legal sources and the use of legal rules, precedent and principles.[29] For example, this will involve detailed textual analysis of Robert George's work and a detailed analysis of the legal arguments expressed in selected equality case law, such as one of the most significant religious liberty cases of recent years: *Eweida and Others v The United Kingdom*.[30] To demonstrate the flaws within George's account of NNL reasoning in the context of US law, it will also be necessary to give an account of the relevant US discrimination law. To this end, a primarily jurisprudential consideration will lead to theoretical conclusions about George's work, natural law and equality legislation.

Furthermore, the reason that this thesis will provide a detailed textual analysis of George's work and critique the leading religious liberty case law is to analyse contemporary religious freedom. This will be realised through applying George's

[28] Within the broad discipline of jurisprudence, I argue that there is room for philosophical reasoning that ultimately provides conclusions about the law.

[29] For instance, chapter 2 will discuss Ronald Dworkin's approach to legal principles within adjudication, see: R Dworkin, *Taking Rights Seriously* (Duckworth, 1977).

[30] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). It will be claimed in section 1.3 that this is one of the most significant cases because it was the first adverse determination for the United Kingdom government regarding religious liberty - M Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (2013) 15(2) Ecc. L.J. 191, 193.

NNL views to equality law. To achieve this two steps need to be taken. First, the work should include understanding of the basic debates surrounding equality law and human moral reasoning. To do so will require a consideration of legal argumentation in, for instance, post-Hartian analytical jurisprudence and cognate interdisciplinary research. This will situate the thesis. Second, in the analysis of religious freedom George's unique contribution will need to be shown. In order to achieve this aim, the work provided by this thesis will analyse Robert George's scholarship.

To gain context for this analysis contemporary jurisprudential scholarship has influenced a distinct legal positivist/natural law conceptual debate.[31] This provides an approach upon which I will reflect[32] and I will seek to demonstrate - and draw upon - understandings of different natural law themes. This will provide a basis to carry out the detailed textual analysis that was mentioned above. To do so will require that I also directly incorporate analysis gathered from Thomas Aquinas' original texts and may also require that I draw an original natural law approach. Such an approach will be drawn from critical engagement with George's work. Moreover, I will use a further method, engaging in what the philosopher Nicholas Wolterstorff has termed 'dialogic pluralism'.[33] By adopting a dialectic approach, this process will involve weighing different perspectives and appropriating insights from philosophical colleagues and their predecessors through rejecting empirical assumptions. This is possible because George's method may be identified as primarily dialectical.[34] In this way novel conclusions about George's NNL approach to English religious liberty case law will be presented. These conclusions will be presented in chapters 4 and 5 in order to analyse the right to freedom of religion.

[31] For instance, see: J Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980); Hittinger (n 13); M Murphy, *Natural Law and Practical Rationality* (Cambridge University Press, 2001); N Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007). This literature will be considered throughout the Introduction and in chapter 2.

[32] Issues of equality and moral reasoning present some of the central problems of jurisprudence for the present day. Coyle has observed that central problems within jurisprudence can be termed 'Protestant'. As such, my analysis will follow this 'Protestant' reflection – S Coyle, *Modern Jurisprudence: A Philosophical Guide* (Hart, 2014) 50.

[33] N Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press, 2008) XI.

[34] George, *In Defense of Natural Law* (n 4) 1.

1.3 Introduction to the problems facing religious freedom within equality law

Introduction to religious freedom

To apply George's thought to an analysis of the right to religious freedom within equality law it will be necessary to consider those irreconcilable tensions, which have emerged in the first decade of the twenty-first century, that impact laws protecting religious freedom. The right to religious freedom stems from the international human rights treaties of the 1950s and their ideals, typified by the ECHR. The Human Rights Act 1998 (HRA), the codifying legislation for the ECHR, has implemented an approach that promotes religious freedom as a human right, particularly under Article 9 (freedom of thought, conscience and religion) and Article 14 (freedom from discrimination) of the ECHR. As such, it is clear that religious liberty is actively promoted as a positive right.[35] At the outset, however, it is clear that there are limitations. Religious liberty is widely considered to be a limited right.[36] For instance, the limitations upon manifestation of religion and belief in Article 9(2) of the ECHR are detailed as those necessary in a democratic society in the interests of public safety. These are: for the protection of public order; for the protection of health or morals; or for the protection of the rights and freedoms of others. It is therefore clear that a balance is struck so that while freedom of religion is a general right, the manifestation of such freedom can be limited.[37]

Although there is a right to religious freedom, a number of legal claims have been brought by employees who have been required to perform new legal obligations which they have been unwilling to comply with because of a conflict with their religious beliefs.[38] In addition, the vast majority of the cases brought with reference to the religion clauses of the ECHR have failed in English domestic

[35] Sandberg, *Law and Religion* (Cambridge University Press, 2011) 205.
[36] M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell, 2011) 313.
[37] J Dingemans, 'The need for a principled approach to religious freedoms' (2012) 12(3) Ecc. L.J. 2012 371, 371-372.
[38] For example, see: *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *Mc*F*arlane v Relate Avon Limited* [2010] EWCA Civ 880; and *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). These cases will be introduced and analysed in this section 1.3.

courts.[39] As such, it has been suggested that overall Article 9 rights are becoming 'insufficiently and erratically protected in the courts'.[40] The problem is that when religious claimants attempt to defend their rights, they lose in human rights litigation. It is suggested, therefore, that more weight is required to be given to protect religious liberty. Better protection is required for religious liberty to redress the balance that has been struck and resolve the tensions that will be outlined below.

Below is an indicative example of the law which will be focused upon in chapter 4, and to an extent, in chapter 5. Chapter 4 aims to provide the substance for the theoretical critique, providing a legislative and case law basis adapted from George's work and to which, in the fifth chapter, theoretical critique can be applied. Doing so is an attempt to resolve the tensions impacting freedom of religion. The cases and legislation focused upon below (and in the wider thesis) will be a selective grouping, logically based upon the cases being leading contemporary religious liberty and equality judgments, and also related through the jurisprudential themes found in legislation which lend themselves to a suitable critique. Through this focus I will analyse the right to religious freedom.

Religious freedom is protected by, for instance, freedom to change belief being secured by Article 9 (there is no restriction upon changing a belief),[41] and also in the EqA 2010, religion or belief sitting alongside eight other 'protected characteristics' under s.4 of the EqA 2010. This designation as a protected characteristic is designed to prevent and protect against religious discrimination. It is also arguable that religious freedom is further promoted within the HRA by s.13(1) of the HRA which requires that 'particular importance' should be accorded to Article 9.[42] All of these points further emphasise the protection available for religious freedom.

A critique drawing on George's thought is required because the right to religious freedom is arguably a contested one. It is true that the HRA has been termed a

[39] J Rivers, 'The Secularisation of the British Constitution' (2012) 14(3) Ecc. L.J. 371, 380. See also C Cross, J Dingemans, H Masood and C Yeginsu, *The Protections for Religious Rights: Law and Practice* (Oxford University Press, 2013) 292.

[40] A Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (2013) 2 (1) OJLR 50, 51.

[41] D Hoffman and J Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (3rd edn, Pearson, 2010) 278.

[42] C McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecc. L.J. 26, 36.

'watershed' moment by providing the domestic courts with the opportunity to directly enforce ECHR rights[43] and that the HRA has also ushered in a new rights driven approach, promoting religious freedom and the right to, and respect for, a private life as protected universal human rights.[44] However, as part of this evolving legal culture, it is now considered the norm to speak about the balancing of these rights, in an attempt to resolve inevitable tensions between them. For example, a proportionality test applied under Article 9(2) of the ECHR, by which the manifestation of Article 9 rights is permitted to be infringed if the action is justified as a proportionate means of achieving a legitimate aim.[45]

Russell Sandberg has suggested that domestic courts can create tensions by underplaying the importance attached to preventing religious discrimination.[46] For instance, Article 9 rights can frequently be contested and this can lead to legal uncertainty for these rights.[47] In addition to uncertainty for religious rights, it was earlier identified that religious freedom often loses out when balanced against other competing rights and considerations in indirect discrimination law and this may be why overall there is insufficient protection for Article 9 rights in the courts.[48] As such, it is evident that the problem with proportionality analysis concerning religion is that individual religious freedom can be infringed upon. This occurs in the balancing of human rights in what has become a conflicted rights discourse. Religious rights can be limited if there is sufficient justification.[49] This also impacts religious freedom which loses out in adjudication concerning the protected characteristics in the EqA 2010. This legislation provides part of the source of tensions to which my analysis of George's critique will be applied in chapters 4 and 5.

The source of these tensions can be attributed to the creation of new obligations within the workplace. An interesting and important development within

[43] Sandberg, *Law and Religion* (n 35) 36.
[44] For instance see: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *Kokkinakis v Greece* (1993) 17 EHRR 397; *Gillan and Quinton v The United Kingdom* [2010] ECHR 28; *Eweida v United Kingdom* [2013] ECHR 37.
[45] Connolly, *Discrimination Law* (n 36) 313.
[46] Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) 203.
[47] L Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc. L.J. 280, 298.
[48] Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (n 40).
[49] Connolly, *Discrimination Law* (n 36) 313.

discrimination law, one particularly relevant to NNL reasoning, is that, in compliance with EU Council Directive 2000/78/EC, a large body of equality law was implemented. For example, firstly, employment discrimination on the grounds of sexual orientation and religion or belief was prohibited, with the implementation of Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660 and the Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661. Then, secondly, discrimination was prohibited in relation to goods and services in the Equality Act 2006 (Part 2) and the Equality Act (Sexual Orientation) regulations 2003 SI 2003/1661. The admirable aim of these provisions centred upon reducing discrimination within the workplace. This extensive anti-discrimination law, now found in the Equality Act 2010 (EqA 2010), has, however, arguably caused a problem and exacerbated tensions in relation to religious freedom and religious discrimination adjudication.

The dispute surrounding the protection given to religious freedom

The problem with English equality law as it pertains to religion has been disputed. For instance, it is suggested that there is definite 'protection available under Article 9'[50] for religion and belief. This may initially highlight a strong mantle of protection for religion. Further, Christopher McCrudden argues that within a proportionality analysis, 'the European Court of Human Rights seems to give particular weight to the importance of the religious beliefs in relation to competing Convention provisions.'[51] Here McCrudden is suggesting that religion or belief is given particular protection. If these were to be viewed as the only responses, then the law surrounding freedom of religion does not seem to be problematic. There would be no need to apply George's thought here.

However, critics have equally identified a problem facing freedom of religion. Gwyneth Pitt argues that listing religion or belief as a protected characteristic has made it impossible for courts to avoid religious liberty litigation.[52] It has been argued that within this litigation, the obligations on employers not to discriminate on grounds of sexual orientation have 'trumped the rights of the employee not to

[50] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 47).
[51] McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (n 42).
[52] G Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (2011) 40 ILJ 4, 384.

be discriminated against on grounds of religion or belief'.[53] This highlights the extent to which Article 9 rights are being infringed. Hepple has suggested that this may be because the harmonisation of equality law within the area of religion and belief has progressed too far[54] and so equality law tends to challenge Article 9 rights. For instance, the way that equality law has been connected to religion and belief may lead to the legal obligations presented in equality arguments being much more precise,[55] and so result in religious equality law preventing claimants from effectively being able to rely upon Article 9 of the ECHR. As such, it is clear that the views presented on the problems facing religious equality law are contradictory. This highlights the tension present in the law and the problem facing freedom of religion and that significant problems and unresolvable tensions have been created within the legal framework.[56] The aim of this this thesis is to resolve these tensions impacting religious freedom and present a constructive resolution.

Introduction to Eweida and Others v The United Kingdom

This thesis will illustrate the problems that can arise for religious freedom in light of religious equality law by drawing upon a number of legal claims that have been brought by employees who have been forced to carry out obligations from new law protecting rights. To address the problems and tensions that can arise for religious freedom in light of equality law, the relevant litigation arising from the EqA 2010 needs to be presented to provide an area upon which George's thought can be applied. The leading equality law case concerning freedom of religion is now *Eweida and Others v The United Kingdom.*[57] Here, Ms Eweida, a British Airways employee, advanced a claim of discrimination based on a breach of her right to manifest her religion by wearing a cross within the workplace, contrary to

[53] R Sandberg, 'The Right to Discriminate' (2011) 13(2) Ecc. L.J. 157, 172. See further, Sandberg, *Religion, Law and Society* (n 46) 214.

[54] B Hepple, *Equality: The New Legal Framework* (Hart, 2011) 177.

[55] J Rivers, 'Promoting Religious Equality' (2012) 1 Ox. J Law Religion 2, 399.

[56] P Edge and L Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law relating to Religion and Belief' Equality and Human Rights Commission (Manchester, September 2015) <http://www.equalityhumanrights.com/sites/default/files/publication_pdf/RR97_Review%20of%20equality%20and%20human%20rights%20law%20relating%20to%20religion%20or%20belief.pdf> accessed 5th December 2015, 40.

[57] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This will be considered at length in chapters 4 and 5; however, what follows will serve as a brief introduction to the law.

Article 9 of the Convention. In other words, Ms Eweida claimed that equality law did not protect her right to exercise religious liberty.

In *Eweida*[58] the European Court of Human Rights (ECtHR) found that Ms Eweida, had a right to manifest her religion in the workplace:[59] by denying Ms Eweida her right to wear a cross, domestic law did not strike the right balance between the protection of Ms Eweida's right to manifest her religion and the rights of others.[60] It is clear that the ECtHR had to weigh the restriction of Ms Eweida's religious rights. This was weighed against the UK government's competing submission that, by restricting her right to wear a cross, British Airways were correctly justifying a legitimate aim, namely enforcing a corporate professional image.[61] In the alternative, it was argued that, even if wearing a cross was motivated by religion or belief, it was not a generally recognised act of observance and so fell outside the protection of Article 9.[62] In recognition of Ms Eweida's Article 9 rights, the ECtHR held that the UK government had not put in place 'legislation adequate to enable those in the position of the applicant to protect their rights.'[63] In other words, domestic law did not provide adequate protection of freedom of religion for Ms Eweida. However, this case benefits from deeper analysis as the headline judgment is not really reflective of the wider case – here there were four conjoined applicants. Only one applicant won her claim – Ms Eweida. It was thus held that Ms Eweida's Article 9 right to wear a cross upon her work uniform was not adequately protected by either a) her employer or b) English law.[64]

The importance of this decision for analysing freedom of religion is highlighted in the stark fact that *Eweida* was the first adverse determination for the United Kingdom government regarding Article 9.[65] As such, a right is established to

[58] Ibid.

[59] *Eweida* has clarified the meaning of 'manifestation of belief': conduct is not restricted to acts of worship or devotion but needs to have a sufficiently close and direct nexus between the practice and underlying belief. However, a religious practice does *not* need to be prescribed by the religion in question – ibid [82]. Here conduct is tied closely to belief.

[60] Ibid [79]. This highlights the affirmation of Article 9 and the place of religion.

[61] Ibid [61], [94].

[62] Ibid [58].

[63] Ibid [66].

[64] Ibid [79].

[65] M Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (2013) 15(2) Ecc. L.J. 191, 193.

manifest religion in the workplace.[66] The structure of Article 9 provides that freedom of thought, conscience and religion is a general freedom not subject to limitation. There is, in other words, no restriction upon holding a belief. It has been shown above that the right is limited in accordance with Article 9(2), however, when the belief is manifested. Hoffmann and Rowe uphold this distinction because, while it would be wrong in principle for the state to legislate how people should think, it may be entitled to regulate how they act, where such action may harm others.[67] This right is a contested one because the ECtHR's explicitly found that Ms Eweida's manifestation of belief should not be limited.[68] Despite the protestations by British Airways and the UK government, Ms Eweida established her right to wear a cross. This right will be important later in the application of George's thought to the analysis of religious freedom.

As noted, within *Eweida*,[69] the other three conjoined applicants lost their claims before the ECtHR. To understand why religious liberty was restricted for the other three applicants, this introduction will provide context by analysing the earlier domestic law hearings. For the purposes of this introduction the applicants will be divided into two categories: 1) provision of services; and 2) wearing of religious symbols.

The applicants within Eweida and Others v The United Kingdom

To start with the provision of services, two of these applications concerned legal claims brought by employees forced to carry out obligations from new law protecting rights. First, the Court of Appeal decision in *McFarlane v Relate Avon*[70] involved a Christian counsellor dismissed for refusing to counsel a homosexual couple, and second, *Islington Borough Council v Ladele (Liberty Intervention)*[71] concerned a registrar threatened with dismissal because she refused on conscience grounds to perform civil partnership ceremonies, which would, in her opinion, contradict her religious belief. Within both cases, the Court of Appeal held that claims of direct discrimination on grounds of religion failed because the

[66] D McIlroy, 'A Marginal Victory for Freedom of Religion' (2013) 2 Ox. J Law Religion 1 211.
[67] Hoffman and Rowe (n 41) 277-279.
[68] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [95].
[69] Ibid.
[70] *McFarlane v Relate Avon Limited* [2010] IRLR 872.
[71] *Islington Borough Council v Ladele (Liberty Intervention)* [2010] 1 WLR 955.

employer did not treat the employee unfavourably on grounds of religion. In a similar vein, claims of indirect discrimination failed on the basis that any disadvantage was justified. For, in the case of *Ladele*,[72] the effect of implementing the policy on the claimant, Ms Ladele, was held to not impinge on her religious belief as she was still able to hold those beliefs. As such, the policy pursued by the employer was a legitimate aim.[73] Here Sandberg analyses that the EqA 2010 consolidated the substantive law[74] concerning religious discrimination and the exceptions that exist for religious groups in the area of indirect discrimination.[75] Arguably this justifies the alleged infringement of rights: it has been suggested that this pays little attention to religious rights.[76] For instance, the consequences for Ms Ladele were serious: even though the job requirement was introduced by the employer at a later date and stage in her employment, Ms Ladele still lost her job given her beliefs because of her inability to carry out what was seen to be part of her job.[77] It can be identified that the severity of losing employment was considered to be a justified restriction upon the right to freedom of religion.

Sandberg has suggested these legislative developments culminating in the EqA 2010 have brought about a significant shift from 'non-discrimination to anti-discrimination',[78] whereby a shift from passive tolerance to the active promotion of religious freedom (Article 9 of the ECHR) and sexual orientation anti-discrimination (Article 14 of the ECHR) as positive legal rights has now occurred.[79] The impact is that both religious freedom and sexual orientation are more frequently defended by claimants within litigation. For instance, the majority of relevant claims are taken under the protected characteristic of religion and belief within equality law.[80] It is evident that this presents freedom of religion as an enforceable, contested right. This presentation provides a basis for the

[72] Ibid.
[73] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [105].
[74] Such as the Employment Equality (Religion or Belief) Regulations 2003.
[75] Sandberg, 'The Right to Discriminate' (n 53) 157, 159.
[76] Sandberg, *Religion, Law and Society* (n 46) 203.
[77] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [106].
[78] R Sandberg, 'The Right to Discriminate' (n 53) Ecc. L.J. 13(2) 157, 180.
[79] Sandberg, *Law and Religion* (n 213) 81. This claim will be discussed in chapter 5.
[80] M Gibson, 'The God 'Dilution'? Religion, Discrimination and the case for Reasonable Accommodation' (2013) 72(3) CLJ 578, 590.

deployment of George's thought to analyse the right to religious freedom in the EqA 2010 and related cases, within this thesis.

An infringement of rights via indirect discrimination appears to be justified by the ECtHR in *Eweida*,[81] at least in relation to the protection of rights concerning sexual orientation. Ms Ladele's and Mr McFarlane's religious beliefs were held to be the direct motivation for their objection to carry out work tasks. This was held to be sufficient to engage Article 9 in *Eweida.*[82] The government argued that the right to manifest religious beliefs and the rights of individuals not to be discriminated against on grounds of sexual orientation were matters failing within the margin of appreciation.[83] This margin of appreciation was given to the jurisdiction of national authorities to derogate from their obligations under Article 9. In contrast, Mr McFarlane's submission highlighted the need to maintain religious pluralism when determining the margin of appreciation given to the state.[84] This call for pluralism highlights that there should be tolerance within society of a diversity of cultural or ethnic groups and the beliefs they express regarding religion.[85] However, the ECtHR held in *Eweida*[86] that for both Ms Ladele and Mr McFarlane, equality legislation led to the justification of *prima facie* discriminatory acts requiring the identification of a legitimate aim and a reasonable relationship of proportionality between the aim and discriminatory effect within the state's margin of appreciation.[87] This legitimate aim positively ignored the religious difference in favour of a conception of proportionality favouring rights relating to sexual orientation. This further highlights the tensions

[81] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[82] Ibid [103, 108] (Fourth Section).
[83] Ibid [63].
[84] Ibid [73].
[85] Hoffman and Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (n 41) 277-278. This call for pluralism was similarly supported by the ECtHR finding for Ms Eweida's religious freedom, whereby it was noted: 'On one side of the scales was Ms Eweida's desire to manifest her religious belief…[which] is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity;' by doing so this emphasises the connection between religious pluralism and religious freedom - *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [94]. See further *Hasan and Chaush v Bulgaria* (2002) 34(6) EHRR 1339 [62].
[86] Ibid.
[87] J Rivers, 'The Presumption of Proportionality' (2014) 77(3) MLR 409, 422 – see section 149(1) of the Equality Act 2010.

between laws protecting religious freedom and those prohibiting discrimination on grounds of sexual orientation.[88]

The question then becomes: have laws protecting sexual orientation constrained religious freedom? The appellate courts have encountered significant difficulty addressing this issue. Case law and legislation are conflicting on this issue. Religious discrimination legislation and sexual orientation legislation are perceived to be acutely irreconcilable by both claimants and academics. For example, the 2015 Equality and Human Rights Commission Report - *Review of Equality and Human Rights Law Relating to Religion and Belief* - has noted the difficulties and tensions created within the legal framework by equality law addressing freedom of religion.[89] I argue this is because future courts are likely to follow the Court of Appeal decisions in *McFarlane*[90] and *Ladele*[91] in that the significant need to eliminate discrimination on grounds of sexual orientation is likely to trump the equally significant need to prevent discrimination on grounds of religion or belief. This is because the later decision in *Eweida*[92] still held that religious freedoms were categorised as choices by the employees.[93] In other words, individual choices were balanced against the deprivation of services and in the end lost out.[94] This conflict will be discussed at length in chapter 5 when George's view of equality legislation is considered.

It must be noted as will be discussed further in chapter 4, that in the EqA 2010 religion and belief sits alongside eight other 'protected characteristics', including sexual orientation. This is noteworthy because there are concerns that religion or belief is different from the other characteristics and thus ought to be protected differently. Indeed, Sedley LJ held in *Eweida v British Airways PLC*[95] that while

[88] Sandberg, 'The right to discriminate' (n 53).
[89] Edge and Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law relating to Religion and Belief' (n 56).
[90] *McFarlane v Relate Avon Limited* [2010] IRLR 872.
[91] *Islington Borough Council v Ladele (Liberty Intervention)* [2010] 1 WLR 955.
[92] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). Later in chapter 5 we will see that the 'choice' for individuals to resign from their job and seek another job (a 'specific situation rule' submitted by the UK government) was only narrowly rejected by the ECtHR.
[93] See further R McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom'* (2014) 77(2) MLR 277, 279.
[94] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). Partly dissenting judgment at [6]. See also *Bull v Hall* [2013] UKSC 73.
[95] *Eweida v British Airways PLC* [2010] EWCA Civ 80.

all the other protected characteristics apart from religion or belief 'are objective characteristics of individuals; religion and belief alone are matters of choice.'[96] This is an interesting comment. Are the courts actively treating religion and belief differently? George's treatment of religion may differ as he debates categorising religion as a basic human good within his NNL. The good of religion has been relentlessly debated between the new natural lawyers and its meaning and purpose have caused significant discussions, in a similar vein to the problematic decisions found in case law. The relationship between the good of religion and the protected characteristics within the EqA 2010 will form an important part of the discussion and critique involved in the modification and application of George's NNL views in chapters 4 and 5, to critique the place of religious liberty within equality law.[97] The notion of the 'good of religion' within George's thought will be argued to be crucial in securing freedom of religion within equality law.

I now move, secondly, to the protection of religious symbols. To understand the situation facing equality law surrounding religion,[98] it is first necessary to take into consideration the wider European tensions surrounding religious human rights and religious symbols. This can be observed through the leading case of *Lautsi and Others v Italy*[99] concerning the place of the crucifix in Italian schools. The ECtHR ruled that the requirement in Italian law that crucifixes be displayed in classrooms of state schools did not violate Article 2 of Protocol No. 1 (right to education) of the ECHR. With such an approach, the presence of the crucifix, falling within the state's margin of appreciation, did not breach the competing right of a parent to have her children educated in accordance with her convictions.[100] This highlights a protective stance taken by the ECtHR towards religious liberty.

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[96] Ibid [40].

[97] As an example, Finnis compares the incommensurability of the goods with a proportionality analysis surrounding the protected characteristics - J Finnis, (2011) 'Equality and Differences' 56 Am. J. Juris. 17, 35.

[98] A range of other cases related to religion will be noted throughout the thesis. For instance: *Williams v Secretary of State for Education and Employment* [2002] EWCA Civ 1925; *R (E) v Governing Body of JFS* [2010] IRLR 136 (SC); *Bull v Hall* [2013] UKSC 73; *R (on the application of Hodkin and another) v Registrar General of Births, Death and Marriages* [2013] UKSC 77; *MBA v London Borough of Merton* [2013] EWCA Civ 1562; *Shergill v Khaira* [2014] UKSC 33; *Greater Glasgow Health Board v Doogan* [2014] UKSC 68; *Ebrahimian v France* (2015) ECHR 370.

[99] *Lautsi and Others v Italy* (30814/06) [2011] E.L.R. 176.

[100] *Lautsi and Others v Italy* (30814/06) [2011] E.L.R. 176 [68-70].

The issue of crosses is a recurring one in law: the remaining two conjoined applicants in *Eweida v United Kingdom*,[101] Ms Chaplin and Ms Eweida, both brought claims regarding wearing the Christian cross at work. It was held in the earlier case of *Chaplin v Royal Devon & Exeter NHS Foundation Trust*[102] that Ms Chaplin's claim failed, following precedent set in *Eweida v British Airways PLC*.[103] The domestic courts dismissed Ms Eweida's claim that her employers (British Airways) had discriminated against her on the ground of her religious belief, within the meaning of regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003/1. The claim was dismissed on the ground that the provision, criterion or practice that jewellery or religious items should be concealed was applicable to all employees regardless of their faith and did not put Christians as a group at a 'particular disadvantage when compared with others persons' as required by regulation 3(1)(b). With this very restrictive approach regarding religious symbols, the Court of Appeal's judgment further held that Article 9 was inapplicable since the restriction on wearing a cross visibly at work did not constitute an interference with the manifestation of belief.[104] Yet, even if it did, the court considered this limitation to be proportionate.[105] As a result, both Ms Eweida and Ms Chaplin complained that domestic law failed adequately to protect their right to manifest their religion, contrary to Article 9 of the Convention, taken alone or in conjunction with Article 14. The distinction was that, unlike *Lautsi*, these claims involved an individual manifesting their religion, and unlike *Ladele* and *McFarlane*, this manifestation of religion was dependent upon an individual wearing a particular religious symbol (a cross) in the workplace.

The decision handed down by the ECtHR was a particularly anticipated, intriguing judgment. As noted above, within *Eweida*,[106] the ECtHR found that Ms Eweida had a right to manifest her religion in the workplace. By a 5-2 majority the ECtHR found that the domestic courts had given too much weight to BA's wish to protect

[101] *Eweida v United Kingdom* [2013] ECHR 37. But not, it seems, in the ECtHR: the case of *Eweida and Others v United Kingdom* was the first time that the ECtHR addressed the question of applicants wearing crosses - P Smith 'Book Review: E Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* by Erica Howard (Routledge, 2011)' (2014) Ecc. L.J. 226, 227.

[102] *Chaplin v Royal Devon & Exeter NHS Foundation Trust* (2011) 13 Ecc. L.J. 242.

[103] *Eweida v British Airways PLC* [2010] EWCA Civ 80.

[104] Ibid [22] (Sedley LJ).

[105] Ibid [38].

[106] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

its corporate image.[107] However, manifestation of religion may be limited because the ECtHR found otherwise for Ms Chaplin. The refusal by the health authority to allow Ms Chaplin to remain in post while wearing her cross was found to be an interference with her freedom to manifest her religion.[108] Nevertheless, the health and safety concerns of the employer (preventing infection on a hospital ward) amounted to a legitimate aim and a proportionate restriction on Ms Chaplin's freedom to manifest her religious belief within the margin of appreciation given to the state.[109] In short, analysis points to manifestation being limited for both proportionate reasons and justified as part of a legitimate aim.[110] These decisions, following in the vein of *Lautsi*,[111] relied upon jurisprudential balancing of a conflicting rights discourse. It is these conflicting jurisprudential approaches (including the tensions they highlight for freedom of religion) which provide the basis for the analysis of the right to religious freedom in the EqA 2010.

To enable this central thesis, an analysis of George's NNL approach needs to be presented. This is in order to mount a telling critique of the place of religious liberty within English law. The key points that are required to be drawn from George's thought were outlined earlier in this chapter. By exposing the flaws within George's analysis of US equality laws (which can be traced to the general weaknesses within George's approach explored within chapters 2 and 3 of the thesis), then, as a result, the earlier critique of George's natural law will reinforce the later jurisprudential critique. By doing so, this approach will analyse freedom of religion within equality law.

The relevant religious equality law is explored here. My critique of George's thought has been briefly started in section 1.3 of this introduction and will be considered in far more depth in chapters 2 and 3 of the thesis. I will argue that George's consideration of the legal issues and concepts raised in these religious discrimination cases, suitably modified, would lead to a radically different process and form of judicial thinking. Can a solution to the outlined tensions be provided? Why would this interpretation be appropriate to secure religious freedom? To arrive at this position, chapters 2 and 3 will analyse George's NNL jurisprudence

[107] Ibid [112]-[114].
[108] Ibid [97].
[109] Ibid [99].
[110] Ibid [100].
[111] *Lautsi and Others v Italy* (30814/06) [2011] E.L.R. 176.

and consider problems evident within his thought. They will do so by considering his views upon two key themes: practical reason and natural rights. This modification of George's thought is necessary to provide a coherent critique upon the place of religious freedom within the EqA 2010. This will lead directly into chapters 4 and 5, which will discern whether such an analysis of George's thought provides a novel, innovative approach providing theoretical answers to religious liberty and religious discrimination problems – problems which pose necessary theoretical solutions.

1.4 Introduction to New Natural Law/Lawyers

For the purposes of analysing George's thought, it is necessary to analyse NNL. This section will introduce and critique the main concepts and main contributors within NNL in order to understand the place of religion in NNL. This is so that throughout this thesis I can engage with this particular jurisprudence and thereby provide a telling account upon the right to religious liberty in the EqA 2010. First, I will introduce the main contributors. Second, I will provide an introduction to the NNL ethic. Third, I will introduce basic human goods within NNL. Fourth, I will turn to the NNL understanding of the First Principle of Practical Reason (FPPR). Fifth, I will consider how the FPPR relates to intentional action within the FPPR. Sixth, I will detail that NNL does not entail the claim that morality can be read from human nature and finally I will consider the place of flourishing in NNL.

Robert George is not the creator of The New Natural Law Theory (NNL). NNL, which George defends and utilises, was originally formulated and pioneered by the theologian Germain Grisez.[112] However, Grisez strictly denies being associated with the name or term 'new natural law'. Grisez instead maintains that he has never regarded his work 'as a contribution to "New Natural Law Theory"'.[113] As was established in the last chapter the term 'New Natural Law Theory' was instead coined by Joseph Hittinger in his critique of the Finnis – Grisez position.[114] Although Grisez's opposition to the term may just be a matter of semantics, for how long can the Grisez School deny the name NNL theory, when all other parties refer to the theory by that name? I suggest that Grisez's opposition to the name stems from, first, his position as a theologian rather than

[112] George, *In Defense of Natural Law* (n 4) 1.
[113] Email from Germain Grisez to author (26 May 2011).
[114] Hittinger (n 13) 5.

a legal philosopher and, second, his opposition to Hittinger's critique of the Grisez School's position.[115]

Although the Grisez School was started by Germain Grisez, it was subsequently developed through his collaboration with John Finnis and Joseph M Boyle.[116] These theorists together have been termed the Grisez School. Equally, as previously mentioned the theory has been referred to as 'New Natural Law Theory'. This is a term that more accurately reflects the contemporary restatement of philosophical techniques being used and one that will be used in what follows.

For the purposes of analysing George's thought, we have already identified the Grisez School, yet the other new natural lawyers, such as: Russell Shaw, Patrick Lee, Christopher Olaf Tollefsen and Robert George, have contributed writings together and with the three primary Grisez School theorists.[117] George claims that even though he has contributed to the development and application of certain aspects of NNL, yet, because the theory was originally created by Grisez, he can claim little credit for it.[118] My objective is to show that George, to my mind, is being modest here.

From the outset it is important to note that NNL has traditionally been viewed as a Roman Catholic ethical theory. The leading individuals are practising Roman Catholics. Indeed, the philosopher Jonathan Crowe suggests that the NNL theory, then, is strongly Thomist in methodology and content, while the views of its proponents tend to fall 'within the mainstream of Catholic ethical thought.'[119] This has led to widespread perceptions of natural law theory as a 'distinctively

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[115] Ibid.

[116] George, *In Defense of Natural Law* (n 4) 1.

[117] See for instance: G Grisez & R Shaw, *Beyond the New Morality: The Responsibilities of Freedom* (University of Notre Dame Press, 1974); G Grisez and R Shaw, *Fulfilment in Christ: A Summary of Christian Moral Principles* (University of Notre Dame Press, 1991); R P George & C Wolfe, *Natural Law and Public Reason* (Georgetown University Press, 2000); Lee & George, *Body-Self Dualism in Contemporary Ethics and Politics* (n 3); and R P George & C O Tollefsen, *Embryo: A Defense of Human Life* (Doubleday Books, 2008).

[118] George, *In Defense of Natural Law* (n 4) 1.

[119] J Crowe, 'Natural Law Beyond Finnis' (2011) 2(2) Jurisprudence 293, 294. However, *prima facie,* even if one rejects Catholic ethical teaching, I suggest there is no need to reject the jurisprudential theory; rather, a separation between the jurisprudence and the Catholic ethical theory can be achieved. This enables, at first instance, the merits of the jurisprudential theory to shine through, without the Catholic ethical teaching that many may reject. This will be argued in chapter 2.3.

and perhaps necessarily Catholic viewpoint.'[120] Crowe here identifies the common assumption that natural law theory is associated with Roman Catholicism. Nicholas Bamforth and David Richards in *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law*, develop this argument further through arguing that the jurists George and Finnis hold prominent conservative moral views on issues such as sexuality, making the theory 'appear at first sight, to constitute a Catholic form of fundamentalism.'[121] This criticism overstates the role and form of Catholicism – in particular Roman Catholic ethical thought - within the theory. Can it be denied, however, that there is a significant Roman Catholic influence within NNL writings?

There is a sense that writing in a Roman Catholic vein, George and Finnis have contributed to the ethical debates surrounding abortion, nuclear deterrence and sexual morality have provided a notable and controversial exposition of the practical implications of the NNL theory. Throughout these writings, Biggar and Black believe there is an underlying Roman Catholic narrative.[122] This is because conclusions are drawn that match and favour Roman Catholic teaching. From this narrative, it may be seen that, on balance, there is a consistent Roman Catholic influence and connection running through the scholarship indicating a form of bias. This may lead to conclusions favouring Roman Catholicism. As such, it may also be more appropriate to term this work a form of Roman Catholic or a Christian ethic. This recurring theme of a possible Roman Catholic bias will be discussed in greater depth in chapter 2, chapter 4 and also in the remainder of the thesis.

Introduction to the Grisez School's Ethic

Even if it is suggested that NNL is influenced by Roman Catholic thought, Germain Grisez makes no claim that NNL is a Christian ethic in the sense that

[120] Ibid. This pre-conception that academics with an interest in natural law must be Roman Catholic or must hold conservative views of moral issues is rejected by Crowe, who believes that this is to 'throw out the baby with the bathwater.' Ibid 294. Crowe identifies a phase of writing that diverges in important respects from both Aquinas' writings and Catholic ethical teachings, he terms this the era of natural law beyond Finnis – ibid 294-295. As shown in this section, particularly in NNL writings I take a more critical view to the role of Roman Catholic thought.

[121] Bamforth and Richards (n 26) 30, 279. There is a sense in this work that, much in the same way as they criticise Finnis and George, Bamforth and Richards are driven by their own ideological secular humanist impetus to criticise NNL in an effort to justify their own beliefs.

[122] N Biggar & R Black (eds), *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Ashgate, 2000) 179, 180.

direct appeal is made to God's self-revelation in Christ – instead, for Grisez, Christian ethics arise when a Christian world view transforms an ethic surrounding creation.[123] Can it be denied then that NNL is a Christian ethic? Looking at the theory, for Grisez human well-being is human fulfilment found within religion. Because of this, the first principle of morality, which guides towards integral human fulfilment,[124] is transfigured into the first principle of Christian morality.[125]

Despite this engagement with religion, it is theologically possible for NNL theorists to engage with secular ethics and they frequently do so.[126] Some critics have, however, suggested the Grisez School fails to present a Christian ethic. For instance, Black has suggested in *Christian Moral Realism* that while NNL work may be ethics written by a Christian, it may not be theological ethics, and thus is not an explicit form of Christian ethics, rather a form based upon the gospel.[127] Black suggests that understanding why Grisez's theory is not more explicitly a Christian ethic is to understand that he desires to avoid 'reinstating a conception of the Christian life that is shaped by another worldly focus.'[128] As such, Black attempts to portray NNL as a form of Christian ethics,[129] though comes to the conclusion it is a form of 'Christian moral realism'.[130] I suggest this portrays Black's struggle to engage with the variety of NNL thought,[131] which arises from the overt NNL engagement with secular ethics, built upon the earlier identified Roman Catholic bias.

The problem here is that although it is a very attractive position to take (reconciling both secular and Christian ethics), it does not conclusively provide a solution to reconcile the presentation of moral theology and practical reason given

[123] Black, *Christian Moral Realism* (Oxford University Press, 2000) 115.
[124] Biggar & R Black (eds), *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (n 122) 67-68.
[125] Black, *Christian Moral Realism* (n 123) 145.
[126] For instance: J Finnis, J Boyle and G Grisez, *Nuclear Deterrence, Morality and Realism* (Clarendon Press, 1987); George, *Embryo: A Defense of Human Life* (n 117); Finnis, *The Collected Essays of John Finnis: Volume 5 – Religion and Public Reasons* (Oxford University Press, 2011) 80.
[127] Black, *Christian Moral Realism* (n 123) 7, 8, 180, 181. A lack of consensus is shown because the theologian Oliver O'Donovan contrastingly believes that the theory is a Christian ethic to the extent that tradition has entered to reinforce the deliveries of practical reason - Biggar & Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (n 122) 127.
[128] Ibid 167.
[129] Black, *Christian Moral Realism* (n 123) 140.
[130] Ibid 7, 8, 180, 181.
[131] Ibid 118.

the apparent Roman Catholic bias, in order to conclusively term NNL a Christian ethic. Could following the Roman Catholic Church's teaching here be leading astray members of the Grisez School in their approach to moral philosophy? If so, will any analysis of George's approach automatically prove fruitless because of the identified Roman Catholic bias? As such, the lack of consensus here presents a problem that needs to be resolved in George's thought. This thesis will attempt to reconcile this ethic through the analysis of George's thought, which is necessary in order to mount a coherent critique of the place of religious liberty within equality law.

Basic Human Goods within NNL

George believes that natural law theories are accounts of basic human goods and reasons for action that they provide.[132] This is a very simple synopsis for NNL. It has merit in my view because the concept of the basic human goods is central to NNL and so the basic goods feature prominently in the writings of new natural lawyers. It is noted that the pluralistic goods first appeared as basic goods, then as basic human goods and latterly in Finnis' work as 'basic reasons for action.'[133] George adopts these terms and so to adequately analyse George's thought (in preparation for later deployment toward religious equality law) his interpretation of 'basic goods' will be introduced below and discussed in-depth in chapters 2 and 3.[134]

For this introductory chapter, the first principles of natural law are not themselves moral principles, nor are they legal principles. Rather, they are philosophical principles that extend to and govern all intelligent practical deliberation, through the process of directing action towards possibilities that offer some intelligible benefit.[135] Such principles refer to non-instrumental ('basic') reasons for action. These basic reasons for action are termed by NNL as 'basic human goods.'[136] To outline George's thought surrounding the basic human goods, in *Body Self*

[132] R P George, *In Defense of Natural Law* (n 4) 229.

[133] Biggar & Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (n 122) 11.

[134] While George uses these terms interchangeably, he does tellingly note that: 'Grisez, Boyle and Finnis call them "basic human goods'" and so this may indicate the preferred terminology - George, *In Defense of Natural Law* (n 4) 231.

[135] Ibid 105.

[136] Ibid 105, 128.

Dualism,[137] George has presented the set of goods that constitute the flourishing life as follows: human life and health, speculative knowledge or understanding, aesthetic experience, friendship of personal community and harmony among the different aspects of the self.[138] Importantly here there is no basic good of religion.[139] This is because of the new natural lawyers' interpretation and use of religion. George's interpretation of the basic good of religion will be discussed in depth in chapter 2.2, chapter 4.4 and chapter 5 as a whole. George's approach to the basic goods (through analysing his approach to practical reasoning) will also be criticised in the next chapter.

The NNL understanding of the FPPR

With the basic goods being basic reasons for action[140] this helps to highlight the agent's practical reasoning. In preparation for later analysing George's position regarding the right to religious liberty, it is helpful here to comment on NNL and George's/his understanding of the First Principle of Practical Reason [FPPR]. Aquinas' statement of the first precept of the natural law was 'good is to be done and pursued, and evil is to be avoided.'[141] This formulation has been termed 'novel' at its own time[142] and scholars of Aquinas have explicated his meaning here. For instance, it has been suggested that principles of the natural law are based upon the FPPR[143] and further that the FPPR is prior to the deliverances of practical reasoning, since it provides the foundation for them and directs towards some good.[144] The centrality of this process within the exercise of our practical reason can be seen because through the FPPR one grasps the intelligible point of certain possible actions for ends (goods, values, purposes) which *qua* intelligible provide "reasons for choice and action'.[145] In other words, the first

[137] George & Lee, *Body-Self Dualism in Contemporary Ethics and Politics* (n 3).
[138] Ibid 91.
[139] Chapter 2 will note that George does list a basic good of religion in his later work. See George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 1) 119.
[140] J Finnis, *Natural Law and Natural Rights* (2nd edn Oxford University Press, 2011) 443.
[141] 'Good is to be done, and pursued, and evil is to be avoided' - ST I-II q.94 a. 2c. - T Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (Henle R J ed, University of Notre Dame Press 1993) 262.
[142] R McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (rev edn, The Catholic University of America Press, 1997) 38.
[143] Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (Oxford University Press, 2002) 216.
[144] Porter, "Basic Goods and the Human Good in Recent Catholic Moral Theology" Thomist 47 (1993), 27, 29-30.
[145] George, *The Clash of the Orthodoxie*s (n 4) 65.

principles of practical reason that direct action towards goods and reasons outline the range of possible rationally motivated actions.[146] As such, it is clear that the exercise of our practical reason engaging with the good is important to the above established non-theological understanding of NNL jurisprudence.

To deploy George's thought to the Equality Act 2010 later in this thesis, chapters 2 and 3 will detail that George broadly speaking follows NNL's Thomistic[147] interpretation of the FPPR.[148] This section will show that a difficulty with the NNL contribution is the connection between this FPPR and the basic reasons for action/basic good/goods. To establish this, the NNL approach to the FPPR leads to Finnis again drawing upon ST I-II q. 94 a. 2c and writing the 'first principle of practical reason is '*Good* is to be *done* and *pursued* and evil avoided".[149] For instance, Finnis suggests that the FPPR prescribes: 'one is to interest oneself in and act to instantiate intelligible goods'.[150] The FPPR directs one to action. This helps to explain how according to Grisez's interpretation of Aquinas, the FPPR is 'a principle of action.'[151] Grisez further maintains that the FPPR provides a basic reason for action by prescribing rational pursuit be intentional toward ends and so making human action possible.[152] For our purposes, according to Grisez's interpretation of Aquinas, this is because the basic goods (treated as ends in themselves) render human choice intelligible by providing ultimate reasons for action.[153] In other words, an item of behaviour is termed an action, when it is consciously directed towards some good.[154] As such, the FPPR's primacy is established.

Moreover, the plurality of these basic human goods has a number of implications for George's own NNL approach towards US discrimination law and the attempt to provide a superior critique of issues pertaining to religious liberty within equality

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[146] George, *In Defense of Natural Law* (n 4) 233.
[147] R McInerny, 'The Principles of Natural Law,' (1980) 25 Am. J. Juris. 1, 15.
[148] George, *In Defense of Natural Law* (n 4) 37.
[149] (*bonum est prosequendum et malum vitandum*) – Finnis, Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory (Oxford University Press, 1998) 95.
[150] Ibid 95.
[151] G Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2' (1965) 10 Natural Law Forum, 168, 191.
[152] Ibid 190.
[153] G Grisez, *Christian Moral Principles: The Way of the Lord Jesus. Vol 1* (Francisco Herald Press, 1983) 180 relying upon T Aquinas, Summa Theologica (D Bourke & A Littledale eds, Blackfriars, 1963) I-II q. 14 a. 2c.
[154] Porter, "Basic Goods and the Human Good in Recent Catholic Moral Theology" (n 144).

law. The leading collaborative NNL restatement by Finnis, Grisez and Boyle: 'Practical Principles, Moral Truth and Ultimate Ends'[155] provides further insight into the connection between practical reason and the basic human goods. The article outlines that the basic goods are basic reasons for acting 'because they are aspects of the fulfilment of persons, whose action is rationally motivated by these reasons.'[156] Basic goods are intrinsic and constitutive aspects of human well-being and fulfilment.[157] Finnis further writes that through said process 'practical reason gives participation to the end of flourishing within NNL.'[158] For our purposes, it is evident that the 'FPPR that directs [human] action to the basic human goods'[159] points to 'realising aspects of human flourishing'.[160] This indicates that within NNL, as these basic human goods are constitutive aspects of the well-being and fulfilment of the individual; basic human goods provide reasons for action precisely insofar as they are intrinsic aspects of human well-being or flourishing (*Eudaimonia/eudaimonaiea*). This displays consensus that the FPPR is rooted in the nature of the concept of the good which leads to flourishing.

The important point for the upcoming thesis chapters is that it is arguable that this NNL theory of rationality and human flourishing is dependent upon the practical reasoning developed by Aristotle and especially his understanding of *eudaimonaiea*.[161] Thus George and Finnis refer to requirements of practical reasonableness to mean the specifications of the (earlier identified) first principle of morality which guide action 'by excluding options that seem reasonable only if one's reason has been fettered.'[162] They provide conclusive second-order reasons not to choose certain practical possibilities, in accordance with human flourishing. As such, drawing upon the classical tradition positions human nature in line with practical reason according to what is good. This position, built around

[155] J Finnis, G Grisez and J Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 Am. J. Juris. 99.
[156] Ibid 103.
[157] R P George, *In Defense of Natural Law* (n 4) 45, 103.
[158] J Finnis, 'Natural law and legal reasoning' in R P George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992) 135-136.
[159] George, *In Defense of Natural Law* (n 4) 233.
[160] Finnis, 'Natural law and legal reasoning' (n 158).
[161] Aristotle's term "Eudaimonia/Eudaimonaiea" is commonly translated as "happiness", but is also described as "human flourishing" or the "good life". See Aristotle, *Nicomachean Ethics* (G P Goold ed, William Heinmann LTD, 1934).
[162] Ibid 231-233.

the concept that the FPPR directs to action, will further be seen as important in chapter 2's analysis of practical reasoning in the work of Robert George.

Intentional action and the FPPR within NNL

If action that can be understood as conforming to the FPPR can be understood as intelligible rational pursuit toward ends,[163] then the FPPR further prescribes intentional action by suggesting that it be intentional.[164] Grisez believes that the first principle of practical reason expresses intentionality, which is the 'first condition for conformity to mind [sic] on the part of works and ends.'[165] This ensures that practical reason intentionally directs toward ends.[166] The centrality of intention can be seen in the following comment:

> 'Intention is a tough, sophisticated, and serviceable concept, well worthy of its central role in moral and legal assessment, because it picks out the central realities of deliberation and choice: the linking of means and ends in a plan or proposal for action *adopted* by *choice* in preference to alternative proposals (including to do nothing).'[167]

These words by Finnis clearly demonstrate the centrality surrounding intention and action within NNL jurisprudence. Where is this intentional direction toward ends within NNL drawn from? This is drawn from Aquinas stating: '[o]ne is said to lay hold of or to have an end, not only in reality, but also in intention,'[168] which connects practical reason toward ends. A theory of action can also be brought out from Aquinas stating: "intention" indicates an act of the will, presupposing the act whereby the reason orders something to the end.'[169] An agent further 'does

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[163] M Murphy, 'The Natural Law Tradition in Ethics', (*The Stanford Encyclopedia of Philosophy,* 2011) <https://plato.stanford.edu/archives/win2011/entries/natural-law-ethics/>.' Accessed 4th December 2016.

[164] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae' (n 151).

[165] Ibid 178-179. Intentionality is held to be the 'first condition for conformity to practical reason' – ibid.

[166] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2' (n 151).

[167] J Finnis, 'Intention in Tort Law', in David Owen (ed.) *Philosophical Foundations of Tort Law* (OUP) 229-48; J Finnis, 'Intention in Tort Law', in *The Collected Essays of John Finnis: Volume II – Intention and Identity* (Oxford University Press, 2011) 198.

[168] T Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (Fathers of the English Dominican Province tr, 1920) <http://www.newadvent.org/summa/index.html> accessed 20th February 2017, I–II, q. 11, a. 4**.** Reply to Objection 3. See also: **'**intention belongs first and principally to that which moves to the end' – ibid, ST I-II, q. 12. a. 1; ST I–II, q. 11 a. 4.

[169] Ibid, ST I–II, q. 12, a. 1 objection 3. Finnis' reading of Aquinas indicates that it is through agent's will that reason has the power to move to action as a desire of reason – ibid, ST I-I q. 19 a. IC. Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 70.

not move except out of intention for an end.'[170] I suggest this follows from: 'all human actions must be for an end.'[171] It becomes apparent that for Aquinas intentional action must be compatible and directed to 'attainment of the final end.'[172] By drawing upon original writing by Aquinas, we can further understand practical reasoning.

The exercise of practical reasoning is linked to intentional action. Rodriguez-Blanco argues that practical reason is 'conceived as a *form* that is displayed in our intentional action'.[173] For instance, the 'sound structure of practical reason and the exercise of this capacity can be understood through the structure of intentional action.'[174] It follows, to act for reasons is to act intentionally.[175] Intentional action is therefore very clearly found to be the paradigm of action.[176] This process intertwining practical reason and intentional action, draws upon the tradition evident in Aristotle, Aquinas and contemporary interpretations forwarded by Anscombe.[177] For instance, Anscombe believes that 'what Aristotle meant by practical reasoning certainly included reasoning that led to action.'[178] Intentional action is thus successfully shown to derive from a rich philosophical history and is a key feature in any discussion surrounding practical reasoning and, in my view, so also any discussion involving NNL.

Once again, this highlights connection between reason, intention and action. The specific phrase 'intentionale/*esse intentionale*' is only used by Aquinas twelve times in a corpus of some eight and a half million words – A Murray, 'Intentionale in Thomas Aquinas' (Plato and Aristotle Conference, January 1993) < http://www.cis.catholic.edu.au/Files/Murray-IntentionaleinAquinas.pdf> accessed 21st February 2017. The rarity in usage does not diminish the detailed discussion in Aquinas' thought which, as indicated above, integrates action, intention and reason. For discussion surrounding '*obiectum*' – 'the object or objective of the act' in Aquinas' work, see T Hoffman, J Müller & Matthias Perkams (eds), *Aquinas and the Nicomachean Ethics* (Cambridge University Press, 2013) 245.

[170] T Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I-II q.1. a.2.

[171] Ibid ST I-II q.1. a.1.

[172] F C Copleston, *Aquinas* (Penguin, 1955) 207-208.

[173] V Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (Bloomsbury, 2014) 3.

[174] Ibid 26.

[175] Ibid 153.

[176] Ibid 40-41.

[177] Ibid 22, 86. See Aristotle, *Nicomachean Ethics* (n 161) I. i. 2; III v. 18-2. Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I–II, q. 12, a. 1; and E Anscombe, *Intention* (2nd edn, Harvard University Press, 2000) 33-34. This position can be seen in the stance adopted by Finnis: whereas he believes Elizabeth Anscombe's work drew from Aristotle, Finnis' position seeks to embrace both Aquinas and Aristotle because his 'treatment of intention fields as a telling philosophical witness from Aquinas, who had understood Aristotle' - Finnis, *The Collected Essays of John Finnis: Volume II – Intention and Identity* (n 167) 14. For argument that Aquinas is a largely undisclosed influence upon Anscombe's work, see ibid 72.

[178] Anscombe, *Intention* (n 177) 61-62.

George identifies intentional action and is also very clear that the FPPR states that practical thinking requires one's reasoning to be directed toward 'some end that is pursuable by human action.'[179] George arguably follows the Grisez School here through understanding that for 'Aquinas, as Grisez reads him, the ends that the practical intellect grasps as ultimate reasons for action are properly understood as intrinsic human goods and, as such, aspects of human fulfilment.'[180] It is evident that human fulfilment can be realised through human action.[181] It is therefore apparent that following the Grisez School's interpretation of Aquinas, the FPPR also draws connections in George's thought directing rational pursuit toward ends.

Importantly for our later analysis of the right to religious freedom, it was earlier established that for the Grisez School the FPPR that directs action to the basic human goods outlines the range of possible rationally motivated human actions. As such, criticism begins to arise because the FPPR is presupposed in acts of practical thinking;[182] the FPPR 'operates in all practical reasoning.'[183] In other words, human action is possible precisely because we have seen that the overarching FPPR provides basic reasons for action by, once again, prescribing rational pursuit be intentional toward ends.[184] The problem may be that in writing about the pursuance of the FPPR,[185] Finnis, and the other new natural lawyers, have insisted that the reference to the 'ultimate end' of human life should be referred to in the plural: referring to *ends*.[186] It has been argued that for Finnis this is analogous to *goods*, which provide the basis of the first principle.[187] Within NNL, Lisska has similarly identified that practical reason is directed towards action for ends, and every end has the nature of good.[188] Seeking the good is realised in terms of seeking the basic goods. This is a controversial approach

[179] George, *In Defense of Natural Law* (n 4) 37.
[180] Ibid 38.
[181] G Grisez, 'The Structures of Practical Reason: Some Comments and Clarifications' (1988) 52 Thomist 269, 278.
[182] C Paterson, 'Aquinas, Finnis and Non-naturalism' in C Paterson and M Pugh (eds), *Analytical Thomism: Traditions in Dialogue* (Ashgate, 2006) 176.
[183] Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 155) 119.
[184] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Q94, Article 2' (n 151).
[185] Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) I-II, q. 94, a. 2c.
[186] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 79.
[187] S Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 32) 191.
[188] Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (n 143) 216.

taken by the Grisez School and the alleged 'modification' of the FPPR by George will be the subject of debate in George's work in chapter 2.2.

Finnis within *Natural Law and Natural Rights* holds there to be seven basic forms of good.[189] According to Finnis' justification for the basic goods there is 'magic in the number seven, and others who have reflected on these matters have produced slightly different lists, usually slightly longer.'[190] The basic model present in intentional action and by which practical reason moves from principles to conclusions follows the practical syllogism.[191] This is because the FPPR is the major premise of the practical syllogism and is the active principle when one deliberates and engages with the good (as seen by the agent). This practical syllogism shows the sound structure of practical reason and so is a 'rational discourse at the service of [intentional] action and to guide choice.'[192] The set of goods that are constitutive of a flourishing life are the result of this exercise of practical reason. For example, in *Natural Law and Natural Rights*, Finnis categorises these 'basic human goods as: 'life (and health); knowledge; play; aesthetic experience; sociability (friendship); practical reasonableness; and religion.'[193] Mark Murphy, on the other hand, argues that natural law theorists 'disagree in their catalogs of basic goods'.[194] He argues this emerges because a task is posed by 'forming propositionally, and in as illuminating a way as possible, what items need be affirmed as intrinsically good in order to make sense of our inclinations.'[195] The view put forward by Murphy is that within the exercise of our practical reason the new natural lawyers disagree on the categorisation of the

[189] Finnis, *Natural Law and Natural Rights* (n 31) 85-90.

[190] Finnis, *Natural law and Natural Rights* (n 140) 92.

[191] T M Osborne 'Practical Reasoning' in B Davies and E Stump (eds), *The Oxford Handbook of Aquinas* (Oxford University Press, 2012) 281; R McInerny, *Aquinas* (Blackwell, 2004) 107-108; D Charles, *Aristotle's Philosophy of Action* (Duckworth, 1984) 90, 94. See Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I-II q.90 a.1, 2m. The practical syllogism derives from the 'Aristotelian practical syllogism' (see Aristotle, *Nic. Eth.* VI.9, 12: 1142b22-26, 1144a31-36; vii.3: 1146b34 -1147a36). For instance, Charles is very clear that 'Aristotle's general conception of practical reasoning includes the practical syllogism within it' - D Charles, *Aristotle's Philosophy of Action* (Duckworth, 1984) 137 and further D J O'Connor suggests that in the classical tradition Aquinas himself referred to this type of syllogism as the "'operative syllogism" – ST I-IIae 76.1c' – D J O'Connor, *Aquinas and Natural Law* (Macmillan, 1967) 42.

[192] R McInerny, *Aquinas on Human Action: A Theory of Practice* (The Catholic University of America Press, 2012) 64.

[193] Finnis, *Natural Law and Natural Rights* (n 31) 85-90. For Grisez's list of basic goods see: G Grisez, *Abortion: The Myths, The Realities and the Arguments* (Corpus, 1990) 312-313.

[194] M Murphy, 'The Natural Law Tradition in Ethics' (n 163).

[195] Ibid.

basic goods (that are constitute of a flourishing life). The basic human goods have altered over the course of the Grisez School's writings and the scholarly input of different NNL theorists. Finnis himself has debated the inclusion of marriage between the publishing of *Natural Law and Natural Rights*[196] and the publication of the *Fundamentals of Ethics*.[197] The set of goods that are constitutive of a flourishing life are, however, the result of our exercise of practical reason and not the result of different categorisation/consensus. It will be shown in section 1.5 that Finnis has also used different basic human goods.

<u>The rejection of human nature within NNL</u>

Further contentious issues in NNL could be considered, not least that NNL does not reach conclusions from human nature. As George states, NNL does not 'propose to judge the morality of acts by their conformity to human nature.'[198] Reasons for action are once more to be considered important because George maintains that we cannot deduce or infer reason for action from premises that do not include reasons for action. Rather our knowledge of basic reasons is underived from anything other than reason or an innate understanding of practical reasonableness:[199] the basic good of practical reasonableness plays an 'architectonic role in guiding worthwhile human action.'[200] George's related claim is therefore that human fulfilment is directly linked to reasons for action, oriented toward what is good.

This disassociation with human nature can be stressed further. It is because of the focus upon practical reason throughout this thesis that it can be re-emphasised that intrinsic goods are basic reasons for action precisely because '*they* are constitutive aspects of human flourishing (emphasis in original)';[201] they are intrinsic aspects of human well-being[202] and human flourishing – the highest form of the good.[203] NNL does not build or derive moral conclusions from

[196] Finnis, *Natural Law and Natural Rights* (n 31).
[197] Finnis, *The Fundamentals of Ethics* (Georgetown University Press, 1983).
[198] George, *In Defense of Natural Law* (n 4) 34.
[199] Ibid 38.
[200] Paterson, 'Aquinas, Finnis and Non-naturalism' (n 182).
[201] George, *Making Men Moral: Civil Liberties and Public Morality* (n 3) 103.
[202] George, *In Defense of Natural Law* (n 4) 34.
[203] Ibid 229. See also G Grisez, 'The Structures of Practical Reason: Some Comments and Clarifications' (n 181) 278.

observations about human nature but by way of deductions from the basic goods.[204]

This stance with respect to the basic goods provides the backdrop against and means by which NNL theorists have countered at least some criticisms laid against natural law traditions. For instance, the background to NNL not reaching conclusions from human nature flows from criticism directed towards natural law that human nature should warrant an 'ought' built into it.[205] Debate arises because NNL maintains that we cannot infer or deduce the 'ought' from the 'is' of human nature.[206] George's rejection of the so-called is/ought dichotomy will be analysed in chapter 2.2. It can be noted here, however, that this is a rejection of the is/ought problem as articulated by David Hume and subsequently restated by G. E. Moore in his account of the naturalistic fallacy.[207] For instance, Grisez attacks the suggestion that Aquinas identified moral norms by reference to knowledge of human nature[208] He is concerned to 'show how far this interpretation misses Aquinas's real position.'[209] Similarly, Finnis is very clear: 'the objection that Aquinas's account of natural law proposes an illicit inference from 'is' to 'ought' is

[204] George, *Natural Law Theory: Contemporary Essays* (n 158) 33. See further J Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (William B. Eerdmans 1999) 27. The claim whether NNL is 'natural law without nature' will be analysed in the next section in relation to John Finnis.

[205] D Hume, *A Treatise of Human Nature* (first published 1739, L A Selby-Bigge ed, Oxford University Press, 1888) 87.

[206] George, *In Defense of Natural Law* (n 4) 89.

[207] See Hume, *A Treatise of Human Nature* (n 205) 469, and G. E. Moore, *Principa Ethica* (first published 1903, Cambridge University Press, 1948), 46-56. In chapter 2 it will be shown how George deals with the history of NNL critique. Importantly for this chapter Ralph McInerny has criticised Grisez and Finnis holding a 'Humean' view of practical reasoning 'which regards knowledge of the world to be irrelevant to [practical reasoning].' R McInerny, *Ethica Thomistica* (The Catholic University of America Press, 1982) 54-55. It follows that a theory of practical philosophical reasoning, following the practical philosophy of David Hume, cannot be regarded as a natural law theory, thus failing to do the thing that makes a theory of morality and practical reasoning a natural law theory. McInerny's criticism of NNL is the need to ground morality in 'nature', in particular human nature and the place of man in nature - George, *In Defense of Natural Law* (n 4) 84. By rejecting this approach the new natural law theorists suggest it involves the 'naturalistic fallacy' of attempting to infer moral norms from facts about human nature. Moral conclusions cannot be derived from premises that do not include reasons for action – a valid conclusion cannot introduce something that is not in the premises – it cannot move from facts to norms – ibid 83. This achieves two things: first, it highlights the importance of reasons for action in NNL thought by not identifying good with a natural fact and, second, it reconciles George's approach with Roman Catholicism which, as will be suggested later in this chapter, is traditionally sceptical about human nature.

[208] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2' (n 151) 168.

[209] Ibid.

quite unjustified.'[210] As we 'cannot deduce or infer the 'ought' from the 'is' of human nature',[211] it is argued that conclusions are not derived from premises that omit reasons for action – there is no movement from is to ought (facts to norms).[212]

George's rejection of the is/ought dichotomy will be analysed in chapter 2.2. For present purposes, if NNL does not build from human nature, but rather an understanding of practical reason, the question is what controversy arises within the theory regarding other factors present in rationally motivated action. In other words, do NNL proponents believe that the practical principles concerning the basic goods require other factors? It is important to clarify that while theorists writing in the NNL tradition believe that the practical principles concerning the basic goods do not state moral propositions, they still assume that desires and other factors (tastes, preferences) are essential ingredients, even in rationally motivated actions.[213] NNL represents a set of general moral principles in order to structure and guide human choice between intelligible human goods. In *Natural Law and Natural Rights*[214] Finnis labelled these principles the earlier mentioned 'requirements of practical reasonableness'.[215] The controversial claim made by Finnis and George is that people sometimes desire to pursue certain ends or purposes precisely because of the reasons constituted and supplied by these ends or purposes themselves - intrinsic human goods can be sought as *ends* in themselves.[216] For instance, one may want to learn more about John Locke's political theory not as a matter of brute desire but precisely because of practical judgement that such knowledge is 'humanly enriching and therefore worth pursuing quite apart from any instrumental value it might have.'[217] George believes that learning more about John Locke is enriching for its own sake, rather than for any other more complicated desire.

By doing so, it is clear that George accepts Grisez and Finnis' presuppositions because practical reason is not merely dictated by reason***/***emotions, a 'mere

[210] Finnis, Natural Law and Natural Rights (n 31) 34.
[211] George, *Natural Law Theory: Contemporary Essays* (n 158) 38.
[212] George, *In Defense of Natural Law* (n 4) 83.
[213] Ibid 49.
[214] Finnis, *Natural Law and Natural Rights* (n 31).
[215] Ibid 3.
[216] George, In Defense of Natural Law (n 4) 272.
[217] Ibid 20.

instrument in the service of desire, which would prevent rationally motivated choice guided by practical intellect.'[218] Adopting this position has led to criticism that not all basic spheres of human experience are covered, which highlights the lack of a 'well-balanced view of human flourishing that interweaves the basic components of human anthropology, like reason, desires and passions.'[219] Rather, a very inclusive non-instrumental position is adopted where basic reasons for action and intrinsic human goods can be sought as *ends* in themselves while still holding a place for morality and desires. In chapter 3 this position will be analysed in relation to George's thought.

Human flourishing and NNL

NNL scholars are very alert to the controversy surrounding the basic human goods and the connection to human fulfilment. For instance, controversy surrounding the basic goods can be seen within *In Defense of Natural Law*[220] through George's adoption of the 'incommensurability thesis.'[221] This requires a defence of the proposition 'that basic values [basic human goods] are incommensurable'.[222] This is suggested to be contentious because the incommensurability of basic values provides ultimate reasons for action (with the focus placed upon the realisation of the basic good not focusing upon other reasons for action).[223] As such, basic values cannot necessarily be calculated in accordance with an objective standard of comparison, and so if basic values are irreconcilable, criticism surrounds why one good cannot be selected at the expense of others.[224] The answer provided is that with any derivation taken away from other more fundamental reasons via incommensurability,[225] the focus is clearly placed upon the FPPR and realisation of the basic good towards the fulfilment of human living,[226] that is, a life that flourishes and where the teleological orientation of human life toward fulfilment provides moral orientation; where human flourishing 'can provide standards capable of guiding choice and

[218] George, *Making Men Moral: Civil Liberties and Public Morality* (n 3) 12.
[219] M Mangini, 'Virtues, Perfectionism and Natural Law' (2010) 3(1) EJLS 99, 124.
[220] George, *In Defense of Natural Law* (n 4).
[221] Ibid 92.
[222] George, *Natural Law Theory: Contemporary Essays* (n 158) 92.
[223] George, In Defense of Natural Law (n 4) 92.
[224] Robinson, '*In Defense of Natural Law:* Robert George's Jurisprudence' (n 20).
[225] George, *In Defense of Natural Law* (n 4) 93.
[226] Ibid 272.

action despite the impossibility of comparisons of value.'[227] Such a focus here places high dependency upon human fulfilment.

Given that there is incommensurability between the basic human goods, this focus upon human fulfilment (which was explicated earlier), has further been identified by Hittinger as being "taken too far".[228] Here Hittinger criticises human fulfilment being linked to incommensurable basic values. For instance, Hittinger's claim can be seen by new natural lawyers stating an 'understanding of human flourishing as constituted by incommensurable values,'[229] which again connects incommensurability of the goods directly to human flourishing. This contentious non-consequentialist approach towards the incommensurability of the basic goods and human flourishing will be reviewed in chapter 2.2.

Within this thesis determinations of the FPPR will further be seen to be important. These determinations serve as first practical principles within practical reasoning – 'the most basic precepts of natural law'[230] – and they refer to the intrinsic goods which render human choices intelligible.[231] For our purposes this is because George outlines that the natural law is made effective through choosing subjects bringing the principles of natural law into consideration in connection with human flourishing. For instance, in situations requiring moral choice, George argues that, even though practical reasoning has its own underived first principles, which include propositions concerning specific moral norms,[232] termed 'pre-moral', individuals are still required to seek after the basic goods relevant to the particular situation.[233] This is something that 'every rational agent does to an extent, and every responsible agent does to a large extent.'[234] I argue in chapter 2.2 that this is a contentious position following the treatment of the basic human goods.

A difficult, broad scope and projection for the theory is here drawn at the outset: it is broad because it is one that applies to all rational agents, deliberating in situations of morally significant choice, and it is difficult given that moral conclusions will not be derived from premises that do not include reasons for

[227] Ibid.
[228] Hittinger (n 13) 78.
[229] George, *In Defense of Natural Law* (n 4) 271.
[230] Ibid 45.
[231] Ibid 49.
[232] Ibid 91.
[233] Ibid 49.
[234] Ibid 105.

action,[235] while at the same time not directly stating moral propositions. It is important to emphasise that George recognises that some natural law theories provide ways to identify basic principles of practical reasoning and morality.[236] The most contentious claim made here is that from these principles can be derived norms to distinctly guide legislators and, to an extent, judges in their judicial decision making process.[237] For instance, George has suggested that others seek to guide legal interpretation, adjudication, and reasoning on the basis of a theoretically necessary connection between morality and law.[238] This chapter will later adumbrate this particular reliance upon legal reasoning and natural law in order to reach pragmatic legal conclusions in line with the common good.

Therefore, this is an introduction to a few of the problematic ways in which principles of NNL thought are brought into consideration. As such, this section has provided an introduction to the main concepts and a brief introduction to the main contributors in NNL. The next section will focus on the most prominent and prolific member, namely John Finnis.

1.5 Introduction to John Finnis

To critique George's NNL thought, we need first to understand George's most significant influence, namely John Finnis. Finnis is a leading member of the so-called Grisez School.[239] Finnis' contribution to natural law jurisprudence *In Natural Law and Natural Rights*[240] has been termed 'a systematic and accessible defence of natural law',[241] that is, he has been deemed to engage with criticism facing contemporary natural law jurisprudence. His influence in natural law theory can be further seen in the edited collection of essays engaging with his work – *Reason, Morality and Law: The Philosophy of John Finnis*.[242] Historically, natural law themes have been widely articulated as part and product of a philosophical

[235] Ibid 84.
[236] Ibid.
[237] This portrays one of the many ways that new natural law theorists (in particular George) have attempted to connect the theory to the practical implementation of law. This important contribution will be developed at length in chapter 2.3/2.4.
[238] George, *Natural Law Theory: Contemporary Essays* (n 158) v.
[239] A substantive analysis of his views and literature will only be found here. The Grisez School was introduced in detail in the last section: 'Introduction to NNL/Lawyers'.
[240] Finnis, *Natural Law and Natural Rights* (n 31).
[241] Crowe, 'Natural Law Beyond Finnis' (n 119) 296.
[242] R P George & J Keown (eds) *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford University Press, 2013).

critique of ethical scepticisms (whether nihilism, relativism or subjectivism).[243] However, Lloyd Weinreb has suggested that, 'in his book *Natural Law and Natural Rights*, John Finnis has developed the most substantial and serious contemporary theory to which the label of natural law attaches.'[244] I broadly accept Weinreb's conclusion in what follows and suppose that Finnis' natural law theory of morality provides a foundation for kind of political theory and jurisprudence that he defends.

The perceived importance derived from Finnis' work is demonstrated by Robert George's *Natural Law, Liberalism and Morality.*[245] Here George maintains that Finnis, in *Natural Law and Natural Rights*,[246] dramatically revived the tradition of natural law theorising, while concurrently contributing to an unprecedented and highly fruitful engagement of philosophical liberalism and natural law theory in the second half of the twentieth century. This influence upon George has persisted to the present day. For instance, natural law theorising continues to be utilised, defended and reinvigorated – in ways that distinctly converge and diverge from Finnis - by George.[247]

One reason for this influence is the voluminous, wide-ranging scholarship.[248] Finnis is a prolific writer. His scholarship ranges from moral, political and legal philosophy to constitutional law and Roman Catholic theology (and even Shakespeare).[249] We have already seen the NNL theory at the beginning of *Natural Law and Natural Rights* is, however, suggested to be 'squarely based' on the work of Germain Grisez.[250] As such, would this necessarily prevent Finnis from being distinguished from other new natural lawyers? We will now move on to see the extent to which this claim is true.

I presuppose in what follows that Finnis may be one of the many new natural lawyers, with each of whom providing different contribution. Although this detracts

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[243] J Finnis, *The Collected Essays of John Finnis: Volume I - Reason In Action* (Oxford: Oxford University Press, 2011) 201.
[244] L L Weinreb, *Natural Law and Justice* (Harvard University Press, 1987) 108.
[245] R P George, *Natural Law, Liberalism, and Morality* (Oxford University Press, 1996).
[246] Finnis, *Natural Law and Natural Rights* (n 31).
[247] George, *Natural Law, Liberalism, and Morality* (n 245) V.
[248] For a five-volume collection of Finnis' essays, see J Finnis, *The Collected Essays of John Finnis: Volumes 1-5* (Oxford University Press, 2011).
[249] See J Finnis, "'The thing I am": Personal Identity in Aquinas and Shakespeare' (2005) 22(2) Social Philosophy and Policy 250.
[250] Finnis, *Natural Law and Natural Rights* (n 31) vii.

from a single focus, the main unifying factor pulling together the wide-ranging contributions is NNL.

This said, an express contrast between members of the Grisez School needs to be made: while Finnis is often also referred to as a constitutive member of the Grisez School, this School represents Grisez's collaboration with Finnis and also with Joseph Boyle, such as in Grisez, Boyle and Finnis' interdisciplinary ethical work: *Nuclear Deterrence, Morality and Realism*[251] and the further leading restatement of NNL 'Practical Principles, Moral Truth, and Ultimate Ends'.[252] This contrast is also shown in their individual academic fields: Finnis is a legal academic; Boyle is a philosopher; and Grisez is a theologian. While much of NNL's philosophical theory was formed by Grisez, it is traditionally Finnis that receives much of the acclaim, particularly after the publication of *Natural Law and Natural Rights.*[253] How much does Finnis recognise the influence of Grisez and other members of the Grisez School? While Grisez is referred to only intermittently throughout Finnis' recent publication - *The Collected Essays of John Finnis*,[254] I argue that Finnis owes a large debt to the Grisez School. For the natural law theory of morality that Finnis here proposes, providing his foundation for the political theory and jurisprudence he defends, is again 'squarely based on the work of Germain Grisez.'[255] Therefore, while the focus upon legal philosophy and the possibility of legal application in *Natural Law and Natural Rights*[256] and *The Collected Essays of John Finnis*[257] can be attributed to Finnis, the formation of the theory needs to be attributed to Grisez.

Whereas Finnis has provided legal scholarship, Grisez's contribution has largely been in the area of Roman Catholic moral theology/philosophy. I suggest this prevents any significant single focus within the Grisez School's contribution. For instance, Robert George's distinct contribution has taken NNL into the areas of American constitutional law.[258] He has also devoted a monograph to the subject

[251] Finnis, Boyle and Grisez, *Nuclear Deterrence, Morality and Realism* (n 126).
[252] Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 155).
[253] Finnis, *Natural Law and Natural Rights* (n 31) vii.
[254] Finnis, *The Collected Essays of John Finnis: Volumes I-V* (n 248).
[255] Ibid vii.
[256] Finnis, *Natural Law and Natural Rights* (n 31).
[257] Finnis, *The Collected Essays of John Finnis: Volumes I-V* (n 248) 201.
[258] See R P George, *Great Cases in Constitutional Law* (Princeton University Press 2000).

of moral paternalism.[259] The contribution is a piecemeal, discipline specific one, with the only central thought being portrayed in *Nuclear Deterrence, Morality and Realism*[260] and 'Practical Principles, Moral Truth, and Ultimate Ends'.[261] The main unifying factor here is the new natural law theory. This consequently provides scope for the wider application of NNL in later chapters.

Introduction to Finnis' Ethic

Finnis, like the other members of the Grisez School, writes from a Roman Catholic theological perspective.[262] This is an important unifying factor within NNL and also raises again the earlier discussion surrounding potential Roman Catholic bias, which is an important factor when considering influence upon George. Finnis does not expect his readership to be Roman Catholic, or to have any prior belief in a Judaeo-Christian deity. This is because, for Finnis, philosophy and theology are intrinsically linked.[263] This is important to our understanding of Finnis' writings for the question of whether it is a philosophical matter to suggest that the 'existence and character of our universe give cogent reason for affirming the existence of such a transcendent explanation [of God]'.[264] For Finnis, the existence of God can be discovered through nature, using the process of human reason.

This positive association of nature and reason, traditionally associated with the Roman Catholic Church, invokes criticism from a Reformed theological position for which the teaching of total depravity mires any conclusion formed on the basis of an agent's reason alone.[265] For instance, Nigel Biggar and Rufus Black draw

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[259] R P George, *Making Men Moral: Civil Liberties and Public Morality* (n 3) 105, 150.

[260] Finnis, Boyle and Grisez, *Nuclear Deterrence, Morality and Realism* (n 126).

[261] Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 155).

[262] Ibid vi.

[263] It is evident that because the natural law theory adopted by Finnis draws heavily from Thomist and Aristotelian sources, this is why it is often referred to as the new classical theory of natural law. George follows this influence, for instance, George has also similarly acknowledged the 'broad revival' of Aristotelian-Thomism that occurred in the late 1970's in the work of Alasdair MacIntyre, Elizabeth Anscombe, John Finnis and Philippa Foot - R P George, 'Introduction' in Keown and George, *Reason, Morality and Law: The Philosophy of John Finnis* (n 242) 1. This highlights the rich philosophical and theological traditional drawn upon by Finnis and George in their work, which allows a deep engagement with a wide range of influences?

[264] Finnis, *The Collected Essays of John Finnis: Volume 5 – Religion and Public Reasons* (n 126) 80.

[265] Romans 3:23 *Holy Bible, English Standard Version* (Collins, 2002). For instance, as the 'human moral order' has been intrinsically corrupted from the fall, humans cannot know human nature and this has led Rufus Black to question whether NNL is a Christian ethic. His conclusion follows that whilst NNL work may be ethics written by a Christian, it may not be theological ethics, and thus is not an explicit form of

upon the theologian Karl Barth's challenge to natural law and transfer this to NNL. Barth's challenge is to build from Christian scripture.[266] Biggar suggests that because of the traditional allegiances to different Christian traditions (Barth was a Protestant and NNL follows Roman Catholicism), it follows that Protestants are conventionally more sceptical than Roman Catholics of the abilities of sinful human beings to grasp religious or moral truth apart from spiritual conversion and enlightenment by scripture. This presents a problem for a Protestant interpretation of Catholic natural law theory.[267] Once again, this draws upon the alleged Roman Catholic bias running through the work of the Grisez School. It is suggested by Biggar and Black that, because Finnis relies on human reason, he will not be able to determine basic goods, as any goods, apart from those dictated by scripture, will be tainted with sin. As Karl Braaton writes: 'It is a longstanding commonplace in Christian thought that Protestantism distinguishes its moral theology from that of Roman Catholicism by its rejection of natural law'.[268] His moderate suggestion for compromise is that natural reason alone and without revelation is not to be considered sufficient. In other words, there are some moves toward healing between Roman Catholic and Protestant traditions with respect to the relationship between revelation and reason. For present purposes, however, I merely note this longstanding tension and draw attention to the response given by Finnis.

Finnis' own response is to search for a reflective equilibrium between, first, revelation in the authoritative teaching of the church and, second, what would be judged morally reasonable even without revelation.[269] In my view this draws some similarity with Braaten: he attempts to interrelation philosophy and theology, reason and revelation, within an account of natural law.

Christian ethics, rather a form of 'Christian moral realism' based upon the gospel - Black, *Christian Moral Realism* (n 123) 7, 8, 180, 181. This criticism will also be further discussed in chapter 2.

[266] Biggar & Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (n 122) 169. Essentially, Barth's criticism is that, apart from revelation, we cannot know our own good, or goods, because of human sinfulness - Ibid 173. See also S Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics* (William B. Eerdmans Publishing Co, 2006) 30.

[267] See also C E Braaten, 'Protestants and Natural Law' (1992) 19(1) First Things 20.

[268] Ibid.

[269] Finnis, *The Collected Essays of John Finnis: Volume 5 – Religion and Public Reasons* (n 126) 10.

This acknowledged, Finnis' Roman Catholic religious claims have become more explicit in recent years.[270] Within the final chapters of *Natural Law and Natural Rights*[271] and also in *Aquinas*,[272] Finnis sought to provide arguments to affirm a divine creator and providential maintainer of the universe.[273] Within a recent work, *The Collected Essays of John Finnis: Volumes I-V* he does not only do this,[274] however, but further outlines arguments for refuting atheism and agnosticism (Volume V). Several of the essays in this collection indicate ways in which they open up the grounds for learning more about God's nature. For Finnis, a deity can be approached through human rationality alone, that is, without explicit reference to revelation. Religion shares in reason's radically public character.[275] This needs to be distinguished from a Rawlsian public reason approach because, unlike Rawls, Finnis' position with respect to the authority of reason is rooted in Roman Catholic teaching. Indeed, for Finnis, there is 'no need for the [Rawlsian] phrase public reason.'[276] Ultimately, Finnis' belief in the divine ordering of creation allows him to support a position with respect to practical reasonableness that further allows human beings to engage with the basic goods; there is he supposes a 'basic intelligible good to which a distinct practical first principle

[270] Finnis has become more confident in his explicit communication of public theology in recent years. Publications such as Finnis, *Moral Absolutes: Tradition, Revision and Truth* (n 2); and Finnis, *The Collected Essays of John Finnis: Volume 5 – Religion and Public Reasons* (n 126) have communicated Roman Catholic theology and ethics to non-theological academic audiences.

[271] Finnis, *Natural Law and Natural Rights* (n 231).

[272] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149).

[273] Indeed, Michael Freeman believes that 'God is Finnis' conclusion, not his premise.' By this Freeman means that, like Grotius, Finnis believes a theory of natural law does not have to stipulate God. For the theory 'stands without need of a religious doctrine.' M D A Freeman (ed), *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet and Maxwell, 2008) 132. Whilst this may appear appealing to a non-believer, Finnis within *Natural Law and Natural Rights* held that if you 'accept the arguments of the book you will have a strong reason to believe in an Uncaused Cause of the Universe.' Finnis, *Natural Law and Natural Rights* (n 31) Ch. XII. For a more recent restatement see J Finnis, 'Does free exercise of religion deserve constitutional mention?' (2009) 54 Am. J. Juris. 41, 56. This suggests that belief in a deity, in particular the Judaeo-Christian Roman Catholic conception, underlies *Natural Law and Natural Rights* – ibid (n 31).

[274] Finnis, *The Collected Essays of John Finnis: Volumes I-V* (n 248).

[275] Finnis, *The Collected Essays of John Finnis: Volume 5 – Religion and Public Reasons* (n 126) 3. Bamforth and Richards maintain that Finnis' work in *Natural Law and Natural Rights* is religious, despite Finnis' claim they are of a secular nature – Bamforth and Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (n 26) 125. Given Finnis' most recent publications combined with the earlier identified Roman Catholic bias point, I suggest this criticism is valid.

[276] Finnis, *The Collected Essays of John Finnis: Volume 5 – Religion and Public Reasons* (n 126) 4. This is a rejection of the 'Public reasonableness' concept argued by John Rawls most famously in *A Theory of Justice* (Belknap Press of Harvard University Press, 1971); J Rawls, *Political Liberalism* (Columbia University Press, 1993); and J Rawls, 'The Idea of Public Reason Revisited' 64 Chi, L. Rev 765 (1997). This concept will be discussed at length in chapter 2.5.

directs us.'[277] Hence his rejection of the Rawlsian position regarding public reason is identified.[278]

As will become apparent below, Finnis' stance with respect to the Rawlsian position significantly influences George. George's approach to Rawlsian public reason will be discussed at length in chapter 2 where I shall offer a critique of George's understanding of practical reasoning that draws attention to how George modifies the Rawlsian concept of public reasoning and traces consequences that follow for this own approach to US discrimination law.

Final causality and the basic human goods

This section considers basic human goods within Finnis' work. Of relevance to this topic is, first, the form of interpersonal communion shown by marriage as a basic human good. Second, the theory of final causality will also be considered. The modification required toward Robert George's work later in this thesis stems, in part, from problems found in Finnis' approach to this account of practical reason. So the foundational steps outlined here are important for my later critique of George's analysis of the right to religious liberty.

It was seen earlier in this chapter that the FPPR is the major premise of the practical syllogism in practical reasoning when one engages with the good and that the basic goods that constitute the flourishing life and provide reasons for action are the result of our exercise of practical reason. The NNL theory proposed by Finnis in *Natural Law and Natural Rights*[279] is essentially a theory of practical rationality, and a difficulty may be that, as seen in the last section, Finnis' acknowledged a list for the first principles of practical reasoning (basic goods) in 1980.[280] Finnis' most recent publication, *The Collected Essays of John Finnis: Volumes I-V*,[281] conveys, in part, however, how Finnis has altered his account. First, he has widened the basic good of play to include skilful performances included in work. Second, he has included the unique form of interpersonal communion that he calls 'the marital good' as a distinct form of basic good.[282]

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[277] Finnis, *The Collected Essays of John Finnis: Volume 5 – Religion and Public Reasons* (n 126) 4.
[278] Ibid 4.
[279] Finnis, *Natural Law and Natural Rights* (n 31).
[280] As set out earlier, this included life, knowledge, aesthetic experience, play, practical reasonableness, friendship and community and religion - Finnis, *Natural Law and Natural Rights* (n 31) 85-90.
[281] Finnis, *The Collected Essays of John Finnis: Volume I - Reason In Action* (n 243).
[282] Finnis, *The Collected Essays of John Finnis: Volumes I-V* (n 248).

These are clear alterations, but the significance with respect to the overarching account of the basic good and practical reason is debatable. More important, perhaps, than the particular changes made is Finnis' position with respect to the possibility that such changes can be made. So, for instance, in Volume I, Finnis helpfully acknowledges his failure to include the good of marriage as a basic human good within *Natural Law and Natural Rights.*[283] The inclusion of marriage has been relentlessly debated by the new natural lawyers, and its omission is frequently questioned by critics. Finnis' exercise of practical reason has here attracted criticism.[284] In response, Finnis and the new natural lawyers have objected to attacks made upon the Roman Catholic Neo-Scholastic moral philosophical-theology.[285] Finnis wanted to produce an ethical theory based upon practical reason that could instead withstand such an assault.[286] This is why in engaging with the exercise of practical reason Finnis provides this account within NNL, because Finnis is insistent on the philosophically absolute nature of the theory.[287]

I argue that the basic good of play and the 'marital good' are examples of Finnis trying to accommodate modern influences into the theory, all the while attempting to maintain the self-evident, morally absolute and universalist nature of the theory. It has already been established that Finnis frequently provides NNL scholarship. It is therefore possible through this scholarship for Finnis to engage with the good and remain (as earlier identified) both a faithful contributor to NNL jurisprudence and also a fervent Roman Catholic.

This section will now move to analyse the relationship between the theory of final causality and the basic human goods. An examination of the theory of final causality will show the philosophical presuppositions that inform and shape Finnis' approach to practical reason. The NNL account of the FPPR and connection with the good[288] has been criticised for allegedly presenting natural

[283] Finnis, *Natural Law and Natural Rights* (n 31).
[284] M Murphy, 'The Natural Law Tradition in Ethics' (n 163).
[285] A contemporary type of moral theology arising from medieval sources, based on Aristotelianism and in which Thomas Aquinas is a leading figure.
[286] Finnis, *Natural Law and Natural Rights* (n 31) 124.
[287] See Finnis, *Moral Absolutes: Tradition, Revision and Truth* (n 2).
[288] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 80.

law without nature.[289] Although it was denied earlier in this chapter that NNL builds conclusions from human nature,[290] it has, however, been maintained that neither Grisez nor any of his principal followers (George included) have ever denied that basic human goods and moral norms have grounding in human nature.[291] The new natural lawyers are perfectly clear here. It is identified that NNL advocates in the Finnisian tradition, believe that basic goods and moral norms *are* what they are, precisely because human nature *is* what it is.[292] Even though it is denied therefore that NNL builds conclusions from human nature, this rejects any notion that NNL is natural law without nature.[293]

As such, it has further been consistently maintained in this chapter that NNL does not propose to judge by conformity to human nature but consistently by way of engagement with the good.[294] For instance, Finnis derives knowledges of the basic goods from his teleological worldview.[295] It was identified earlier in the chapter that this is by the focus upon the self-evident nature of the good as the ultimate end. A version of the natural law tradition is connected to conceptions of 'nature' but there is also a more sophisticated version connected to the idea of 'practical reason'.[296] For instance, in developing this connection between human nature and practical reason the theory of final causality entails the view that the agent does not need to infer the good from theoretical perspectives about nature (her own nature as theoretical). In order for this to be established it will now be

[289] Bamforth and Richards, Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law (n 26) 182; George, Natural Law Theory: Contemporary Essays (n 158) 33.
[290] See section 1.4 – 'The rejection of human nature within NNL'. It was established that NNL does not build from human nature but rather from an understanding of practical reason – as a reminder George states: NNL does not 'propose to judge the morality of acts by their conformity to human nature.' George, *In Defense of Natural Law* (n 4) 34; George, *Natural Law Theory: Contemporary Essays* (n 158) 31; Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2' (n 151).
[291] George, Natural Law Theory: Contemporary Essays (n 158) 33.
[292] Ibid 33.
[293] Ibid 31.
[294] Finnis, *Natural Law and Natural Rights* (n 140) 443.
[295] There is dispute surrounding this classification. Finnis, Grisez and Boyle deny that NNL is teleological because unlike teleological theories, they believe that NNL shows why there are absolute moral norms - Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 155) 101. George contrastingly takes a more traditional position here by following Aquinas. This clarifies the matter because he views Aquinas as logically presenting a 'teleological' view based upon the theory of final causation - George, *In Defense of Natural Law* (n 4) 41.
[296] V Rodriguez-Blanco, 'Book Review: E Pattaro, The Law and The Right: A Reappraisal of the Reality that Ought to Be (Springer, 2007)' (2009) 22(2) *The Canadian Journal of Law and Jurisprudence* 451, 453.

shown that the final cause is understood by both Aquinas and Finnis to be important in the exercise of practical reason.

I turn first to Aquinas. In a normative view of nature, the first of all causes is held by Aquinas to be the final cause.[297] This is made very clear by the original text: '[n]ow the first of all causes is the final cause.'[298] Final causality is one of the ways in which Aquinas viewed the movement from potency to act in which change consists.[299] NNL has similarly recognised how important the concept of final causality is to Aquinas' understanding of natural law.[300] The natural law theory advanced by Thomas Aquinas therefore holds an important place for final causality.

Final causality also has an important role to play in Finnis' thought. Indeed, to analyse practical reason and the basic goods in Finnis' thought requires an understanding of final causality. It has been identified that Finnis reads Aquinas to invoke a philosophy that appeals to formal and final causality.[301] This is why it was established above how 'important the conception of end, or final causality, is to Aquinas's understanding of natural law.'[302] Aquinas' natural law understanding

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[297] D J O'Connor, *Aquinas and Natural Law* (n 191) 14. J Bobick, *Aquinas on Matter and Form and the Elements: A Translation and Interpretation of the De Principiis Naturae and the De Mixtione Elementorum of St Thomas Aquinas* (University of Notre Dame Press 1988) 9.

[298] ST I-II q 1. a2 - *T Aquinas, The Summa Theologiae of St. Thomas Aquinas* (Fathers of the English Dominican Province tr, Burns, Oates and Washbourne Ltd, 1920) 4**.** See also: 'Although the end be last in the order of execution, yet it is first in the order of the agent's intention. And it is this way that it is a cause' Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I-II q.1 a.1.

[299] O'Connor, *Aquinas and Natural Law* (n 191) 14. J Bobick, *Aquinas on Matter and Form and the Elements: A Translation and Interpretation of the De Principiis Naturae and the De Mixtione Elementorum of St Thomas Aquinas* (University of Notre Dame Press 1988) 9.

[300] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Q94, Article 2' (n 151). See also V Rodriguez-Blanco, 'The Why-Question Methodology, The Guise of the Good and Legal Normativity' (2017) 8(1) Jurisprudence 127, 136. Grisez goes so far as to suggest 'that final causality underlies Aquinas's conception of what law is.' Ibid 182. See Aquinas, *Commentary on the Sentences* (first published 1253-1256, D Schrader tr, Mardonnet-Moos ed, 1956) bk. 3, d. 33, q. 2, a. 4, q'la. 4, c. The importance attached to final causality by Aquinas (and also NNL) is clear.

[301] J Finnis, 'Aquinas' Moral, Political, and Legal Philosophy' (*The Stanford Encyclopedia of Philosophy,* 2014 Edn), E N Zalta (ed.), <http://plato.stanford.edu/archives/sum2014/entries/aquinas-moral-political/> accessed 4th December 2016; J Goyette, M S Latkovic, R S Myers (eds), *St Thomas Aquinas & The Natural Law Tradition: Contemporary Perspectives* (Catholic University of America Press, 2004) 9. See further Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 170 drawing upon Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I q.83 a.I ad 3. It is clear that George also traces final causality to Aquinas - R P George, 'Kelsen and Aquinas on the Natural Law Doctrine' in *St Thomas Aquinas & The Natural Law Tradition: Contemporary Perspectives* (eds, J Goyette, M S Latkovic, R S Myers, Catholic University of America Press, 2004) 237.

[302] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Q94, Article 2' (n 151) 181. See further Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 60.

leads Finnis to present practical reasoning with the good connected to an end.[303] It is suggested that the reason that final causality is important in Finnis' work is precisely because basic goods are treated as ends.[304]

Practical reason requires that reasons for action should be transparent to the agent.[305] For individual agents, it was earlier identified that the goods, as reasons for action, provide reasons for agents to act.[306] Certainly, reasons for action are limited by NNL to the basic human goods[307] (presented as ultimate ends.)[308] For our purposes this is because practical reason understands its objects in terms of good - through the FPPR practical reason acts on account of an end[309] in all practical reasoning.[310] This is made plain by Grisez writing that 'all subsequent direction must be in terms of intelligible goods, i.e., ends toward which [practical] reason can direct.'[311] It is thus clear that for NNL (and Finnis) final causality involves the self-evident FPPR directing in terms of goods: ends towards which reason can direct. The good as an end gives one a reason for action.[312] This analysis shows that an engagement by Finnis with practical reason is present here with the good connected to an end.

This reading from Aquinas and latterly Finnis connecting basic goods, human action and causality in NNL, again depends upon a theory of rationality. It has been established there is a clear link between final causality and the action oriented basic human goods. In order to further analyse Finnis' NNL thought

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[303] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 79-80. Finnis relies upon Aquinas ST I-II q.94 a. 2c and I-II q.56 a.3c.

[304] Finnis and Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends,' (n 155) 100. Finnis elsewhere writes that "[s]ince 'good' and 'end' are interdefinable, they are equally our basic ends." Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 80. See Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I-II q.56 a.3C.

[305] V Rodriguez-Blanco & G Pavlakos (eds), 'Introduction' in *Reasons and Intentions in Law and Practical Agency* (Cambridge University Press, 2015) 4.

[306] Murphy, 'The Natural Law Tradition in Ethics (n 163). See also Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 95.

[307] Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 155) 115.

[308] Ibid 133.

[309] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Q94, Article 2' (n 151) 181.

[310] Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 155) 119.

[311] Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Q94, Article 2' (n 151) 181.

[312] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 95. Further support can be found for this connection. The Grisez School have termed NNL a 'theory of some of the principles of human action' – Finnis and Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends,' (n 155) 100.

surrounding final causation and action, a theory of rationality drawing upon practical reason (like that proposed by Finnis) is framed from what Rodriguez-Blanco terms the *deliberative point of view*.[313] In the philosophy of action, Rodriguez-Blanco asserts that description of the action can be held to be from the point of view of the person who performs the action.[314] It follows that the form of intentional actions is given by description provided by the agent.[315] As such, there is connection in human rationality between action and causation.[316]

More specifically, Finnis shows how the deliberative point of view is connected to practical reason. For Finnis, practical reasoning is 'deliberating about what to want and choose to try to have.'[317] A theory of rationality (such as practical reason) requires the notion that that agent herself engages with human action. The agent's practical reasoning thus requires the deliberative point of view to be known through the end or goal of intentional action and this provides the form of the action.[318]

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[313] Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (n 173) 28. Rodriguez-Blanco identifies that the central description of the action comes from the deliberative point of view because it is the perspective that 'truly grasps the action as intentional.' Ibid 59. This coherently attempts to weave together the deliberative point of view and intentional action.

[314] Ibid 28.

[315] Ibid 37.

[316] Indeed, Raymond Stout additionally identifies in the philosophy of action an Aristotelian focus upon agents as causes - R Stout, *Action* (Acumen, 2005) 61. For a compelling account drawing upon 1048a15-21 (*Metaphysics* IX) to establish links between intentional action and causation in Aristotle, see Charles, *Aristotle's Philosophy of Action* (n 191) 108. See further in the original text Aristotle, *Physics*, *Book II*, ch. 3, 194b-195a in Aristotle, *The Basic Works of Aristotle* (R McKeon ed, Random House 1941) 240-242.

[317] J Finnis, 'Law and What I Truly Should Decide' in *The Collected Essays of John Finnis: Volume IV – Philosophy of Law* (Oxford University Press, 2011) 41. See also J Finnis, 'On Hart's Ways: Law as Reason and as Fact' in *The Collected Essays of John Finnis: Volume IV – Philosophy of Law* (Oxford University Press 2011) 235-236, 256.

[318] V Rodriguez-Blanco, 'Does Kelsen's Notion of Legal Normativity Rest on a Mistake?' (2012) 31 Law and Philosophy 725, 727-728. For Rodriguez-Blanco, the deliberative point of view can be further used to criticise Finnis. By using the Aristotelian notion of central analysis, Finnis tries to show that the 'deliberative point of view is the central or paradigmatic case to determine the nature of law.' Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (n 173) 77. (Finnis set out the 'central case' in Natural Law and Natural Rights - Finnis, *Natural Law and Natural Rights* (n 31) 14-15.) Yet it is suggested that this 'central case' approach does not sufficiently assist us in showing the primary role of the deliberative point of view that Finnis aims to defend - Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (n 173) 77. It is questionable whether this sufficiently shows a theory of rationality drawing upon practical reason is from the deliberative point of view. This is therefore modified through suggesting that 'the paradigmatic case of creating and following legal rules is the case of legal authorities and citizens who engage with objectively sound grounding reasons as good making characteristics of legal rules' - ibid 206. See also V Rodriguez-Blanco, 'Is Finnis Wrong? Understanding Normative Jurisprudence' (2007) 13 Legal Theory 257, 259. Rodriguez-Blanco does well here to identify a problem with Finnis' approach to practical reason and further integrate the deliberative point of view in practical reasoning.

[318] Rodriguez-Blanco, Law and Authority under the Guise of the Good (n 173) 28.

To recap: in this section it has been shown that the theory of final causality entails the view that the agent does not need to infer the good from theoretical perspectives about nature (her own nature as theoretical). It follows, therefore, that the agent actualises her practical reasoning capacities to apprehend the form[319] and bring about the result.[320] As the connection between the form of the action and the end of intentional action was earlier established,[321] final causality can stem from the individual's form.[322] As such, it is my view in this section that manifestation in action does not build from nature. It has been argued that, instead, it is through a theory of rationality which is from the deliberative point of view and reliant upon the agent via practical reasoning. Chapter 2.3 will argue that such reliance upon human rationality throughout George's writings may be a flaw in his thought.

This emphasis upon human rationality and final causality has been shown to draw from an account of practical reasonableness. Arguably this theory of basic human goods contributes to Finnis providing the most recognisable[323] and contentious[324] form of Roman Catholic moral teaching in contemporary jurisprudence. The philosophical presuppositions that underline Finnis' approach to practical reason have been highlighted. My working assumption in what follows is therefore that Finnis' account of practical reasonableness provides the most considered recent defence of the natural law. This position is very influential. It is a substantial influence upon George. As such, it was earlier identified that George's thought indicates that human fulfilment is directly linked to reasons for action, according to what is good. The next section will consider whether this account given by Finnis provides a sustainable approach toward legal validity.

Introduction to legal validity within Finnis' work

As will be shown in chapter 2.3, George and Finnis hold dissimilar positions concerning legal validity. George's view upon legal validity is important when applying George's thought to equality law. To this end, Finnis' position towards

[319] Ibid 73.
[320] Ibid 68.
[321] Ibid 103.
[322] J Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (William B. Eerdman 2005) 296.
[323] Weinreb, *Natural Law and Justice* (n 244) 108.
[324] See Hittinger, *Critique of the New Natural Law Theory* (n 13); Black, *Christian Moral Realism* (n 123); and Bamforth and Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (n 26).

legal validity will be analysed, to enable the later critique of George. In this section, I shall analyse Finnis' position on legal validity and look at application following this position. There is a range of thought surrounding legal validity in NNL jurisprudence, and George's work is a clear example. For George, legal validity depends upon a 'minimum standard of reasonableness'[325] and so then this arguably creates the 'moral reading' of the natural law thesis. This follows from George's conditional nature of obligation viewpoint, which suggests that all the natural law theorist wants is to issue a reminder that adherence to some laws would constitute such a departure from reasonableness that there could not be adequate reason to obey them, and so the only law that merits our obedience is law that meets a certain minimum standard of reasonableness in line with the common good.[326] With this viewpoint it is evident that George believes that legal validity depends upon law that contains a 'certain minimum standard of reasonableness'.[327] For Mark Murphy, this is termed the 'moral reading' of the natural law thesis.[328] This 'moral reading' will receive detailed analysis in chapter 2.3 when critiquing George's approach to practical reasoning, which will be essential in applying George's thought to analyse the right to religious freedom within the EqA 2010.

In contrast, for Finnis, there is not a simple and universal moral criterion for the validity of every law.[329] Instead, legal validity imposes obligation. Finnis' position towards legal validity will be analysed here, so that in chapter 2.3 critique can be applied to the contrasting standard adopted by George. For Finnis, validity has to do with the observance of proper procedures. Whereas 'an unjust law is no longer legal but rather a corruption of law'[330] is a teaching of Aquinas, Finnis distinguishes that this is *not* a thesis about the validity of law in the technical sense.[331] Rather, validity depends upon the observance of proper procedures by persons having appropriate competence: obligation. As the validity of the relevant statutory norms is not put in doubt by their injustice, it is reasonable to suggest that they can instead be defective or corrupt legal rights or legal duties. Finnis

[325] George, *Natural Law Theory: Contemporary Essays* (n 158) 68.
[326] Ibid 51.
[327] Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 9.
[328] Ibid.
[329] George, *Natural Law Theory: Contemporary Essays* (n 158) 108.
[330] George, *The Clash of the Orthodoxies* (n 4) 139.
[331] Finnis, *Natural Law and Natural Rights* (n 31) 357–360.

holds that this defectiveness weakens and, in very serious cases, negates any moral case for obedience.[332] As such, Finnis is termed a 'weak natural law' theorist by Crowe.[333] A rule or command that does not provide decisive reasons for action is defective under the 'weak reading.'[334] By drawing a position that obligation depends upon legal defectiveness, this distinguishes Finnis' position towards legal validity. This focus upon defectiveness, rather than a conditional evaluation of the law's merits, is an important way Finnis is distinguished from George.

However, the 'weak' designations given (by Crowe and Murphy) to Finnis does(may) not accurately display the breadth of Finnis' thought. In a moral sense, legal validity imposes obligation. For Finnis, 'legal obligation is treated as at least presumptively a moral obligation'.[335] This is a 'viewpoint [which] will constitute the central case of the legal viewpoint.'[336] This 'central case' may be read as:

> those who … treat law as an aspect of practical reasonableness, there will be some whose views about what practical reasonableness actually requires in this domain are, in detail, more reasonable than others. Thus the central case viewpoint itself is the viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable.[337]

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[332] Ibid 108.

[333] J Crowe, 'Between Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller' in 'Review Symposium – K Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Hart Publishing, 2012)' (2014) 5(1) Jurisprudence 96, 114–115.

[334] Murphy, *Natural Law in Jurisprudence and Politics* (n 327) 48. Murphy makes clear that a central thesis of natural law political philosophy and jurisprudence can be independent from a central theses of the natural law account of practical rationality – ibid 4. As such**,** Michael Freeman has suggested that Mark Murphy's work is the most significant natural law work since Finnis published *Natural Law and Natural Rights* – Freeman (ed), *Lloyd's Introduction to Jurisprudence* (n 273) V. Murphy has also (here) termed NNL a form of the weak natural law thesis, see: Murphy, *Natural Law and Practical Rationality* (n 31) 26. Yet, Murphy does not consider any problems associated with defective law here. To invoke the positivist critique – what does it matter if valid law is defective, is it not still law? Murphy's criticisms towards George will be addressed in chapter 2.3.

[335] Finnis, *Natural Law and Natural Rights* (n 31) 14.

[336] Ibid 14–15.

[337] Ibid 15. Rodriguez-Blanco broadly agrees with NNL that 'the paradigmatic case of law is from the point of view of the man exercising practical reason.' Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (n 173) 206. For Rodriguez-Blanco, by using the Aristotelian notion of central analysis, Finnis tries to show that the 'deliberate point of view is the central or paradigmatic case to determine the nature of law.' Ibid 77. Yet Rodriguez-Blanco does not believe that this 'central case' approach sufficiently assists us in showing the primary role of the deliberate point of view that Finnis aims to defend – ibid. So Rodriguez-Blanco does very well to modify this by suggesting that 'the paradigmatic case of creating and following legal rules is the case of legal authorities and citizens who engage with objectively sound grounding reasons as good making characteristics of legal rules' - ibid 206. See also

It is clear that, as a moral realist (believing that there are set moral truths),[338] Finnis demonstrates that law is a moral phenomenon within the 'central case' viewpoint.[339] The presentation of law as a moral phenomenon, ensures that Finnis holds there is still place for evaluating content within legal adherence. This may position Finnis' reading closer to George's 'moral reading'. This 'central case' demonstrates how moral obligation is further inherently tied to practical reasonableness. For this thesis it is key therefore that through this practical reason directs the obligation created by laws to enable the participation in human flourishing. This will be key in the application of George's thought towards the Equality Act 2010 in order to analyse the right to religious freedom.

Introduction to practical application of natural law within legal adjudication

To further see how George's position will arguably differ from Finnis, although Finnis does not say much about the practical application of his theory to legal adjudication, Finnis has anticipated and responded to the issue of application later in *Natural Law and Natural Rights*. In a verbose manner Finnis demonstrates that law co-ordinates behaviour so that members of the community can enjoy the good life, to the extent that law is:

> …Rules made, in accordance with regulative legal rules, by a determinate and effective authority for a complete community and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's coordination problems for the common good of that community,[340]

Here, I argue this provides Finnis with a broad-brush approach to law which allows wider interpretation and legal application in line with the community's common good. For instance, Finnis provided a NNL critique to question whether the Supreme Court proposed to replace proportionality with rationality as the standard of review of primary legislation[341] in *R (on the application of Nicklinson)*

Rodriguez-Blanco, 'Is Finnis Wrong? Understanding Normative Jurisprudence' (n 317) 259. Once again the centrality of practical reason is maintained.

[338] My thanks goes to Professor Julian Rivers for this classification.

[339] Finnis, *Natural Law and Natural Rights* (n 31) 14-15.

[340] Ibid 276.

[341] J Finnis, 'A British "Convention Right" to Assisted Suicide?' (2015) 131 LQR 1, 3.

v Ministry of Justice,[342] which concerned s.2 of the Suicide Act 1961.[343] As such, it is apparent that Finnis' view of law as a moral phenomenon provides discretion towards adjudicative consequences within the legal process. This is exactly what many legal statutory tests employ with the concept of 'reasonableness'.[344] Yet, even if it is suggested that Finnis may not say much of practical value, it does not follow that this is also the case for George.

This thesis will show that George brings practical application built on practical reasoning from NNL. It is arguable that George elaborates upon the practical application of his theory through believing that authority to enforce the natural law may be vested with the legislature as a check on law making power.[345] The natural law acts as a check upon its own enforcement. I also suggest George goes further and states that the legislator follows the practical intellect[346] – 'determinatio'[347] (earlier identified as Aquinas' first practical principles) – to derive the positive law from the natural law.[348] George believes that the degree of law-creating power is a matter of both the 'positive law of the constitution'[349] and is purely determinable by the natural law alone. This is one method that is applied to the creation of law in both statutory and case law form. As will be analysed further in chapter 4, this may well present a justiciable form of natural law. I believe that this shows George's reliance upon scholastic legal reasoning and the natural law to reach pragmatic legal conclusions in line with the common good.[350] As such, although Finnis' influence is significant, this is one area in which George's thought is distinct. In the critical application of George's NNL views to equality law throughout this thesis, chapter 4 will note the limits that this places

[342] *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[343] This section reads: 's2 (1) A person ("D") commits an offence if — (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide.'

[344] For instance: s.14 (2A) Sale of Goods Act 1979 – (satisfactory quality of goods); s.76(4)(a) Criminal Justice and Immigration Act 2008 (self-defence); s.98(4)(a) Employment Rights Act 1996 (unfair dismissal).

[345] R P George, *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996) 329.

[346] R P George, 'Natural Law' (2007) 31 Harvard Journal of Law & Public Policy 171, 189.

[347] Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I–II, q. 95, a. 2.

[348] George, 'Natural Law' (n 346) 171, 190.

[349] Ibid 171, 191-192.

[350] It should be noted that unlike the United States of America, the UK does not have a written constitution. An analogous method to solve this jurisdictional problem will be shown in chapter 4.

upon adjudication, and George's applicatory method will be further discussed in chapter 2.3.

Introduction to Finnis' interpretation of Aquinas

The thought, or perhaps the interpretation, of Thomas Aquinas is a central feature of this thesis. This section will consider how far John Finnis differs from Aquinas. It will consider Finnis' approach to human reasoning and the way Finnis approaches the good in light of Aquinas' work.

John Finnis, has published widely concerning Aquinas. For instance, Finnis' extended contributions in *Natural Law and Natural Rights* and perhaps most notably *Aquinas: Moral, Political and Legal Theory*[351] where he proposes a NNL exposition to Aquinas' treatise on law and government. To comment briefly on the latter theme here – government – a standard liberal objection to Aristotelian and Thomistic political thought is that it licenses an excessively expansive and intrusive role for political authorities.[352] Finnis accepts that 'there are some serious flaws in Aquinas' thoughts about human society'[353] and that 'my exposition quite often goes beyond what Aquinas says'.[354] Within this important work concerning Aquinas, Finnis argues that norms of natural law limit the scope and potential for intrusiveness of government in a variety of significant ways.[355] In other words, the natural law provides an obstacle for the state. This highlights how natural law can provide a political limitation and this influence will be important in George's critique towards the state, as will be shown in chapter 5.

It is debatable, however, whether the Grisez School take themselves to be developing, and building upon, the classical theory expounded by Aquinas.[356] Indeed the neo-naturalism of John Finnis *et al.* is a development of classical natural law theory. However Hall has suggested that the Grisez School have

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[351] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149).

[352] K Greenawalt, 'What are Public Reasons?' (2007) 1 J.L. Phil. & Culture 79, 82.

[353] Ibid vii.

[354] Ibid viii. For one situation in which Finnis openly departs from Aquinas, see Finnis, *Natural Law and Natural Rights* (n 31) 94-95.

[355] George, *Natural Law, Liberalism, and Morality* (n 245) v.

[356] For instance, the extent to which new natural law theory is Neo-Thomist, and whether it is a good representation of Aquinas, has been debated by Ralph McInerny, 'The basic dimensions of human flourishing: a comparison of accounts' in N Biggar & R Black (eds), *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Ashgate, 2000).

given up any claim that their natural law is Aquinas'.[357] In contrast a derivational claim moving from Aquinas was made in: Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends'.[358] Here the authors note that whilst some language used is broadly speaking 'Thomistic' they 'differ in various ways from….Thomas Aquinas'.[359] For instance, it was established above that Finnis admits his 'exposition quite often goes beyond what Aquinas says'.[360] It is clear by their own admission, that although Aquinas features centrally in the work of John Finnis and the wider Grisez School, there are significant differences. As such, chapter 2 will show that George's NNL significantly differs from Aquinas' natural law theory, and this critique will be important in highlighting the flaws in George's thought for the purposes of later application. The accuracy of the claim that new natural law theory is Neo-Thomist will also be a large part of the debate in chapter 2.2 – 'Robert George's interpretation of Practical Reasoning in Aquinas'.

A brief analysis of Finnis' approach to Aquinas' reasoning can be outlined here. I will further develop this in chapter 2.2 and chapter 3 to analyse George's thought. The role of human rationality is a central tenet in the writings of both Aquinas and Finnis.[361] Finnis interprets Aquinas as suggesting that the role of reason in NNL takes a forward role to divine revelation. Moreover, he suggests this mode of natural law reasoning taken from Aquinas, as well as Aristotle, does not presuppose any form of revelation. The elements of what is proposed to us by divine revelation are neither opposed nor incompatible with any truth accessible to natural reason.[362] It is clear that within Finnis' account this puts general

[357] See P M Hall, *Narrative and the Natural Law: an Interpretation of Thomistic Ethics* (University of Notre Dame Press, 1998) 74.

[358] For a classic treatment of new natural law theory citing Aquinas see Finnis, Grisez and Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 155).

[359] Ibid 99.

[360] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) viii. This is surprising, given that in *Natural Law and Natural Rights* Finnis terms Aquinas to be 'a paradigm 'natural law theorist'' - Finnis, *Natural Law and Natural Rights* (n 31) 28.

[361] This introduction will necessarily be brief and the role of human rationality will be developed in chapter 2.

[362] Finnis' reading does suggest, however, that some truths proposed by divine revelation, are altogether inaccessible to philosophical reasoning, and that there is no reason for believing them, save that God 'directly or through the divinely established Church, has proposed them to us as true.' Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 296 quoting T Aquinas, *Summa Contra Gentiles* (Aeterna, 2015) I c.3 n. 2 [14], c. By doing so, Finnis provides an escape for controversial religious practices that may (and perhaps should) be questioned on the basis of rational objection.

revelation ahead of special revelation. Finnis believes that rational argument will heat the conflict, yet also resolve any conflict between revelation and philosophical conclusions termed 'natural reason.' This indicates that natural law is the resolution to any conflict. Natural reason is able to 'defend divine revelation against all rational objections.'[363] Given that natural reason is philosophical reasoning based on ordinary experience of natural things, which are unaided by any divine revelation, then natural reason is in theory capable of meeting rational objections.[364] As such, this is why Finnis suggests in *Natural Law and Natural Rights* that if you 'accept the arguments of the book you will have a strong reason to believe in an Uncaused Cause of the Universe.'[365] In addition to again indicating possible favouritism for religious belief, this is a clear instance whereby natural reason works alongside (divine) revelation.

Though, it needs to be remembered that the NNL interpretation of Aquinas relies upon distinguishing a class of practical principles that Aquinas considered self-evident. According to Aquinas, '[t]he good of the human being is in accord with reason, and human evil is being outside the order of reasonableness.'[366] As such, Finnis points out that 'for Aquinas, the way to discover what is morally right (virtue) and wrong (vice) is to ask, not what is in accordance with human nature, but what is reasonable'.[367] Once again, this highlights human reason, which can be read together with the earlier need for nature within natural law.[368] This is evidently a common theme within Finnis' interpretation because Finnis' account of the 'common good' links to human reasoning:

> …a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realise reasonably for

[363] Ibid.

[364] Ibid 296. This has led Nigel Biggar and Rufus Black to criticise NNL. They believe an underlying Roman Catholic narrative to be employed because NNL cannot present a 'coherent body of knowledge about the human good, its components and its moral implications, which is sound per se, and to which reason can in fact attain 'naturally' that is, without illumination by revelation.' Biggar & Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (n 122) 179, 180. Chapter 2.3 will show that this critique has merit because George moves beyond reliance solely upon revelation in his claims about legal moral reasoning. This observation by Biggar and Black also highlights, once again, the recurring Roman Catholic bias that will be identified throughout this thesis.

[365] Finnis, *Natural Law and Natural Rights* (n 31) Ch. XIII.

[366] George, *In Defense of Natural Law* (n 4) 298.

[367] Ibid 298.

[368] George, *Natural Law Theory: Contemporary Essays* (n 158) 31.

themselves the value(s), for the sake of which they have reason to collaborate with each other (positively or negatively) in a community.[369]

To build on Finnis' conclusion, George highlights a dominant issue – a central tenet of scholasticism and post-Hartian[370] natural law theory – which is a belief in a universal human nature in line with the common good.[371] The interpretation here again brings out the criticism provided by Biggar and Black toward Roman Catholicism: following from the teaching of total depravity, the ability of human reason to reach conclusions on the basis of human nature is compromised.[372] The Thomistic influence Finnis draws may further realise this criticism surrounding human reasoning. This can be seen through Finnis, following Aquinas, with the 'first principles of natural law', principles that can be grasped by 'anyone of the age of reason … [and] are per se nota (self-evident) and ... underived.'[373] As such, the centricity of human reasoning seen through practical reasoning in Finnis' thought, will carry over into the criticism of George's thought in chapter 2. This is because moral reasoning will be shown to be essential in the analysis of George's thought in order to establish a better critical understanding towards the place of religious liberty within equality law.

We have seen above that Finnis frequently derives his thought surrounding reasoning from Aquinas.[374] Questions arise, however, about his reading of Aquinas and his use of his basic concepts in the development of the New Natural Law theory. To conclude this section I will show that Finnis may misread Aquinas in the development of the basic human goods. Work in a collection of essays edited by George helps highlight an inconsistency between Finnis and Aquinas. From Finnis' reading of Aquinas, Finnis suggests that: 'A Natural Law theory in the classical tradition makes no pretence that natural reason can identify the one right answer to those countless questions which arise.'[375] To answer these questions, Finnis assumes that, in the classical view expressed by Aquinas, 'there are many ways of going wrong and doing wrong; but in ... perhaps most

[369] Ibid 235. See Finnis, *Natural Law and Natural Rights* (n 31) 155.
[370] See Crowe, 'Natural Law Beyond Finnis' (n 199).
[371] George, *In Defense of Natural Law* (n 4) 235 quoting Aquinas, ST I-II q. 71, a. 2c.
[372] Biggar & Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (n 122) 169, 173; Black, *Christian Moral Realism* (n 123) 7, 8, 180, 181.
[373] Finnis, *Natural Law and Natural Rights* (n 31) 33.
[374] Ibid.
[375] George, *Natural Law Theory: Contemporary Essays* (n 158) 151, 152.

situations of personal and social life there are a number of incompatible right (i.e. not-wrong) options.'[376] This leads Finnis to the conclusion that prior personal choice 'can greatly reduce the variety of options for the person who has made that commitment,'[377] in the later exercise of practical reason and engaging with the good. Thus, we can see that Finnis, a Thomist, develops his theory of basic human goods upon themes which are to be found in Aquinas.[378] But no description or recognition of basic human goods is specifically outlined by Aquinas. As we have seen, Aquinas merely held the principles to be 'self-evident' and 'indemonstrable'.[379] This reading is also supported by the Aquinas scholar Ralph McInerny. McInerny notes that there is not any form of list in Aquinas' work.[380] Rather Aquinas listed precepts of practical reason without, purposefully, listing human goods. For instance, it is suggested that although the outline of the FPPR in ST I-II 94.2 is the most fundamental precept of the natural law, Aquinas does not state that basic goods are then self-evident to all persons.[381] Schockenhoff further provides clarity here by suggesting that Aquinas did not intend to present a complete list of all the intermediary principles of practical reason but instead intended to discuss their necessary interplay with the natural ends of human striving.[382] The good is connected to the end without specifying the basic goods. As such, Finnis incorrectly builds from Thomas. By explicitly listing basic human goods here then we can see a significant issue has been raised in Finnis' development of Thomistic natural law theory. The claim is that this theory depends upon a logical interpretation of Aquinas' theory, and yet it appears to struggle to adequately incorporate the essence of Aquinas' writing concerning the good. This has led to a potential incorrect movement concerning the human goods which may be a misnomer. This will be an important

[376] Ibid.

[377] Ibid.

[378] Finnis, *Natural Law and Natural Rights* (n 31) 85-90. In the monograph *Aquinas*, Finnis further draws doubt upon his interpretation of the basic human goods. He concedes that Aquinas has no word or phrase literally corresponding to 'reason for action' and does not use the adjectival metaphor 'basic' but then goes on to assert that there are 'basic reasons for action' by reading Aquinas, ST I-II q.94 a. 2c and ST I-II q.14 a.2c - Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149) 95**.**

[379] George, *In Defense of Natural Law* (n 4) 108.

[380] R McInerny, *Aquinas on Human Action: A Theory of Practice* (The Catholic University of America Press, 2012) 121. See Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) I-II. Q. 94; ST II-II q. 108. a2.

[381] J Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (n 204) 92-93.

[382] E Schockenhoff, *Natural Law and Human Dignity: Universal Ethics in a Historical World* (B O'Neill trs, Catholic University of America Press, 2003) 162.

consideration for analysing George's own interpretation regarding practical reasoning following Thomas Aquinas's thought. Chapter 2.2 will show how George's understanding surrounding the basic human goods similarly misreads Aquinas through listing specific basic human goods.[383]

Introduction to Finnis' use of natural rights

The influence of Aquinas is also necessary for Finnis' doctrine of natural rights. Finnis uses a doctrine of natural rights, drawing on older Thomistic theory of natural rights, and then applies this to a Western rights theory in order to come to applied conclusions concerning current legal matters. This is necessary to explain Finnis' Neo-Scholastic theory of natural law and natural rights, which is a central part of NNL. This is also important for understanding George's natural rights doctrine which will be analysed in chapter 3. Tierney, in the *Idea of Natural Rights*,[384] finds there to be considerable disagreement among scholars who have tried to relate the Judeo-Christian religious tradition to the growth of Western rights theories.[385] One school sees all modern rights theories as rooted in the 'atheistic' philosophy of Hobbes[386] and so regard them as incompatible with the whole preceding Christian tradition.[387] Yet another school of thinkers, perhaps most famously Jacques Maritain,[388] sees a doctrine of individual rights as always implicit in the Christian emphasis on the dignity of human personality. There is a division in the scholarship here.

Finnis, George and Maritain instead see a relationship between modern rights theories and the more classical doctrines of natural law. Natural rights are shown to be essentially a) implicit in the Christian emphasis on the dignity of human personality and b) out workings from principles that are always inherent in the natural law tradition.[389] This may align Finnis and George with the second school

[383] Chapter 2.2 will argue that George misreads *inclinations* within Aquinas' work (see ST I-II q. 91 a.2) and finds them to be analogous to the basic human goods.

[384] B Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Wm. B Eerdmans Publishing, 1997).
[385] Ibid 214, 215.
[386] Thomas Hobbes' 'social contract theory' (outlined in T Hobbes, *Leviathan* (C B Macpherson ed, Pelican, 1968) Ch. XIII) contributed to a natural rights theory which will form discussion in chapter 3.
[387] Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (n 384) 214, 215.
[388] A Thomist political philosopher who was instrumental in drafting the Universal Declaration of Human Rights 1948. See J Maritain, *Man and State* (University of Chicago Press, 1951) 76-107.
[389] Ibid 4-5.

outlined above, one which embraces the Christian tradition. In rejection of the first school, Finnis has recently termed Hobbes' theory of natural rights to be 'rationally ineligible, an outrageous muddle…in which there are…no human or natural rights.'[390] Instead, allegiance towards more classical doctrines is often dependant on the interpretation of Aquinas.[391] In contrast, however, Tierney critically believes that Aquinas did not teach any doctrine of 'subjective natural rights',[392] nor had any theory of natural rights.[393] Villey's interpretation provides a basis for denigrating subjective, individual natural rights:

> A key-word for Villey is Aristotle's *dikaion* – the just – usually rendered into Latin as *ius*. Aristotle understood the term in two senses, neither of them equivalent to the idea of a subjective right. He distinguished between justice as a moral virtue and justice as an objectively right state of affairs in a particular context, something inherent in the nature of a situation, or "in the nature of the case".[394]

For Tierney, this provides no concept of modern, subjective natural rights and he has further read this into Aquinas. This would dismiss any concept of subjective natural rights in Aquinas. Moreover, Villey asserts that for Thomas, the meanings of *ius* and *lex* were quite different. Thomas did indeed distinguish between the two terms in his definition of *ius* within the *Summa Theologica*.[395] But he followed this at once in the next article with a sentence in which the terms seem equated with one another, and elsewhere in the Summa he used them interchangeably.[396] This initially presents a difficulty in tracing Finnis' natural rights basis back to Aquinas.

However, given the breadth of scholarship focusing upon Scholasticism and natural rights, it is not difficult to find conflicting scholarship. Brett has seen Aquinas as adapting Aristotle to view *ius* or right objectively as the *iustum*, the 'right thing' in a given situation. The notion of right as the object of justice is laid

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[390] J Finnis, 'Grounding Human Rights in Natural law' (2015) 60(2) Am. J. Juris. 199, 217.
[391] E D Reed, *Theology for International Law* (Bloomsbury, 2013) 142.
[392] Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (n 384) 257.
[393] Ibid 88.
[394] Ibid 24.
[395] Ibid. See T Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST II-II q.57.1.
[396] Ibid 24. Villey considered that to a modern jurist a right is a power; to a classical jurist a ius was 'a thing.' Ibid 16.

out in Book V of Aristotle's *Nichomachean Ethics*.[397] Brett also supports the common assumption that Aquinas exhibits Aristotelian intentions within his work. If this is justified, then Aquinas may be said to rely upon a doctrine of natural rights. For Aquinas opens his treatment in *Summa Theologica* not with a definition of the virtue itself but with a definition of its object,[398] according to the principle of Aristotelian science that the 'identification of the object logically precedes that of the faculty or habit.'[399] Aquinas establishes the nature of *ius* as the object of justice.[400] Accordingly, he takes note of the Aristotelian concept of justice as 'the constant and perpetual will of rendering to each his right.'[401] Finnis conversely translates the Thomistic *iustum* within *Natural Law and Natural Rights*, translating *iustum* as 'the fair' or the 'what's fair'.[402] This is particularly indifferent to whether the *iustum* is a thing or an action.[403] So Finnis may overlay Aquinas' approach to natural justice with a modern and substantive account of natural rights. As such, this allows Finnis to derive a natural rights basis from the natural law tradition following Aquinas. George's own natural rights position and his position in relation to natural rights within NNL will be the focus of concern in chapters 2.2/2.3 and chapters 3.3. Here I will argue George further diverges from Finnis and may take his natural rights basis from what I will term the 'secular humanist tradition', which includes Thomas Hobbes. This allows George to go further in applying natural rights. This key difference between Finnis and George will be argued to make George the ideal candidate in order to help analyse religious freedom within the EqA 2010.

Introduction to religious liberty within the work of John Finnis

The sections above have presented the Thomistic interpretation and natural rights basis used by Finnis. How then has Finnis applied his position in subsequent literature? This section will show the consideration Finnis gives to religious liberty in his work. Establishing this will provide context for analysing the

[397] A Brett, *Liberty, Right and Nature* (Cambridge University Press, 1997) 88.
[398] Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST I-II q. 55, a. 1.
[399] Brett (n 397) 92.
[400] T Aquinas, *The Summa Theologiae of St. Thomas Aquinas* (n 168) ST II-II q. 57 a. 1. See Finnis, 'Grounding Human Rights in Natural law' (n 390) 214.
[401] Brett (n 397) 92. The object of justice, according to Aristotle's *Nicomachean Ethics*, is the iustum or just thing - ibid 91.
[402] Finnis, *Natural Law and Natural Rights* (n 31) 206.
[403] Brett (n 397) 91.

flaws within George's own approach towards US discrimination law, in order to provide a superior critique surrounding religious liberty within equality law. When Finnis considers religious liberty, his consideration of religion depends upon the value given to the subject by society. If religion is considered by society as 'just one among the deep passions and commitments that move people' then for Finnis this would lead to the conclusion that 'it does not deserve constitutional mention on account of any special dignity or value.'[404] Indeed, Finnis rejects this. For Finnis, religion is a basic human good and thus does deserve dignity and value. In contrast, the religious liberty scholars Einsgruber and Saber strictly deny to religion and religious liberty any moral or constitutional status distinct from other 'deep commitments.'[405] Accordingly, at the outset, there may be no reason why religion and religious liberty deserve particular protection, or indeed any protection at all. By his own admission, Finnis recognises that there need to be 'necessary and appropriate limits [imposed] on the right to religious freedom'.[406] This thesis will attempt to explain the reason why, and the process as to how, new natural lawyers have regard for this 'good.' Chapter 4.4 will build upon this 'good' and apply this understanding to English religious liberty case law in chapter 5, in order to analyse the right to religious liberty.

The new natural lawyers provide fundamental rights for religious liberty. The arguments that George uses when defending religious liberties are built upon these fundamental natural rights. For instance, chapter 4.2 will show that for George, the right to religious liberty is preceded by the basic good of religion.[407] In addition, for Finnis, the first amendment of the American Constitution and the European Convention on Human Rights both intrinsically associate religious liberty with freedom of conscience.[408] This is more easily established within the Article 9 title: 'Freedom of thought, conscience and religion'. It will be argued in chapter 4 and chapter 5 that this rights basis, grounded in a basic good approach, allows religious judgements to be made in line with individual conscience. Yet, why is religious liberty important to natural law? The answer given by the Grisez School is that religious matters allow divine creativity and intelligence to 'provide

[404] J Finnis, 'Why Religious Liberty is a Special, Important and Limited Right' (2008) Notre Dame Law School Legal Studies Research Papers 09 (1) 5.
[405] Ibid 4.
[406] Ibid 14.
[407] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 1) 117.
[408] Ibid 7.

[the] ability [for us] to make judgements that link us with real opportunities of flourishing.'[409] Religious liberty is linked to flourishing. Therefore religious liberty is essential to NNL.

In *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory,*[410] Finnis emphasises the Scholastic interpretation used in NNL reasoning. This Thomistic interpretation is important in the context of religious liberty reasoning. For Aquinas, the fundamental proposition about human freedom was that it is 'through one's will, that one's reason has the power to move one to action, and one's 'will' is the capacity to share by responding to reason.'[411] As a result, human freedom is fundamentally linked to the combined action of will and reason. This is a process of having 'free-will and control' of one's actions.[412] Within religious liberty and discrimination law, we can see all three engaged. In this section, Finnis' analytical contribution to moral, political and legal philosophy and substantive case law has been shown to be grounded in a NNL basis. Moreover, even if it is suggested that Finnis does not say much of practical value, it has been shown that this is not also the case for George - although Finnis is a significant influence, George diverges significantly from this influence. This provides a platform to comparatively display and analyse Robert George's approach in chapters 2 and 3 of this thesis. This required improvement of George's thought consequently provides scope for the application of NNL thought in later chapters.

Now that the contribution of the Grisez School and its most prominent member has been considered, in order enable a possible application of George's NNL views towards equality law, the next section will highlight where this work will be carried out.

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[409] Ibid 9. It is from this basis that Finnis has termed religious truth to be a 'higher good', this is because 'religious truth, and the religious community organized around it, is in some important ways higher and of higher significance – that is, rationality has a more directive, because all-embracing, status in deliberation – than the requirements of one's political community'. J Finnis, 'Reflections and Responses' in Keown and George, *Reason, Morality and Law: The Philosophy of John Finnis* (n 242) 574. Once again, this is a controversial position and the favouritism towards the good of religion may further indicate a Roman Catholic bias. George's approach to the basic good of religion will be analysed in chapter 2.2.

[410] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 149).

[411] Ibid 70 quoting Aquinas, *Summa Theologica* (n 153) ST I-II q. 90, a. 1 ad 3; ST I q. 19, a. 1c.

[412] Aquinas, *Summa Theologica* (n 153) ST I-II pr.

1.6 Chapter Summary

The work provided by this thesis will be the first time that a detailed examination of Robert George's work in relation to the Equality Act 2010 has been compiled. It is anticipated that this will form a comprehensive reference point for future examination of the jurisprudence of Robert George in relation to analysing the right to religious freedom within the Equality Act 2010. This initially presents a broad scope to the thesis. The thesis title: 'Equality Act 2010: Law, Reason and Morality in the Jurisprudence of Robert P. George' is also ideally suited to analyse the thoughts, ideas and academic contribution provided by George. This process significantly narrows the scope of the thesis and by doing so this chapter has established that this work will improve upon George's thought to provide a unique, novel approach.

While the academic contribution by George is sizeable; the academic literature written on George, particularly in the areas of moral philosophy and religious liberty/employment law is significantly smaller. This is shown by an extended focus on the new natural lawyers, with particular reference to the Grisez School - there have been whole works devoted to the subject - such as Hittinger's *Critique of the New Natural Law Theory*[413] and Bamforth and Richards' *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law*.[414] There has also been plenty written surrounding Finnis' individual contribution.[415] It is an expected outcome; however, that there has been no such focus on George's contribution as a new natural lawyer. There is certainly far less attention paid to George than Finnis - there has been very little written about George's thought. George has published widely – so why then has there not been such a focus?

Why is there a disproportionately small focus upon George? Is it because George is the forgotten brother of the Grisez School? Do academics view George's

[413] Hittinger, *Critique of the New Natural Law Theory* (n 13).

[414] Bamforth and Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (n 26).

[415] For instance, a small sample: A J Lisska, 'Finnis and Veatch on Natural Law in Aristotle and Aquinas' (1999) 36 Am. J. Juris. 55; Rodriguez-Blanco, 'Is Finnis Wrong? Understanding Normative Jurisprudence' (n 357); M Wright, 'The aim of the Law and the Nature of Political Community: An Assessment of Finnis on Aquinas' (2009) 54 Am. J. Juris. 133; Crowe, 'Natural Law Beyond Finnis' (n 119); Keown & George, *Reason, Morality and Law: The Philosophy of John Finnis* (n 242); and P Yowell, 'Book Review: J Finnis, Collected Essays: Volume I-V (Oxford University Press, 2011)' (2013) 2(1) Ox. J Law Religion 247, 254.

contribution as largely derivative and so not worthy of discussion? Is this because there are large tensions present in George's jurisprudence that prevents analysis surrounding this jurisprudence from being applied to the Equality Act 2010? Has George not contributed to the discussion of discrimination/equality law? Are George's views so reviled that they are not deemed worthy of discussion? This has identified an area of research that needs to be conducted. By introducing the problem facing religious liberty and introducing the new natural lawyers (particularly John Finnis), this chapter has provided a platform to delve deeper and analyse George's thought.

George's specific analytical NNL jurisprudential contribution will therefore be analysed in the thesis in order to resolve substantive and conceptual tensions that arise for religious freedom in the application of the EqA 2010. This gives scope for the analysis of George's thought as well as its application. To improve upon, analyse and modify George's thought, Chapter 2 will be entitled 'Robert George as New Natural Lawyer – The Importance of Practical Reason'. This will consider George's use of practical reason and the tensions that this causes in his work. To this end, the chapter will demonstrate that George stands in a position subtly different to that of the rest of the Grisez School. The chapter will critically analyse, first, George's unique contribution to NNL and use of reason (particularly his approach to Aquinas' understanding of the good which will present his interpretation of practical reasoning within Thomas Aquinas' work). Secondly, the chapter will consider George's work beyond Aquinas focused around debate about the validity of laws. To achieve this I will consider the sources of George's approach to moral reasoning, which are: a) divine revelation, b) moral realism, c) human reason and d) value – with particular focus upon Ronald Dworkin's approach to religion in *Religion Without God*.[416] Finally, this chapter will consider George's use of practical reasoning through the challenges posed by the Rawlsian public reasoning critique and the subsequent liberal critique that this has drawn. By doing so, this chapter will begin to critically apply George's thought in order to later analyse religious liberty within the EqA 2010.

Chapter 3, entitled 'Robert George as New Natural Lawyer – Source and Development of Legal Rights' is necessary to present significant influences upon

[416] R Dworkin, *Religion Without God* (Harvard University Press, 2013).

George's work in the context of his natural rights basis. This chapter will consider aspects of George's unique contribution drawn from the secular humanist tradition, for example: Thomas Hobbes, John Locke, Samuel Von Pufendorf and Huge Grotius. Despite claims that George's work is largely derivative of other new natural lawyers, it will be argued that George's use of the secular humanist tradition is illustrative of the unique contribution that he has made to the NNL tradition. It will be argued that this is through his rights discourse. As such, this chapter will show George's narrowing of natural law jurisprudence towards a natural rights discourse. It is anticipated that chapter 3 will analyse George's contribution by detailing the transformation of natural law reasoning into natural rights jurisprudence.

Chapter 2 and chapter 3 are required to prepare for the application of Robert George's NNL views to religious liberty law in chapters 4 and 5. The anticipated outcome, if as expected, will open the way for the substantive case law analysis carried out in the later chapters which will assess the right to religious freedom within equality law. This is because these chapters will highlight and critique two key themes and tensions within George's thought: practical reason (chapter 2) and natural rights (chapter 3). These themes will be shown to be fundamental in the application of George's views when assessing religious equality law. Within chapters 4 and 5, through critically analysing George's NNL approach towards substantive law, conclusions will be drawn about George's use of discrimination law on grounds of religion and belief. This is in order to solve the tension surrounding the protection of religion and belief at work.

As such, Chapter 4 entitled 'Robert George's Approach to Discrimination and Equality Law' brings an innovative approach to NNL jurisprudence. Within recent religious equality law cases, it has been noted in this chapter that particular jurisprudential tensions have arisen and it may be suggested that a natural law approach holds the key to these problems. So the question is how has George dealt with discrimination/equality law, particularly discrimination on grounds of religion and belief? Chapter 4 will focus upon George's approach to discrimination law to provide analysis and begin the application of George's approach to equality law. In particular, this chapter will critique George's thought surrounding US discrimination law, where George has considered constitutional matters, natural law ethical debates and religious communication. From this, the interpretation

and reasoning employed by George in cases such as *Griswold v Connecticut*,[417] and *Romer v Evans*[418] is expected to show a novel, innovative approach. This is an approach from which I can analyse problems within George's jurisprudence and provide theoretical answers to the tensions faced by religious freedom generated by equality law which, as identified earlier, pose necessary theoretical solutions. Chapter 4 will show that this theoretical critique is applicable across both jurisdictions. Through analysing George's approach, chapter 4 is necessary to derive a set of transferable concepts and criteria that can be applied in chapter 5.

Within chapter 4 I will, firstly, analyse George's methodology towards discrimination and equality law; secondly, introduce George's approach to US religious liberty case law; and thirdly, present the 'natural rights and the common good' approach George applies to US and European constitutional case law to highlight the tensions within applied NNL. This will therefore make it possible to determine whether the modification of George's thought is necessary in order to provide a telling critique of the place of religious liberty in equality law.

Following this Chapter 5, entitled 'Possible Application of Robert George's Approach to Religious Liberty and Religious Discrimination', will seek to show whether the analysis in the previous chapters can be applied to the equality law issues at hand. These are the important equality law issues in relation to religious liberty issues that the English legal system faces. Such an approach will provide a stronger, richer understanding surrounding equality. This will further improve and support the concept of equality in modern public discourse. Building from the critical analysis already applied to George's work, can the modification of his theory be effectively applied and relied upon to resolve the tensions evident in the law and George's theory? This chapter will therefore show George's critique of equality law. This will include George's critique of religious liberty cases taken under the provisions of the Equality Act 2010.

This section will do so by addressing a number of concepts that currently feature in the discourse surrounding the right to religious freedom. At this outset this later work requires clear identification. For instance, through focus upon the

[417] *Griswold v Connecticut* (1965) 381 US 479.
[418] *Romer v Evans* (1996) US 620.

manifestation of religion and belief under Article 9 in *Eweida*, it will be claimed that under George's use of the Religious Freedom and Restoration Act 1993, natural rights are held by individuals as protection against the state. Through a focus upon the concept of individual autonomy, it will be established that this posits a right for individuals to manifest their religion in the workplace. As such, George's thought will analyse the right for individuals to manifest religion.

Another example will be that by a critique of the 'specific situation rule',[419] George's thought will be further analysed in relation to choice in chapter 5. Here it will be argued that in a 'goods based' opposition towards laws restricting religious liberty, the concept of 'legal liberty' offers a balance to individuals forced to change jobs. Freedom to change jobs will not be shown to be a form of religious freedom within equality law.

Further it will also be suggested in chapter 5 that freedom of religion is not currently accommodated within the law. This thesis will arrive at this position through: first, critically engaging with George's use of the 'goods-rights' synthesis; and second, analysing the presentation of religion as a public good in light of both *Bull v Hall*[420] and *Greater Glasgow Health Board v Doogan*.[421] This will be shown to accommodate matters of conscience. Here the concept of 'reasonable accommodation' will be shown to be important when discovering whether there is, or should be, a right to religious freedom.

Finally, the judgment in *Eweida* will further inform the discussion surrounding whether freedom of religious conscience presents a problem for equality law. To do so will require engagement with the concept of conscience. Chapter 5 will critically analyse George's NNL thought to suggest that presenting religion as a public good presents law as a form of public morality and religious freedom as a part of political morality. This will result in an obligation towards freedom of conscience securing human fulfilment. It is anticipated that such an express position for the concept of conscience, will secure religious freedom and the protection of religious liberty as a public good.

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[419] A position impacting religious freedom, which indicates that if the possibility of changing jobs is available, then this option guarantees an individual freedom of religion - *Eweida v British Airways PLC* [2010] EWCA Civ 80 [22]. See also Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (2013) HRLR 1, 10.

[420] *Bull v Hall* [2013] UKSC 73.

[421] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

Through engaging with the above concepts, an insightful critique surrounding the right to religious freedom within the EqA 2010 will be established. From this will be drawn George's religious liberty law conclusion. This application will be then used to draw a critique of George's thought, freed from the identified problems of NNL jurisprudence and ready to use in equality case law. This thesis will argue in chapter 5 that although there are many problems with George's thought, the modified analysis of these NNL views can nonetheless provide solutions to religious equality law tensions.

Chapter 6 will serve as a conclusion. This will seek to draw together the individual conclusions drawn in each chapter.

All of the above will provide an answer to the analysis of the right to religious freedom within equality law, with particular reference to Robert George's thought. Now that the contribution of the Grisez School and its most prominent member has been considered alongside the relevant law in this chapter, in order enable a possible application of George's NNL views towards equality law, this thesis will move in the next chapter to introduce George's approach to practical reason, which will trace flaws in George's thought that are crucial in his views surrounding US discrimination law.

Chapter 2 – Robert George as New Natural Lawyer – The Importance of Practical Reason

Table of Contents

Chapter 2 – Robert George as New Natural Lawyer – The Importance of Practical Reason

2.1 Introduction

The aim of this thesis is to critique and apply Robert George's new natural law (NNL) views to religious discrimination law. One part of this is to consider George's approach to jurisprudence. In this process, George is used as the primary dialogue partner partly because of his approach to practical reason. From this it is necessary in this chapter to examine, critique, and utilise George's theory of practical reason to provide the modified NNL basis. This understanding of practical reason is necessary to enable, and prepare the reader for the application of George's NNL views to religious liberty law in chapters 4 and 5.

This chapter falls into four parts. First, I will discuss Robert George's interpretation of practical reason in the work of Thomas Aquinas at 2.2. This will show that George's notion of practical reasoning departs from Aquinas' position in several key respects. To achieve this, I will first consider the modification of the first principle of practical reason (FPPR); secondly, George's movement from Aquinas' concept of the good to the basic goods; thirdly, George's elevation of the principle of ethical autonomy; and fourthly, the inclusion of the basic good of religion within practical reasoning in George's work.

I will next argue in 2.3 that George moves beyond Aquinas in the areas of revelation and reason. These moves are focused around debate about the validity of laws. To achieve this I will consider the sources of George's approach to moral reasoning: a) divine revelation, b) moral realism, c) human reason, and d) value. Section 2.3 will finish by considering Robert George's 'minimum standard' of practical reasonableness. This is an independent form of practical moral reasoning within NNL. This approach will be viewed as a form of moral reasoning in light of the positivism/natural law debate.

Third, and finally, this chapter will provide an address to the challenges of the Rawlsian critique from public reason at 2.5. This will begin by outlining George's rejection of Rawlsian public reason. This will be followed through a consideration of the expansive pluralist modification to public reasonableness and the concept of Political Liberalism. Public reasoning orientated towards a religious consensus will then finally be proposed before this chapter concludes at 2.6 with an assessment of George's use of practical reason.

George's use of practical reason will inform an analysis of his thought which will be applied to critique religious liberty case law within the jurisdiction in chapters 4 and 5. George's value system will provide a basis to engage contemporary religious equality case law. From this basis, it will be argued in chapter 4 that a modified NNL theory is adequate to solve religious liberty case law tensions within English law. Practical reason is critical to any application drawn from George's thought and so this chapter will begin to analyse this concept and provide a coherent, improved way forward for natural law reasoning within George's jurisprudence.

2.2 Robert George's interpretation of practical reasoning in Aquinas

Modification of the first principle of practical reason

This section falls into four parts to argue that, while the influence of Thomas Aquinas is central to Robert George's jurisprudence, George's understanding of practical reasoning departs from Aquinas' position in several key respects. It will be shown that George incorrectly reads Aquinas here. To achieve this I will consider; first, the modification of the first principle of practical reason; secondly, George's movement from Aquinas' concept of the good to the basic goods; thirdly, the elevation of the principle of ethical autonomy; and fourthly, the inclusions of the basic good of religion within practical reasoning in George's work.

Robert George has described the philosophies of Thomas Aquinas as the *philosophia perennis* – the perennial philosophy.[1] A wide literature has established that Aquinas' influence upon natural law theory continues to the present day[2] and so the following section will argue that this influence is fundamental[3] as it pertains to the approach taken by George regarding the good and practical reasoning. George's approach frequently cites and modifies

[1] R P George, *Natural Law, Liberalism, and Morality* (Oxford University Press, 1996) 95.
[2] See, for instance J Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (Wm.B.Eerdmans Publishing, 2005); A MacIntyre, *Whose Justice? Which Rationality* (2nd edn, Duckworth, 2001); A J Lisska, *Aquinas' Theory of Natural Law: An Analytic Reconstruction* (Oxford University Press, 2002); J Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998); and P M Hall, *Narrative and the Natural Law: an Interpretation of Thomistic Ethics* (University of Notre Dame Press, 1998).
[3] S Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon Press, 1991) 24.

Aquinas, notably key parts of the *Summa Theologica,*[4] to supplement, improve and sustain his key arguments regarding practical reason. This understanding of practical reasoning will be key for the application of George's NNL views to religious liberty law in order to analyse religious freedom in the later chapters.

In contemporary Thomism there is a central understanding that certain fundamental practical truths are available to anyone,[5] regardless of allegiances.[6] George has argued that these practical truths are expressed and captured in sound practical judgements. They are not deduced or inferred from other theoretical or practical truths, but rather they are *per se nota* (self-evident). As part of the critique to George's thought, a contentious aspect of the NNL is that these practical truths may be formed by *any* thinking person.[7] They are accessible to rational agents.

The FPPR reading provided by George

It can be identified in George's writing that it is among the self-evident truths that the basic principles referred to by Aquinas as the 'first principles of practical reason' occur.[8] As such, it will first be shown that through the first principles of practical reason [FPPR],[9] Thomist thought has provided a direct influence on the interpretation of practical reasoning within NNL theory. This will help to analyse George's interpretation of practical reasoning in Aquinas' work.

Throughout George's work, with particular reference to *In Defense of Natural Law*, he seeks to provide a 'sound exposition of the natural law tradition and of

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[4] T Aquinas, *Summa Theologica* (D Bourke & A Littledale eds, Blackfriars, 1963) I-II q.90 a.4. The first and second responses within Question 90 are most frequently highlighted.

[5] L Kolakowski, *Modernity on Endless Trial* (University of Chicago Press, 1997) 45.

[6] Such as, cultural or intellectual heritage.

[7] R P George, *In Defense of Natural Law* (Oxford University Press, 1999) 254.

[8] Ibid 254. George interestingly uses the first principle of practical reason/first principles of practical reason interchangeably. However he does highlight that the 'determinations' of the first 'principle' of practical reason refers to basic goods. As such, the determinations are the first practical principles of natural law – the 'most basic precepts of natural law' - ibid 45. This will be shown to be important later in this chapter.

[9] Aquinas accepted Aristotle's conception of phronesis. This is translated in Aquinas' Latin as *prudencia.* This is the virtue translated as practical reasonableness - Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 167. George fetters his discretion in his narrow interpretation of Aquinas here: MacIntyre has suggested that *prudential/prudencia* is exercised so that human law accords with the divine law, particularly so that human law accords with the divine/natural law nexus. From this, MacIntyre notes that Aquinas reads *prudencia* as *always* having a theological dimension when applied to the right reasoning generated from practical reasoning. This is not evident in George's approach. See Aquinas, *Summa Theologica* (n 4) *S.T.* IIa-IIae, 47, 8. This chapter will develop George's approach to practical reason.

the new classical theory'.[10] To do this George criticises the NNL approach[11] towards Aquinas in certain respects, such as the application of the good, which involves debate, and application, of Christian ethical theory.[12] Nevertheless direct Thomist influence upon George's NNL views is arguably evident when comparing Thomas' approach to that of George. For Aquinas believed that reasons constituted the most fundamental principles of practical reason and precepts of natural law by virtue of their intrinsic value and choice worthiness.[13] The same process is applied by George.

George draws upon Aquinas' non-exhaustive list of fundamental principles.[14] It was outlined in chapter 1 that these principles act as a list of moral norms/the good for Aquinas. I suggest that this is important for George's understanding of practical reasonableness because Aquinas' principles have been re-interpreted in NNL as basic human goods.[15] When these principles are specified, it is evident that they constitute the body of moral norms available to guide human choosing toward integral human fulfilment.[16] Directly from this listing of the good George has drawn his list of the basic goods. In short, George interprets Aquinas' moral norms to *guide* his own formulation of the basic human goods.[17]

George's understanding of the first principle of practical reason is based upon his interpretation of Aquinas. Interpreting Aquinas leads George to the *Good*, based upon Aquinas' formulation of the first principle of practical reason: 'good is to be done and pursued; and evil is to be avoided.'[18] All other precepts of the natural

[10] George*, In Defense of Natural Law* (n 7) 229. Hittinger has criticised proponents of NNL for following Aquinas yet not willing to be termed 'Thomist' - R Hittinger, *Critique of the New Natural Law Theory* (University of Notre Dame Press, 1988) 8. This is a telling observation in our analysis of Robert George's thought following Aquinas.

[11] Daniel N. Robinson has noted that although George is 'closely associated' with the other NNL, his work is not 'cloned' from or 'consistently at one' with the others – D N Robinson, '*In Defense of Natural Law*: Robert George's Jurisprudence' (2000) 45 Am. J. Juris. 117, 120-121. As such, the claim made concerning George's original contribution in chapter 1 is substantiated.

[12] Ibid 229.

[13] George, *In Defense of Natural Law* (n 7) 38. See Aquinas ST I-II q.94 a.2.

[14] These are: human life, marriage and the transmission of life to new human beings, and knowledge, particularly of religious truth - T Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (R J Henle ed, University of Notre Dame Press, 1993) *Summa Theologica*, Ia Iiae, q. 94, a. 2.

[15] R P George, *The Clash of the Orthodoxies* (ISI Books, 2001) 65, 66. The basic human goods were listed in chapter 1.4.

[16] Ibid 65, 66.

[17] The FPPR is recognised by identifying the irreducible aspects of human well-being and fulfilment, eg. the basic human goods.

[18] 'Good is to be done, and pursued, and evil is to be avoided' - Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) 262. Ralph McInerny has observed that in Question 94, Article 2, Aquinas makes the transition from 'the good is that which all things seek' to 'the good is to be done and

law are based upon this.[19] This is why George argues that he gives a faithful account of the natural law tradition in NNL. I identify that the central factor here is the reliance on Thomas' scholasticism. This reliance is a central observation in this thesis. Below I will cast doubt upon George's belief that proponents of NNL have followed Aquinas 'exactly' on the first principle of practical reason[20] and I will argue instead that George has modified the FPPR.

George's modification occurs through suggesting that practical reasoning has its own underived (i.e. *per se nota* and *indemonstrabilia)* first principles.[21] These first principles provide reasoning that includes propositions concerning specific moral norms.[22] Eberhard Schockenhoff has suggested that within NNL, practical reason is articulated in a plurality of individual moral precepts.[23] These precepts are guiding moral norms, which George links to empirical knowledge.[24]

It was shown in chapter 1 that this key movement from practical reason to first principles is used widely within NNL.[25] For instance, Finnis has expressly noted that Germain Grisez's analysis of the FPPR influenced his own reinterpretation of Aristotle and Aquinas.[26] In his later book *Aquinas*,[27] in the passage concerning

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pursued and evil avoided.' R McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (rev edn, The Catholic University of America Press, 1997) 38.

[19] From this all the things which the practical reason naturally apprehends as man's good belong to the 'precepts of the natural law under the form of things to be done or avoided.' Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) Ia IIaw, q. 94, a.2.

[20] G V Bradley & R P George, 'The New Natural Law Theory: A Reply to Jean Porter' (1994) Scholarly Works Paper 853, 305-306. Though George believes that NNL has always asserted the FPPR is: 'Good is to be done and pursued; *the bad* is to be avoided' - ibid 305-306. Hittinger also notes that new natural lawyers here believe they follow Aquinas in their understanding of the FPPR - R Hittinger (n 9) 8.

[21] Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) Ia Iiae, q. 94, a. 2.

[22] George, *In Defense of Natural Law* (n 7) 91.

[23] E Schockenhoff, *Natural Law and Human Dignity: Universal Ethics in a Historical World* (B O'Neill tr, Catholic University of America Press, 2003) 162.

[24] George, *In Defense of Natural Law* (n 7) 128**.**

[25] It is worth re-stating here that both George and Finnis include 'practical reasonableness' in their list of basic human goods.

[26] A J Lisska 161. Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) 262. Anthony Lisska is incorrect in his assertion that Finnis never expressly states that he is offering a defence of Aquinas and Aristotle, instead both Finnis and George offer a *critique* and this is still to be considered an engaging, deferential critique - A J Lisska (n 2) 141. Finnis is quite cunningly careful never to claim that he is offering a defence of Aristotle and Aquinas. However he has written that 'Aristotle and Aquinas, I believe, both accepted the thesis [on practical reason] I have just put forward.' J Finnis, *Fundamentals of Ethics* (Georgetown University Press, 1983) 12. It is unfortunate that neither Aquinas nor Aristotle have the recourse available to respond to Finnis. If practical reason is shown to be central to natural law, then the central arguments put forward on practical reasonableness would be largely parallel. This chapter suggests that George, to a greater extent than Finnis, diverges in key interpretation.

[27] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 79.

the FPPR,[28] Finnis insisted that the reference to the 'ultimate end' of human life should be referred to in the plural: referring to *ends.* This for Finnis is analogous to *goods*, which provide the basis of the first principle.[29] The FPPR (as the pursuit of good and avoid evil) is clearly morally prescriptive. In *Natural Law and Natural Rights*, for example, Finnis attributed to Aquinas the first principles which 'specify the basic forms of good and evil and which can be adequately grasped by anyone of the age of reason … are *per se nota* (self-evident) and indemonstrable'.[30] It is from this basis that a theory of practical reasonableness can for Finnis be called a theory of 'natural law.'[31] This shows the centrality of both practical reasonableness and the first principle to NNL. It also shows that the FPPR provides a direct influence on the interpretation of practical reason within NNL, which will be important when considering NNL in the context of religious equality law

Problems with the modified reading of the FPPR

Sean Coyle has observed that NNL 'mischaracterizes Aquinas' first principle of practical reason.'[32] Coyle argues this is because to follow Aquinas practical reasonableness should be taken to include the governance of human action by virtues.[33] Instead of finding a route within the nature of the concept of the good,

[28] Aquinas, *Summa Theologica* (n 4) I-II. 94. 2.
[29] S Coyle, *Modern Jurisprudence: A Philosophical Guide* (Hart, 2014) 191.
[30] J Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 33, 34.
[31] There is consistency in Finnis' account here because practical reasoning's first principles are those basic reasons which identify the basic human goods as ultimate reasons for choice and actions. This is precisely because participating in these goods leads to realising aspects of human flourishing. As such, it is logical that practical reason gives participation to the end of flourishing within NNL - J Finnis, 'Natural law and legal reasoning' in R P George, *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992) 135-136. Rodriguez-Blanco does well to carefully provide another approach towards practical reasoning. This approach requires a reason for action to be presented as a good-making characteristic - V Rodriguez-Blanco, 'Does Kelsen's Notion of Legal Normativity Rest on a Mistake?' (2012) 31 Law and Philosophy 725, 728. This is Rodriguez-Blanco's 'guise of the good model' and is the main explanation given for complying with legal rules - V Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (Bloomsbury, 2014) 152. This model does not show that there are basic goods like within NNL - ibid 178. Rather, Rodriguez-Blanco opts for the good-making characteristics – V Rodriguez-Blanco, 'Book Review: N Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theories* (Oxford, 2013)' (2016) 79(1) MLR 183, 197-198. See further Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (n31) 21-24, 71, 73-74, 206; Rodriguez-Blanco, 'Does Kelsen's Notion of Legal Normativity Rest on a Mistake?' (n31) 736; V Rodriguez-Blanco, 'Book Review: E Pattaro, *The Law and The Right: A Reappraisal of the Reality that Ought to Be* (Springer, 2007)' (2009) 22(2) *The Canadian Journal of Law and Jurisprudence* 451, 454; and V Rodriguez-Blanco, 'Reasons in Action v Triggering Reasons: A Reply to Enoch on Reason-Giving and Legal Normativity (2013) *Problema* 7, 10-11, 14.
[32] Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 29) 191. Similarly see: M Pakaluk, 'Is the New Natural Law Thomistic?' (2013) National Catholic Bioethics Centre 57, 60.
[33] Ibid.

or as ‘modes’ of realising basic goods, the FPPR must include rational actions ‘essential to our nature as rational beings.’[34] This is because NNL’s approach does not argue from what is to be considered ‘natural’ to what is ‘reasonable and right’. Rather the reverse: ‘what is reasonable and right’ is ‘therefore natural’.[35] Practical reason thereby guides nature. Coyle believes that by this process NNL ‘overstates the position in making “nature” a mere conclusion of the inquiry.’[36] Natural law should be based from the beginning in the nature of the good leading to flourishing.

Ralph McInerny has disagreed with Coyle’s observation by noting that, for Aquinas, when goods come under the guidance of *reason* they come to be constituents of the human good.[37] This finds the FPPR to be rooted in the nature of the concept of ‘the good’ and also the reasonableness of the human good.

In order to critique George’s approach to practical reason w does George fit into this debate? This may more accurately represent George’s position: practical reason is directed towards action – every agent acts for an end, and every end has the nature of good.[38] It was argued in chapter 1 that final causality involves the FPPR directing in terms of goods, with the good as an end providing a reason for action. George goes so far as to suggest that this very formulated approach is a *law* for practical reason.[39] This legalistic approach to the concept of the good – the ‘good is that which all things seek after’[40] – is essential to practical reasoning and central within George’s work and so is a key observation in the analysis of George’s thought.

As such, we have seen in this section how George has a particular understanding of the FPPR in relation to the good. All other principles of the natural law are based upon the first principle and so all actions which the practical reason

[34] Ibid 191n.
[35] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 153.
[36] Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 29) 191n.
[37] McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (n 18) 46.
[38] Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (n 2) 216. This is an attempt to follow Aquinas, for whom ‘in acting every agent intends an end.’ T Aquinas, *Summa Contra Gentiles Book Three: Providence, Part I* (V J Bourke tr, University of Notre Dame Press, 1975) Chapter 2 [1], 34.)
[39] R P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press, 1993) 42. See also George, *In Defense of Natural Law* (n 7) 37-38.
[40] Aquinas, *The Treatise on Law*: *Summa Theologica* (n 14) 262 I-II q. 94 a 2.

undertakes are perceived as belonging to the human good.[41] This locates the FPPR firmly in the good.

If this first principle is located with respect to the nature of the good, with all other principles based upon the first principle, then it will be logical to consider George's analysis of the good/goods next. The purpose of this is to further understand the presentation of practical reasoning that is critical to George's critique of equality law impacting religious freedom.

Movement from the good to basic goods

In this section I will argue that George moves from a Thomist conception of the good to a related but different way of conceiving basic human goods. As earlier outlined,[42] George perceives the self-evident goods to be drawn from Thomas's reading of practical reason.[43] As George puts it, 'For Aquinas…the ends that the practical intellect grasps as ultimate reasons for action are properly understood as intrinsic human goods.'[44] George's premise is that practical reason requires that basic goods be treated as ends in themselves, which is what they are if the incommensurability thesis is valid. Given that the FPPR is rooted in the nature of the good, this demonstrates its essential nature to practical reasoning.[45] Following this premise, Lisska reads Thomas to suggest that all actions which the practical reason undertakes are necessarily perceived as belonging to the human good, in terms of both actions to be done and actions to be avoided.[46] It has been shown in chapter 1 that George holds the human good to be intrinsically

[41] Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (n 2) 216. In terms of actions to be done and actions to be avoided.

[42] See chapter 1.4 – 'Basic Human Goods within NNL'.

[43] If knowledge is a basic value and so an intelligible reason for action, then as we have seen George's reliance stems from Aquinas' reading first principles of practical thinking: being self-evident (*per se nota*) and indemonstrable (*indemonstrabilia*) - George, *In Defense of Natural Law* (n 7) 108. See Aquinas ST I-II q. 91 a.3c; q. 58 aa.4c.

[44] George, *In Defense of Natural Law* (n 7) 38.

[45] Ibid 37.

[46] Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (n 2) 215. This is a reading of Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) I-II q. 94 a 2. It was noted in chapter 1 that Aquinas's moral doctrine invokes practical reason directed towards an end. McInerny and O'Callaghan put this well: 'Human beings always act for an end that is conceived of as good…What binds together all the acts that humans perform is the overarching goodness they seek in this, that, and the other thing. That overarching goodness, what Thomas calls the *ratio bonitatis*, is the ultimate end. It follows that anything a human agent does is done for the sake of the ultimate end.' R McInerny and J O'Callaghan, 'Saint Thomas Aquinas' (*The Stanford Encyclopedia of Philosophy*, 2016) <https://plato.stanford.edu/archives/win2016/entries/aquinas/> accessed 22nd January 2018. See further in George's thought - George, *In Defense of Natural Law* (n 7) 38, 41.

variegated: 'people must choose between incompatible options offering different, or different possible instantiations of, basic human goods.'[47] Logically, this entails that one should avoid choosing deliberately to destroy or damage a basic good – thus one ought to avoid acting against a basic reason for action (a basic good).[48] We will see that this approach to the goods creates considerable problems for the theory. For many, these problems have provided a stumbling block in their acceptance of NNL.[49]

It has been shown that the first principle is for NNL located in the good.[50] Aquinas notes that, 'the intellect apprehends not only this or that good, but good itself, as common to all things.'[51] This is helpful for seeing then how Grisez establishes that the FPPR 'articulates the intrinsic, necessary relationship between human goods and appropriate actions bearing upon them'[52] and determinations of the first principle render choice intelligible for action. The determinations of the FPPR refer to the basic goods.[53] This raises the issue of whether or not the intrinsic ends generated by NNL provide 'fundamental determinations'[54] of the FPPR, and so provide the basic precepts of natural law.[55] In other words, can the premise match the ends? George's interpretation rests upon the ends grasped by the practical intellect, understood as practical reasons for action. If the first principle outlines a range of possible rationally-motivated action and points to an ideal of 'integral human fulfilment', then for George, principles generated by practical intellect provide fulfilment and flourishing. Therefore these determinations serve as first practical principles – 'the most basic precepts of natural law'[56] – the basic human goods as ends are intrinsic aspects of human well-being and flourishing.[57]

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[47] George, *In Defense of Natural Law* (n 7) 294.
[48] George, *In Defense of Natural Law* (n 11) 294. For instance, George states: 'Catholics and other natural law theorists hold that one can and should avoid choosing deliberately to destroy, damage or impede any basic good.' George, *In Defense of Natural Law* (n 11) 294.
[49] N Biggar & R Black (eds), *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Ashgate, 2000) 10.
[50] George, *In Defense of Natural Law* (n 7) 38.
[51] Saint Thomas Aquinas, *Summa Contra Gentiles Book Two: Creation* (Trans James F. Anderson, University of Notre Dame Press, 1975) Chapter 48 [6], 146.
[52] G Grisez, *Christian Moral Principles: The Way of the Lord Jesus. Vol 1* (Francisco Herald Press, 1983) 180.
[53] George, *In Defense of Natural Law* (n 7) 45.
[54] Ibid 38.
[55] Ibid.
[56] George, *In Defense of Natural Law* (n 7) 45.
[57] Ibid.

Based upon George's logic this creates a distinct space for ethically autonomous moral decision making; however, Porter has criticised the NNLT approach to the basic goods. In an article by Porter[58] and subsequent reply by Bradley and George,[59] Porter offers three main criticisms. First, Porter believes NNLT rests on claims of 'self-evidence' and argues that it might not be irrational to act against one of the basic goods.[60] Second, Porter suggests that Grisez and Finnis could counter-argue that if an agent cannot see the irrationality involved in acting against a basic principle then this means that the agent is not sufficiently self-reflective. Porter is unsatisfied with this answer.[61] Third, Porter considers that NNLT does not provide a satisfactory account of the moral life – Porter is uncertain about the logical/ontological status of the basic human goods.[62] In this debate George and Bradley think that Porter seriously misunderstands NNLT. This is to the extent that 'Porter's critical appraisal so misses the mark that it simply fails to contribute to the vigorous debate about Grisez' project.'[63] This leads to George and Bradley opposing many of the criticisms that Porter offers. For instance, George and Bradley argue that Porter does not correctly understand the notion of 'self-evidency', which applies to the FPPR and not the basic goods.[64] Instead, they say that 'for NNL, the first principles [of practical reason], not the basic goods, are self-evident'.[65] This distinguishes the basic goods because it is evident that the FPPR, not the basic goods that they specify, are self-evident.[66] George and Bradley provide a reading here that is consistent with the presentation in *Natural Law and Natural Rights*[67] and the article,

[58] J Porter, 'Basic Goods and the Human Good in Recent Catholic Moral Theology' (1993) 47 *The Thomist* 27.
[59] G V Bradley & R P George, 'The New Natural Law Theory: A Reply to Jean Porter' (1994) Scholarly Works Paper 853, 305-306.
[60] Porter, 'Basic Goods and the Human Good in Recent Catholic Moral Theology' (1993) (n 58) 36.
[61] Ibid 37.
[62] Ibid 37-39. This criticism is not particularly original, see: Lisska, *Aquinas' Theory of Natural Law: An Analytic Reconstruction* (n 2) 158.
[63] Bradley & George, 'The New Natural Law Theory: A Reply to Jean Porter' (n 20) 304.
[64] Ibid 305. Porter appears to change her opinion and adopt the NNL reading in *Natural and Divine Law* - J Porter, Natural and Divine Law: Reclaiming the Tradition for Christian Ethics (William B. Eerdmans, 1999) 92-93, but then maintains her earlier (1994) reading in the later *Nature as Reason - Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 127, 263.
[65] Bradley & George, 'The New Natural Law Theory: A Reply to Jean Porter' (n 20) 305.
[66] See further R McInerny, *Aquinas on Human Action: A Theory of Practice* (The Catholic University of America Press, 2012) 113.
[67] Finnis, *Natural Law and Natural Rights* (n 30) 33. Here citing Aquinas, *in Eth*. V, lect. 12, para. 1018; *S.T*. I-II q.94 a. 2; q. 91 a. 3c; q. 58 aa. 4c, 5c.

'Practical Principles, Moral Truths, and Ultimate Ends'.[68] As such, it is clear that George undermines Porter's critique, by adopting a consistent position over the presentation of self-evidency. It is thus clear that George and Bradley advance debate over the basic goods and FPPR in the wider NNLT discourse. That being said, Porter's critique does have merit. Porter does particularly well to engage a contemporary debate at the heart of Roman Catholic moral theology, and by doing so further force George to maintain a robust defence of NNLT, which is useful for our purposes because it forces George to explicate his ideas. How then do the basic precepts of natural law impact upon the self-evident interaction between the first principles and the basic goods, which leads to flourishing?

George expressly combines the basic goods with human fulfilment. For George, practical reason pursues the goods which lead to human well-being. Chapter 1 noted George's preference for flourishing based upon the Aristotelian notion of *Eudaimonia* and the Thomist understanding of the good, which is the ultimate end of happiness. For instance, in chapter 1 it was identified for George that basic goods are intrinsic and constitutive aspects of human well-being and fulfilment.[69] For our purposes, it is evident that the 'FPPR that directs [human] action to the basic human goods'[70] points to 'realising aspects of human flourishing'.[71] But as the article, 'Practical Principles, Moral Truth, and Ultimate Ends' makes clear, the basic goods are basic reasons for acting 'because they are aspects of the fulfilment of persons, whose action is rationally motivated by these reasons.'[72] As it was established in chapter 1 there is a parallel between practical reason and intentional action.[73] Given that practical reason grasps as self-evidently desirable a number of basic goods[74] it is not the goods leading to human fulfilment that constitutes the *logos* of intentional action. Indeed, Chapter 1 argued that the

[68] J Finnis, G Grisez and J Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 Am. J. Juris. 99, 106.
[69] George, *In Defense of Natural Law* (n 7) 45, 103.
[70] Ibid 233.
[71] J Finnis, 'Natural law and legal reasoning' in R P George, *Natural Law Theory: Contemporary Essays* (n 31) 135-136.
[72] J Finnis, G Grisez and J Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends' (n 67) 114. See further George, In Defense of Natural Law (n 7) 103.
[73] V Rodriguez-Blanco, 'Re-examining Deep Conventions: Practical Reason and Forward-Looking Agency' in P Banas, A Dyrda and T Gizbert-Studnicki (eds), *Metaphilosophy of Law* (Hart, 2016) 178.
[74] G Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Q94, Article 2' (1965) 10 Nat. L. F. 168, 181. See further that basic goods: 'come to be known in non-inferential acts of understanding wherein one grasps, in reflecting on the data of one's experience, the intelligible point of possible action…directed towards the realization of (or participation in) the good in question by oneself or others.' George, *In Defense of Natural Law* (n 7) 231.

FPPR directs in terms of goods, with the good as an end providing a reason for action. In NNLT the fulfilment of the basic goods *qua* basic goods is a crucial part of integral human fulfilment.[75]

Coyle has critically observed that this NNL movement towards flourishing - flourishing provided by the FPPR pointed to action via 'integral human fulfilment' - is based upon Finnis' incorrect movement from the good to *goods*.[76] By noting that the FPPR should be read as referring to the pluralised *ends*, Coyle has suggested this may be a mistaken reading of Aquinas' statement in the *Summa Theologica*, at I-II. 1. 4-7 that 'there is only one possible final *end* of human life, that of happiness: *beatitudo*.'[77] Furthermore, within *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas*,[78] McInerny has identified that for Aquinas, although 'natural law precepts are rational directives aiming at man's comprehensive good', law is the work of reason and as man recognises life as *good* and 'devises ways and means of securing it in shifting circumstances', this *should* be at the expense of forming a plurality of goods.[79] For this reason, any movement by George to a pluralised form of the good requires more investigation into the role of fulfilment and the basic goods in order to continue critiquing George's thought and later apply this to religious equality law.

The moral philosopher Alasdair MacIntyre has further criticised the movement to goods. MacIntyre notes that his 'account [is] … at variance with some modern Thomistic writers on natural law'[80] and by this he refers to Finnis. In doing so, MacIntyre has further criticised NNL's reliance upon Aquinas and Aristotle to present *telos*. To achieve this, MacIntyre puts forward a framework which presents 'a fundamentally Aristotelian account … into which are integrated both an Augustinian conception of the will and … concepts [such] as those of *intention*

[75] J Finnis, G Grisez and J Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends,' (n 67) 118. A good example of the way that basic goods (seen as good-making characteristics) connects to intentional action can be seen in Rodriguez-Blanco's work. This draws upon Rodriguez-Blanco's 'guise of the good model' and is the main explanation given for complying with legal rules - Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (n 31) 152. It is argued that the grounding reasons/*logos* of the rules guide the agent - ibid 39. This is because they constitute the reason for the agent's intentional action to follow the rule – ibid. As such, because of the way that good-making characteristics function in this model, there is no longer seen to be a dependence upon human fulfilment to provide the underlying *logos* of intentional action.
[76] Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 29) 191, 192.
[77] Ibid.
[78] McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (n 18).
[79] Ibid 46.
[80] MacIntyre, *Whose Justice, Which Rationality* (n 2) 188.

and *synderesis* and *conscientia*.'[81] MacIntyre suggests this account was achieved through Aquinas conversely accepting the substance of what Aristotle had to say on three central issues: first, the theoretical and practical relationship of subordinate goods to the supreme good; secondly, the process of deliberation, where argument as to how the best means to achieve the good is identified; and thirdly, the organisation of the reasoning in pursuit of the good which 'generate[s] the right action as the conclusion of practical reasoning.'[82] There is not a clear distinction here between the good or the goods. That being said, this treads closer to the notion of the *good* rather than the *goods*.

MacIntyre's criticism of NNL follows a rejection by Aristotle of human goods forming the telos of human life, which MacIntyre identifies was extended to Aquinas.[83] MacIntyre believes that Aquinas shows Aristotle's account of the teleology of human life to be 'radically defective'.[84] The focus upon the good by MacIntyre may be a misreading because Thomas' ultimate end is nothing except the state of perfect happiness: the contemplation of God, in which contemplation all of human nature finds its completion.[85] Instead Thomas writes, '[e]veryone desires perfect happiness, and everyone has as the true end of their nature, that for the sake of which they move toward all other *goods* in the way that they do, the goodness of God.'[86] This is important because George presents a combination of *eudaimonia* with the human good and goods. This is not, however, to overstate the role of fulfilment. It was earlier suggested that in NNLT the fulfilment of the basic goods acting as basic reasons for action is an essential aspect of integral human fulfilment.[87] MacIntyre's criticism given to the NNL account of the good can be clearer. Natural law should be based from the beginning in the nature of the good leading to flourishing. MacIntyre has, for instance, not identified the same misreading in George's later work or in any other NNL work. For the purposes of analysing George's thought, George's approach to practical reasonableness can therefore be seen to combine the basic goods with human fulfilment and flourishing, which as we have seen by drawing upon

[81] Ibid 188.
[82] Ibid 189.
[83] Ibid 192.
[84] Ibid 205.
[85] Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) 262, I-II q. 94 a 2, I-IIae, 5, 4.
[86] Ibid Ia, 6, 1 – A MacIntyre, *Whose Justice, Which Rationality* (n 2) 192 [emphasis added].
[87] J Finnis, G Grisez and J Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends,' (n 67) 104.

the thought of Coyle, MacIntrye and McInerny in this section may indicate a movement from the good to the goods.[88] George's approach to the good (linked to fulfilment and flourishing) is an important observation for later application in chapters 4 and 5.

This combination has attracted further criticism. It has been argued by the theologian Nigel Biggar that Grisez rejected Thomas' formulation of practical reasoning as a moral principle, instead preferring a 'First Principle of Morality' to guide human fulfilment.[89] For George, the first principle of morality ensures that one ought always choose and otherwise will in a way that is compatible with a will towards integral human fulfilment.[90] To enable this, basic human goods must be arrived at through a process of normative reasoning providing conduct for human action. As highlighted above, this is not the case because George's NNL is a mixture of the FPPR and the first principle of morality – practical reason is articulated in a plurality of individual moral precepts.[91] George distinguishes, within practical reason, between the "first principles of practical reason" as pre-moral (that the good(s) ought to be pursued) and the first principle of morality (that they should be chosen in a way that respects the integrity of human well-being).[92] This distinction differentiates clearly between natural law as involving material principles of practical rationality, and 'natural law as involving specifically moral principles governing choice.'[93] These are moral norms which George would link to empirical knowledge. This differs from the pursuit of intrinsic value strictly

[88] George, *Making Men Moral: Civil Liberties and Public Morality* (n 39) 102-103.
[89] Biggar & Black (eds), *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (n 49) 67-68. See further J Boyle, 'On the Most Fundamental Principle of Morality' in J Keown and R P George (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford University Press, 2013) 69.
[90] R P George, 'Introduction' in J Keown and R P George (eds) *Reason, Morality and Law: The Philosophy of John Finnis* (n 88) 2. George here relies upon Finnis' development of the first principle of morality: George believes that Finnis' 'failure' to articulate the first principle of morality within *Natural Law and Natural Rights*, was rectified by terming "openness to integral fulfilment" the status of the "master principle of morality" in J Finnis, *The Fundamentals of Ethics* (n 26) 70-74, 120-124, - R P George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, Delaware: Isi Books, 2013) 272. To my mind this is an instance whereby George fails to fully criticise Finnis, most likely because of George's connections to the Grisez School. See also R P George, 'Introduction' in J Keown and R P George (eds) *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford University Press, 2013) 2.
[91] Schockenhoff (n 24) 162.
[92] R Hittinger, *Critique of the New Natural Law Theory* (n 10) 13.
[93] Ibid 13.

adhered to by Thomas. In George's NNL the first principles provide reasoning articulated in a plurality of basic goods.

It has also been shown that George develops his theory of basic human goods, themes of which are to be found in Aquinas, even though no description or recognition of basic human goods are outlined specifically by Aquinas. Chapter 1 considered this issue in the work of Finnis, and I now turn to criticise George's reading. As it was established in chapter 1, Aquinas merely holds the good to be 'self-evident' and 'indemonstrable' leading to 'fulfilment' and 'integration' instead of listing specific human goods required for practical reason.[94] The difference may be, as Jean Porter notes, due to George finding *inclinations* to be analogous to the basic goods.[95] Does George overstep Aquinas' understanding of the good here?

Finnis reads Aquinas' understanding of practical reason as stating that we are directed by the inclinations mentioned in the *Summa Theologica* I-II 94.2 towards the basic goods.[96] For Aquinas these natural *inclinations* provide connections between the individual precepts of natural law.[97] George and Finnis, however, reject the terminology of 'inclinations'.[98] The rejection of natural *inclinations* instead leads to an adoption of the incommensurable basic goods, which lead, via a number of further intermediary principles, to norms of conduct.[99] George rejects the terminology of 'inclinations' by finding them to be analogous to the basic goods (and so terming them 'basic goods').[100] Schockenhoff has suggested, however, that Aquinas did not intend to present a complete list of all the intermediary principles of practical reason but instead intended to discuss their necessary interplay with the natural ends of human striving.[101] Whereas

[94] McInerny, *Aquinas on Human Action: A Theory of Practice* (n 67) 121. See Aquinas, *Summa Theologica* (n 4) I-II. q. 94; ST II-II q. 108. a2.
[95] Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 37-38.
[96] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 56-84. For an outline of this process see: Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 37-38.
[97] Finnis, *The Fundamentals of Ethics* (n 26) 69. See Aquinas ST I-II q. 91 a.2-a.3.
[98] Ibid.
[99] Schockenhoff (n 24) 162. The basic goods lead to norms of conduct, based upon the further intermediary principles, such as: a starting point in a coherent plan for life; no arbitrary preferential treatment of individual basic values or persons; a balance between distance and dedication to the fundamental values; respect for every fundamental value in every action; promotion of the common good; and obedience to one's conscience. These have a distinct Catholicised approach. This once again raises the Roman Catholic bias criticism identified in chapter 1.
[100] George, *In Defense of Natural Law* (n 7) 38-39.
[101] Ibid.

George develops legal application on the basis of seven, specific basic goods, Aquinas does not list human goods for application. By listing basic goods, George arguably allows the good to be recognised on a practical, basic level. The connections between the individual precepts of natural law are removed in order to allow incommensurability between the basic goods for application. This is why George does not adopt the term 'inclinations', in order to move the basic goods towards practical outcomes. This is a movement from Aquinas. However, is this an acceptable clarification of the good shown by George? Or, does a theory of practical reasonableness demand even more 'practical' specification? In other words, does George here overstep Aquinas' previous understanding of the good here?

The application of the good

George has attempted to provide an answer to the meaning and application of the good in everyday situations. This is one of the reasons he is the ideal candidate for our purposes in chapters 4 and 5. From Finnis' reading of Aquinas, it is asserted that 'a Natural Law theory in the classical tradition makes no pretence that natural reason can identify the one right answer to those countless questions which arise'.[102] To answer these questions Finnis assumes that, 'there are many ways of going wrong and doing wrong; but in … perhaps most situations of personal and social life there are a number of incompatible right (i.e. not-wrong) options.'[103] However, Finnis is frequently criticised for providing no practical application for NNL. Chapter 1 highlighted that as a moral realist,[104] Finnis demonstrates that law is a moral phenomenon within the 'central case' viewpoint.[105] This is because practical reason directs the obligation created by laws to enable participation in human flourishing. This leads Finnis to the conclusion that prior personal choice 'can greatly reduce the variety of options for the person who has made that commitment,'[106] in later deliberating and engaging

[102] George, *Natural Law Theory: Contemporary Essays* (n 31) 151, 152.
[103] Ibid.
[104] My thanks goes to Professor Julian Rivers for this classification.
[105] Finnis, *Natural Law and Natural Rights* (n 30) 14-15. George believes that Finnis' central case is one 'in which legal rules and principles function as practical reasons for citizens as well as judges and other officials because of people's appreciation of their virtue and value i.e. Their point'- George, 'Introduction' in Keown and George (eds) *Reason, Morality and Law: The Philosophy of John Finnis* (n 88) 4.
[106] George, *Natural Law Theory: Contemporary Essays* (n 80) 151, 152.

with the good as part of the process of the exercise of practical reason.[107] This conflicted set of choices within ethics presents a problem. This chapter has outlined that the NNL approach to the good leads to human flourishing but does not *prima facie* give rise to explicit application.[108] For instance, it was established in chapter 1 that Finnis' view of law as a moral phenomenon only provides discretion towards adjudicative consequences within the legal process.[109] The lack of explicit application in NNL is purposeful but does not readily help the agent. The problem is that a set of choices provides an area of 'grey' within legal penumbra, which gives ambiguity and variety to moral decision making.[110] As such, this directly draws Ronald Dworkin's criticism within *Taking Rights Seriously*[111] and *Law's Empire*:[112] in this case can there be one direct answer (i.e. a right answer to a hard case)?[113] Finnis is clear, for instance, that under his NNL views the 'search for the one right answer is practically incoherent and senseless'.[114] There is not a definitive answer to be given by a theory of human goods working as principles of practical reasoning.[115] From this position, which presents a conflicted set of choices, the practical application of NNL to areas such as abortion, euthanasia and sexual ethics can be seen as conflicted. I will go on to argue how George may fix the problem surrounding application by providing practical application built on practical reasoning.

It was argued in the Introduction that George goes further and states that the legislator follows the practical intellect[116] to derive the positive law from the natural law.[117] This is a method that is applied to the creation of law in both statutory and case law form. The application of laws for George may be 'rationally guided and criticized in light of those principles; and legal right … can be judged morally good or bad … by reference to standards of the higher [natural] law'.[118] The categorisation of the basic goods allows more specific application. It will be

[107] This process was introduced and analysed in chapter 1.
[108] George, *Making Men Moral: Civil Liberties and Public Morality* (n 39) 103.
[109] Finnis, *Natural Law and Natural Rights* (n 30) 276.
[110] For instance, this uncertainty and ambiguity may again invoke the criticism made throughout this thesis that there is a Roman Catholic bias present in the causes supported and engaged in NNL.
[111] R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).
[112] R Dworkin, *Law's Empire* (Hart, 1986).
[113] Dworkin, *Taking Rights Seriously* (n 110) 105-130; R Dworkin, *Law's Empire* (n 111) 99-100.
[114] George, *Natural Law Theory: Contemporary Essays* (n 31) 144.
[115] George, *Natural Law Theory: Contemporary Essays* (n 31) 138, 151.
[116] R P George, 'Natural Law' (2007) 31 Harvard Journal of Law & Public Policy 171, 189.
[117] Ibid 190.
[118] George, *The Clash of the Orthodoxies* (n 17) 155.

shown in section 2.3 and chapter 4 that George has transferred this analysis of the good into contemporary NNL application which will be used to critique English religious liberty law.

George argues, following Aquinas, that what he calls the 'first principles of natural law … can be grasped by anyone of the age of reason ... are per se nota (self-evident) and ... underived.'[119] The centricity of human reasoning seen through practical reasoning and the good was established in chapter 1. A common theme which determines the practical application of the good within jurisprudence[120] is 'will' seen as a desire of reason.[121] As Aquinas notes, '[t]here is a desire for good in everything: *good*, the philosophers tell us, *is what all desire*…In things with understanding it is called intellectual or rational desire: will.'[122] How then does this work within adjudication? As was established above, there is a connection between will and reason in the exercise of practical reason. An example within the English legal system will be used to show this point. In practice, the English and United States legal systems show many elements combining will and human rationality. For instance, Mark Murphy has suggested that 'statutory law is primarily will, whilst common law reasoning is often a matter of "reason"'.[123] To show how this is the case, it is evident that judicial reasoning, based upon statutory interpretation factors heavily, for instance in criminal law. The sentencing guidelines are a good example of this: a judge sentencing for a criminal offence, committed after 6th April 2010, must follow s.125(1) of the Coroners and Justice Act 2009, which states: '(a) follow any sentencing guideline which is relevant to the offender's case'. These sentencing guidelines provide the judge with a range of sentences appropriate for each type of offence. Within each offence, there are three specified categories which reflect varying degrees of

[119] Ibid 33.

[120] A theme that also runs through George's discussion on practical reason and a factor in deploying George's thought to analyse religious equality law.

[121] V Rodriguez-Blanco, 'Book Review: T Macklem, *Law and Life in Common* (Oxford, 2015)' (2016) 75(2) C.L.J. 440, 442-443. See further: Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 253-254.

[122] St Thomas Aquinas, *Summa Contra Gentiles* 2.47-48. *Summa Contra Gentiles* (*Opera Omnia*, Leonine edn. vol. xiii) (1264) in Aquinas, *Selected Philosophical Writings* (trans T McDermott, Oxford University Press, 1993) 169. See Aquinas, *Summa Contra Gentiles Book Three: Providence, Part I* (n 38) Chapter 3 [11], 38; Aquinas, *ST* I-II q. 8, a. 1; I–II, q. 12, a. 1. In chapter 1 it was established that Finnis's reading of Aquinas (St. Thomas Aquinas; ST I-I q. 19 a. IC) indicates that it is through an agent's will that reason has the power to move to action as a desire of reason – Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 70.

[123] M C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2009) 139.

seriousness. To decide upon the appropriate category, harm and culpability are considered. The starting point defines the position within a category range to calculate the provisional sentence. This decision also considers aggravating factors, which increase seriousness, and mitigating factors, which reduce seriousness and reflect offender mitigation. Here a judge, while bound by the certain facts of the case, has the ability to apply a range of sentences within the judicial reasoning.

The process here involves a high dependence of will and reason, a mix of statutory analysis and case law precedent. The criminal justice system allows for conflict, which takes into account human error by allowing recourse to the Court of Appeal for erroneous sentencing.[124] Man-made 'positivist' theories work best with the 'will' aspects of law. Indeed, the phrase 'positive law' is itself a reference to the setting down, the positing by human rule-makers of legal standards, such as criminal offence standards. Natural law also recognises that 'the discovery of "natural" or "divine" legal standards through the operation of reason.'[125] In this sense, it is suggested that George's understanding of practical reasoning allows discretion in the implementation of will and reason, centred on the good. As such, in the analysis of George's thought it is identified that there is a separation between will and reason in discernment of the good.

George brings practical application built on practical reasoning from NNL. This is a key observation in order to transfer George's thought to critique religious equality law. George deliberately makes the claim that by presenting a number of 'incomparable right' options,[126] legal obligation within NNL can be directed towards: 'resolving any of the community's coordination problems for the common good of that community.'[127] George goes further with United States constitutional law. He sees the creation of such law a matter of both the 'positive law of the constitution'[128] and determinable by the natural law alone. Within the moral natural law thesis[129] this necessitates a finite conclusion – the community and

[124] The Attorney General will consider unduly lenient sentences under s.36(1)(a) of the Criminal Justice Act 1988. For instance – *R v Connors* [2013] EWCA Crim 324.
[125] Ibid 140.
[126] George, *Natural Law Theory: Contemporary Essays* (n 31) 151, 152.
[127] Finnis, *Natural Law and Natural Rights* (n 30) 276.
[128] George, 'Natural Law' (n 88) 191-192.
[129] It was identified in chapter 1 that, within Murphy's categorisations, George's 'moral reading' of the natural law theory differs from Finnis' 'weak reading' - Murphy, *Natural Law in Jurisprudence and*

constitution bind all – natural law is binding upon all. For George, this would extend to binding precedent derived from case law setting *ratio decidendi* if in accordance, and derived from, the natural law. This will be the subject of discussion in chapter 5. I will next show George's process may misrepresent the good due to the incommensurability of the goods.

Development of the good

The incommensurability of the goods may show incorrect development of the good from Thomas because the morally guided ends differ. The Introduction presented the incommensurability of the basic goods within NNL. NNL's basic form of human good is derived upon a universal value – the reliance upon practical principles here is contentious. For instance, in his *In Defense of Natural Law*, George, presents:

> A set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realise reasonably for themselves the value(s)…to collaborate with each other (positively or negatively) in a community.[130]

Reasonable objectives differ in the community. Aquinas' scholastic values differ from Robert George's twenty-first century postmodernist community.[131] The guidance of practical reason determines what counts as an appropriate action in each choice. This leads to an end focused upon moral reason. While George believes that the process may be similar, as Porter argues, morally guided ends differ in their application.[132] A universal value of the good cannot have definitive application. This is because of incommensurability of the goods, and so may be seen as a difficult movement from Aquinas by George.

Finally the development of the good may invoke the is-ought problem often called the naturalistic fallacy. Like most contemporary philosophers, George has worried about the is/ought dichotomy so forcefully articulated by David Hume and

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Politics (n 122) 9; M C Murphy, *Natural Law and Practical Rationality* (Cambridge University Press, 2001) 26.

[130] George, *In Defense of Natural Law* (n 7) 235.

[131] As shown in the differentiation between the first practical principles and their subsequent widening within NNL to the basic human good formulation.

[132] J Porter, *Moral Action and Christian Ethics* (Cambridge University Press, 1995) 162.

reinvested with authority through G. E. Moore's naturalistic fallacy.[133] That is, the problem with deriving moral conclusions from factual premises.[134] Grisez and George suggest that any reductivist position ascribed to Aristotle or Aquinas entails deriving an 'ought' from an 'is' based upon a natural property.[135] However, the development between practical reason, the good and the basic human goods may circumvent the naturalistic fallacy. It has been argued that George's distinction between practical reasonableness and the basic goods is satisfactory in circumventing the naturalistic fallacy of identifying good with a natural fact. This is because George believes that the first practical principles and basic precepts of natural law do not state moral propositions, they are 'pre-moral'.[136] As 'pre-moral', this overcomes David Hume's fact-value dichotomy and G. E. Moore's formulation of the naturalistic fallacy.[137] The ethicist David Oderberg has identified Finnis' NNL contribution in *Fundamentals of Ethics*[138] and 'Scepticism, Self-refutation and the Good of Truth'[139] as being the leading academic criticism of the fact-value distinction.[140] This rejection is further supported in work by the ethicists Philippa Foot[141] and Jean Porter.[142]

In 'The Basic Principles of Natural Law' Finnis and Grisez made the claim that: '[t]here can be no valid deduction of a normative conclusion without a normative principle, and thus … [the] first practical principles cannot be derived from metaphysical speculations.'[143]

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[133] D Hume, *A Treatise of Human Nature* (first published 1739, L A Selby-Bigge ed, Oxford University Press, 1888) 469, and G. E. Moore, *Principa Ethica* (first published 1903, Cambridge University Press, 1948), 46-56.
[134] Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n2) 123. J Locke, *Two Treatises of Government* (first published 1698, P Laslett ed, 2nd edn, Cambridge University Press, 1967) 289.
[135] J Finnis & G Grisez, 'The Basic Principles of Natural Law: A Reply to Ralph McInerny' (1981) 26 Am. J. Juris. 21, 24.
[136] George, *Making Men Moral: Civil Liberties and Public Morality* (n 39) 49.
[137] E D Reed, *Theology for International Law* (Bloomsbury, 2013) 106. Here Reed is directly refuting the criticisms put forward in N Bamforth and D Richards*, Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge University Press, 2008) 4.
[138] Finnis, *Fundamentals of Ethics* (n 26).
[139] J Finnis, 'Scepticism, Self refutation and the Good of Truth' in J Raz and P Hacker (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977).
[140] D S Oderberg, *Moral Theory: A Non-Consequentialist Approach* (Blackwell, 2000) 9, 10.
[141] See P Foot, *Virtues and Vices and Other Essays In Moral Philosophy* (University of California Press, 1978) 110-131.
[142] See Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 123-124.
[143] Finnis and Grisez, 'The Basic Principles of Natural Law: A Reply to Ralph McInerny' (n 106) 24.

This claim was made to avoid reductivism which, in their opinion, leads to the naturalistic fallacy.[144] George is convinced that reductivism entails adopting the is/ought problem of deriving an 'ought' prescription from an 'is' proposition.'[145] A relaxed stance is taken to this problem, which in and of itself is no longer a pressing issue in contemporary analytical jurisprudence.[146] The use of the good here is indicative of the wider, problematic approach that George makes in his understanding of the good. A problem which has identified modification required in George's thought. The centrality of practical reason to George's NNL thought has again been shown here. To shed more light upon practical reasoning, the next section will turn to George's approach towards the principle of ethical autonomy.

Elevation of the principle of ethical autonomy

The last section conveyed that George was influenced by Aquinas' moral theology and that the good within practical reasoning is central to George's use of Aquinas. It further noted Aquinas' teleological understanding of human actions i.e. that whatever is action is undertaken for some end or purpose, and his ultimate attribution of goodness to God. We saw briefly that, for Aquinas, the first principle of practical reason [FPPR] is inseparable from his belief that the meaning of goodness is found in God:

> Consequently the first principle of practical reason is one founded on the notion of good, viz. that "good is that which all things seek after." Hence this is the first precept of law, that "good is to be done and pursued, and evil is to be avoided." (*S.T.* II-I, q.94, art.2, *c*)

For Aquinas, the FPPR is rooted theologically in the nature of the concept of the good which leads to flourishing. Yet, Aquinas does not use the term ethical autonomy, nor does he discuss autonomy in modern, liberal terms. He states clearly, however, that the human person is capable of apprehending the good as something to be sought, thereby implying that the human person has moral agency:

[144] Ibid.
[145] D J O'Connor, *Aquinas and Natural Law* (Macmillan London, 1967) 32.
[146] Ibid. Further see McInerny, *Aquinas on Human Action: A Theory of Practice* (n 67) 118.

> Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. (*S.T.* II-I, q.94, art.2, *c*)

Hence NNL theorists have assumed that he operates with an understanding of moral agency comparable to modern notions of autonomy. Of interest for our purpose is how the new natural law theorists, and George in particular, explain, understand and appropriate Aquinas' theologically-informed natural law reasoning in their jurisprudence. Schockenhoff recognises the tension between traditional theological teaching on natural law and modern, predominantly philosophically informed versions. He notes a critical boundary which distinguishes 'an autonomous ethics of reason and a theonomous ethics of faith'.[147] Moreover, he provides context for analysing George's approach to ethical autonomy because he guides us helpfully in appreciating how natural law theorists have tended to present tensions between revelation and the autonomy of practical reason.[148] So, for instance, he observes that A.J. Lisska 'remains too bound to this basically neoscholastic type of interpretation, since he derives moral philosophy (as a logically secondary discipline) from metaphysics, thereby ultimately undermining the autonomy of practical rationality'.[149] As is becoming apparent, both evidence an awareness of theological traditions of metaphysically-rooted theological reasoning. Both speak to an audience, however, who might not be sympathetic to theologically-explicit modes of argumentation. Hence both venture ways of speaking that are cut loose from explicit linkages with theology. Both, as we shall see, assume that practical reason is capable and acting in ways that seek the basic goods. Schockenhoff's representation of this theologically-informed natural law reasoning is a helpful preparation for our reading of George. For our purposes, it is important to be clear that George understands ethical autonomy to be the 'capacity to be author of one's own life'.[150] George is aware

[147] Schockenhoff, *Natural Law and Human Dignity* (n 23) 3. For instance Aquinas states: 'the practical intellect is that which directs what it apprehends to operation.' Aquinas, ST, I Q 79 a.11.
[148] See his account of a range of views on this point, Schockenhoff, *Natural Law and Human Dignity* (n 23) 137-140.
[149] Ibid 139.
[150] George, *Making Men Moral: Civil Liberties and Public Morality* (n 39) 147. In this work George draws upon limited references in the *Summa Theologiae* in an attempt to substantiate his claim: see ST I-II, q. 95, a. 1.; ST I-II q. 96, a. 2.**;** ST II-II, q. 10, a. 8.

of the potential anachronism at stake here but maintains a reliance upon ethically autonomous practical reasoning.[151] The autonomous operation of practical reason is a feature in his development of ethical autonomy.[152] George's argument is that autonomous practical reasoning is authentically Thomist.[153] George states: '[I] allow for a measure of autonomous practical reasoning. This solution, I think, is the authentic Thomist one.'[154] It is evident that there is a promotion of ethical autonomy and dependence upon the autonomous ethics of reason as he engages natural law jurisprudence.[155]

Further support for this claim is given by Stephen Long who finds that George favours ethical autonomy in rationalist terms.[156] This attempts to follow Aquinas, for whom practical reason is the 'perfection of some activity other than thinking.'[157] As such, ethical autonomy may be evident in the writings of George as he develops the moral theology of Aquinas and engages with autonomous practical reasoning.[158]

Shockenhoff criticises this approach. He criticises NNL for attempting to 'defend this approach justify[ing] it by appealing…to the historical example of Thomas Aquinas' doctrine of nature law.'[159] There is some merit in this criticism because there is very little direct reference to the original works by Aquinas when George attempts to explicate his understanding of moral agency present in Thomas' natural law reasoning.

On the other hand, establishing the elevation of ethical autonomy within moral reasoning is helpful in this chapter to determine George's normative moral doctrine. O'Connor has identified that within Thomas' ethics, actions are called human or moral inasmuch as they 'proceed from the reason.'[160] This is important

[151] R P George, *Embryo: A Defense of Human Life* (Doubleday Books, 2008) 132.
[152] George, *In Defense of Natural Law* (n 7) 64-66.
[153] Ibid 255.
[154] Ibid.
[155] See further ibid 37, 76; Biggar & Black (eds), *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to* the Finnis-Grisez School (n 49) 67-68.
[156] S Long, 'Natural Law or Autonomous Practical Reason: Problems for the New Natural Law Theory' in J Goyette, M S Lutkovic and R S Myers (eds), *St Thomas Aquinas & The Natural Law Tradition: Contemporary Perspectives* (Catholic University of America Press, 2004) xix.
[157] McInerny, *Ethica Thomistica: The Moral Philosophy of Thomas Aquinas* (n 18) 38-39. See Aquinas, ST Ia, q. 14, a. 16.
[158] See further George, *In Defense of Natural Law* (n 7) 64-66.
[159] Schockenhoff, *Natural Law and Human Dignity* (n 23) 2.
[160] O'Connor (n 116) 32. See ST I-I 9.90 a.I ad 3.

for our analysis of George's thought because it implies that disputes about morals are capable, in principle, of being decided by practical reasoning. This inference has developed as a method to engage the choosing agent within George's monographs, notably *In Defense of Natural Law* and *Making Men Moral*[161] and will be seen to be important when later applying the modification of George's thought to religious equality law.

George consistently maintains that the basic human goods, as intrinsic aspects of well-being and flourishing, create a distinct space for ethically autonomous moral decision making. Flourishing is instead enabled through actions undertaken by practical reason. The human goods create space for ethically autonomous practical reasoning. For George, this provides an ethical autonomy of the human person and the dignity of the rational being.[162] This is intrinsically marked by two positions: first, a level of personal decision making; and second, the connection of the good with autonomy to enable such decision making, which can be used later in this thesis to analyse the right to religious liberty within equality law. Taken together, the combination of the FPPR with ethical autonomy provides George with a specific normative moral doctrine. It is one that is supplemented with an ethically autonomous responsibility. This is important because in chapter 1 it was also suggested that in George's thought authority to enforce the natural law may be vested with the legislature as a check on law making power.[163] George's reliance upon scholastic legal reasoning and the natural law to reach pragmatic conclusions in line with the common good may well produce a justiciable form of natural law, which will be further developed in chapter 4.3.

This section has shown that the autonomous nature of practical reason is an important feature in George's development of ethical autonomy. It will now be argued that the basic good, in both an ethical and moral notion, depends upon a certain form of the good. The basic good of religion will be shown to be modified by George.

[161] For instance: George, *Making Men Moral: Civil Liberties and Public Morality* (n 39) 226; George, *In Defense of Natural Law* (n 7) 38.
[162] George, *Embryo: A Defense of Human Life* (n 150) 132.
[163] R P George, *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996) 329.

Inclusion of the basic good of religion within practical reasoning

In this section I will show that George further differs from Aquinas in the approach to the basic good of religion. There is reason to believe that George diverges from the teaching of Aquinas concerning practical reason's connection to the basic good of religion. The premise is that NNL attempts to construct a genuinely Thomistic account of natural law 'without needing to advert to the question of God's existence or nature or will'.[164] As outlined in chapter 1, this is also the position of George.

MacIntyre points out Aquinas' view of religion and draws notice to the difference between NNL treatments of the good of religion. Aquinas, in MacIntyre's view, suggests that religion is a moral virtue 'being part of the cardinal virtue of justice concerned with what we owe to God in the way of honour, reverence and worship.'[165] This is because obedience to the natural law requires the virtue of justice.[166] Given that Aquinas' view of religion was concerned with justice and the metaphysical, this involved, first, the ultimate end being the state of perfect happiness, and then, second, the contemplation of God, in which contemplation all of human nature finds its completion.[167] It is a view of religion that posits a deity setting down obligations in order to achieve justice.

George has given a high place to the good of religion within NNL, even though there is an uncertainty surrounding of the basic good of religion within his list of basic goods,[168] although there is no such uncertainty in Finnis' list.[169] For instance, while there is clearly a basic good of religion listed in *Natural Law and Natural Rights,* George does not list a basic good of religion within *Body Self Dualism in Contemporary Ethics and Politics*[170] but he does list a basic good of religion in the later - *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism.*[171] This shows the increased importance that George has attached to religion over time.

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[164] Finnis, *Natural Law and Natural Rights* (n 30) 48-49.
[165] A MacIntyre, *Whose Justice? Which Rationality* (n 2) 188.
[166] Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) S.T IIa-IIae, 79, 1.
[167] Ibid 262 Ia, 6, 1 - A MacIntyre, *Whose Justice? Which Rationality* (n 2) 192.
[168] R P George & P Lee, *Body Self Dualism in Contemporary Ethics and Politics* (Cambridge University Press, 2008) 91.
[169] Finnis, *Natural Law and Natural Rights* (*n* 30) 85-90.
[170] George & Lee, *Body Self Dualism in Contemporary Ethics and Politics* (n 169) 91.
[171] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 119.

Within *A Critique of the New Natural Law Theory*[172] Russell Hittinger critiques the place of religion within NNL. Hittinger proposes that it is necessary to distinguish between the good of religion and *a religion*, and in addition to offer criteria for assessing whether the latter 'satisfies the nature of the general good of religion.'[173] Within the context of the basic good of religion and religious liberty, Hittinger argues that it is unclear why one ought to choose the basic good of religion, much less promote or safeguard the basic good of religion.[174] Any position taken on religion and religious liberty by the new natural lawyers is dependent on their Thomist interpretation. Hittinger notes that Aquinas distinguishes between religion and the good of belief in God. In *Christian Moral Principles*:[175]

> Grisez uses the Thomistic distinction to reinforce his own position that the basic goods, including religion, are incommensurable, and that there does not exist, prior to choice, a hierarchy amongst them. What he overlooks is the theoretical apparatus that Aquinas employs in order to justify the so called natural good of religion and in its place the natural law system.[176]

Aquinas' discussion of religion presupposes a philosophy of human nature – an account of the intellect and the will's relation to objects and ends.[177] This distinguishes Aquinas from Grisez. The argument runs that the virtue of religion is superior to the other natural virtues precisely because it governs man far more immediately, in particular, to his final end.[178]

George's approach to the basic good of religion

George's approach to the good of religion has been rejected by the legal idealist Mark Murphy who rejects George's approach as it relates to practical reason. He discards George's incommensurability thesis and instead argues that 'what is needed to participate in one good requires participation in another good'.[179] Murphy's logical suggestion is that, if participation in the religious good was threatened by pursuit of other goods, then those committed to religion would

[172] Hittinger, *Critique of the New Natural Law Theory* (n 10).
[173] Ibid 90.
[174] Ibid 108.
[175] Grisez, *Christian Moral Principles: The Way of the Lord Jesus. Vol 1* (n 52).
[176] R Hittinger, *Critique of the New Natural Law Theory* (n 10).
[177] For instance: Thomas Aquinas, *Summa Contra Gentiles Book Two: Creation* (n 51) Chapter 48 [6] 146.
[178] Ibid 171. See Aquinas, ST I-II q. 1 a. 8.
[179] Murphy, *Natural Law and Practical Rationality* (n 129) 194.

'abandon those other claims.'[180] Much like George, Murphy's conclusion is that practical reason provides a state of affairs similar to the function that constitutes human flourishing. Yet, Murphy finds there are reasons to doubt that practical reason affirms that all other basic goods are for the sake of religious good.[181] The inference from this is that practical reason does not 'provide an independent reason to think religion to be a superordinate good.'[182] This is a surprising conclusion. The differentiating factor here is that Murphy, in his criticism of NNL, finds religion to be a superordinate good. I agree with his initial finding, which will be the subject of in-depth discussion in chapter 4 in which the modification of George's thought is required to establish a better critical understanding towards the place of religious liberty within equality law. Nonetheless, Murphy's later conclusion ignores the full incommensurability of the good of religion, which will also later be discussed in detail.

In the analysis of George's thought, what role does the common good play regarding religion and law? Chapter 1 presented George's set of general moral principles that are: a) distinct from the basic practical principles and b) enable the basic moral principles to work.[183] This successfully allows the contentious choice between human goods. As argued earlier in this chapter, Finnis' labelling of these principles as 'requirements of practical reasonableness'[184] is *vital* to the process and performance of NNL deliberation and judgement in situations of morally significant choice. This is a choice that is not merely confined to the intellectual natural law theorist, instead to every rational agent.[185] Hence George under his own methodology would achieve practical reasoning of reason, morality and law.

I suggest that George presents here two substantial, differing claims. First, because George recognises that NNL clarifies ways to identify basic principles of practical reasoning and/or morality, he provides direction to guide the arms of the state: legislators, the executive and to an extent, judges, in their decision making processes.[186] Secondly, it is evident that George recognises that other natural

[180] Ibid 42.
[181] Ibid 197.
[182] Murphy, *Natural Law and Practical Rationality* (n 129) 191, 197.
[183] Basic moral principles that are derived from the first principle of morality.
[184] Finnis, *Natural Law and Natural Rights* (n 30) 3.
[185] George, *Natural Law Theory: Contemporary Essays* (n 31) 105.
[186] This would be applicable to the British context. A good example of this is the English common law, which emerged historically as a sort of positive embodiment of the natural law, due to its creation not being dependant on an act of parliament. So Corwin concludes 'the Common Law becomes higher law,

lawyers seek to guide legal interpretation, adjudication and reasoning on the basis of a necessary connection between morality and law.[187] This is important because George has previously recognised the normative basis of adjudication required to divide different natural law interpretations of legal validity. Moving further than Aquinas, these must be separate issues – separate issues that by analysing George's thought I claim divide his approach/NNL into a jurisprudential and ethical theory. This presents a normative basis for moral judgment built upon practical reason and provides a place for the basic good of religion, within the later analysis regarding religious freedom in equality law.[188]

2.2 Conclusion

From the above we can see George's development of Thomistic natural law theory to provide application through the basic good of religion.[189] The aim of this section was to demonstrate that Aquinas' influence was fundamental[190] in pertaining to all jurisprudential decisions taken by George regarding the good and practical reasoning. George's development should be seen as dependent upon a logical interpretation of Aquinas' inclinationist theory of practical reason.[191] George's development of Aquinas' natural law theory, however, may not adequately incorporate the essence of Aquinas' writing. It is not right to say that Aquinas' influence is 'fundamental' to all the relevant jurisprudential decisions taken by George. It has been argued that George's interpretation of practical reason in the work of Aquinas departs from Aquinas' position in several key respects, such as: the elevation of the principle of ethical autonomy; George's development of the good/goods; and the modification of the first principle of practical reason which fails to adequately incorporate Aquinas' understanding of the good.

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without at all losing its quality as positive law.' (George, *The Clash of the Orthodoxies* (n 17) 175). Corwin suggests: 'first, that Natural Law is entitled by its intrinsic excellence to prevail over any law which rests solely on human authority; second, that Natural Law may be appealed to by human beings against injustices sanctioned by human authority.' (Ibid 174.) This is of course misguided direct derivation – NNL is at pains to suggest that law is not to be variegated nor idealised. It will be shown in section 2.3 that the natural law provides an internal arbiter for a minimum standard of law, rather than any indirect prevailing form.

[187] George, *Natural Law Theory: Contemporary Essays* (n 31) v.

[188] Chapters 4 and 5 will argue this presents a place for the basic good of religion.

[189] George, *Natural Law, Liberalism, and Morality* (n 1) 95.

[190] Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (n 3) 24.

[191] Murphy, *Natural Law and Practical Rationality* (n 129) 86.

In summary, George's NNL approach is contingent upon, following Aquinas, the good in reason and morality and the relation of ethical autonomy to practical reason. However, NNL diverges significantly upon the basic good of religion, and wider presentation of goods, within practical reasoning. Therefore, through ethical autonomy, the good in reason and morality provides practical application. In particular, through the basic good of religion. I suggest that this provides a coherent way forward for natural law reasoning in the context of jurisprudence. This basis will be crucial in chapters 4 and 5 to critique religious equality law. Section 2.3 will further detail how George's NNL approach to moral reasoning has moved beyond many of the particular claims made by Aquinas.

2.3 Beyond Aquinas: Revelation and Reason – debate about the validity of laws

In an effort to further critique George's thought, this section will show how George moves beyond Aquinas, to debate the validity of laws in a deeper exploration of moral reasoning within NNL. It will be argued that the sources of George's NNL approach to moral reasoning depend upon three main approaches: 1) revelation; 2) value; and 3) reason. This section will conclude by considering George's contribution to the concept of the 'minimum standard' of practical reasonableness. Central to this section is the question of whether NNL is a product of human reason or divine revelation?

The sources of George's approach to moral reasoning: divine revelation, moral realism or human reason?

This subsection will begin to address the question of the sources of George's approach to moral reasoning by suggesting that George attributes more weight to human reason than divine revelation when framing his discussion of NNL. Herein lies a point of tension with Aquinas for whom natural law reasoning is ultimately a theologically grounded mode of reasoning.[192] It will be argued that,

[192] Jean Porter, a leading theological commentator on Aquinas's natural law reasoning, makes this point while drawing attention to differences between Aquinas and subsequent, modern theorists of natural law: 'In the transition from the later Middle Ages to modernity, the tradition of the natural law was transformed from a theologically grounded interpretation of human morality into a philosophical framework for deriving, or at least testing and supplementing, determinate moral norms'. Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 28.

like Aquinas, the sources of George's NNL approach to moral reason depend upon both revelation and reason. Unlike Aquinas, however, George downplays the significance of divine revelation in relation to human reason. He follows Finnis in this regard. At issue is the degree of tension in this regard between George and Finnis, and where George wants to place his own work in relation to Aquinas.

Law, morality and reason – moral reasoning in George's thought

Mindful of the above, this section will discuss in more detail George's combination of law, reason and morality. Briefly stated, George believes that, for Aquinas, the natural law is humankind's God-given participation in the eternal law of God through reason and will: 'The natural law is a participation in the eternal law because even that part of creation subject to the norms of the natural law ultimately depends upon divine intelligence and free choice'.[193] George cites from Aquinas to this effect: '[The human being] has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law.' [194] As such, the natural law is the rational creature's participation in the eternal law.[195] This is not the place to explicate Aquinas' meaning. For our purposes, the point is simply that George is here concerned explicitly to align his approach with key tenets of Aquinas' teaching. This has been noted by McInerny, for instance, who has observed that George is wanting to position himself close to the position of Thomas, who believed there was no real conflict between faith and reason.[196] George seems explicitly to want to hold together both faith and reason. He thus interprets Aquinas to the effect that: 'there should be a knowledge revealed by God besides philosophical science built up by human reason.'[197] As such, we can see that George wants to position himself close to Aquinas in maintaining that the sources of a NNL approach to moral reason depend upon both revelation and reason. The

[193] George, *In Defence of Natural Law* (n 7) 42.
[194] George, *The Clash of the Orthodoxies* (n 17) 161, 162 referencing Aquinas ST I-II q.91 a.2. This once again shows George's reliance upon Aquinas.
[195] Aquinas, *Summa Theologica* (n 4) I – II q. 91. a. 2.
[196] McInerny, *A First Glance at St. Thomas Aquinas: A Handbook for Peeping Thomists* (n 150) 62. See Aquinas ST I q. 6. a. 1. This reading is distinguished from the two extreme attitudes identified in the nineteenth century by McInerny: rationalism (reason without faith) and fideism (faith without reason). Within George's thought neither extreme is adopted. This chapter will establish that there is always an acceptance of both in the theory; however, the argument lies in the extent that one dictates the other - McInerny, *A First Glance at St. Thomas Aquinas: A Handbook for Peeping Thomists* (n 150) 26.
[197] Aquinas ST I q. 1. a. 1. See also Saint Thomas Aquinas, *Summa Contra Gentiles Book One: God* (Trans A C Pegis, University of Notre Dame Press, 1975) Chapter 5 [5], 71: 'the human reason cannot grasp fully the truths that are above it.'

question lurking close below the surface, however, is whether, despite these protestations, George tends nonetheless to elevate the human reason above revelation.

As will become apparent, the significance that George attaches to the sources of moral and practical reasoning may also be a misreading of Aquinas. It has been shown above that for Aquinas, the natural law is the rational creature's participation in the eternal law[198] and it connects beings in contemplation with God. Aquinas' posing of natural law as a participation in the eternal law follows because: '[e]veryone desires perfect happiness, and everyone has as the true end of their nature, that for the sake of which they move toward all other goods in the way that they do, the goodness of God.'[199] In addition, 'the ultimate end of human beings is the state of perfect happiness, the contemplation of God in the beatific vision, in which contemplation all of human nature finds its completion.'[200] Aquinas' thought follows that it is evident that a scholastic understanding of natural law participates in the eternal law and connects beings in contemplation with God.[201] The natural law participates in the eternal law. This is distinctively *different* to the significance George's approach provides to practical reasoning and religious faith which will be shown in the next paragraph.

George's discussion of faith differs in believing that law, morality and reason combine with both special and general revelation. Biblical scripture is a form of special revelation, whereas natural law is a form of general revelation. For George, '[i]f natural law is based upon "faith," it is a faith in reason, and in the possibility of practical reason in particular.'[202] Note here how George directs the object of faith toward reason rather than the substance of divine revelation. It is in this sense he moves beyond reliance upon revelation alone in his claims about legal moral reasoning – this is an important observation for the purpose of analysing George's thought which will later be applied to religious equality law. George reads Aquinas as suggesting that a Judaeo-Christian God directs man in His own image and likeness, and more specifically, the capacity of reason. Faith

[198] Aquinas, *Summa Theologica* (n 4) I – II q. 91.
[199] Aquinas, *The Treatise on Law*: *Summa Theologica*, I-II, qq. 90-97 (n 14) *S.T.* Ia, 6, 1.
[200] MacIntyre, *Whose Justice? Which Rationality* (n 2) 191-2 quoting Aquinas, *Summa Theologica* (n 4) *I-IIae,* 3, 7.
[201] Ibid 191-192.
[202] George, *The Clash of the Orthodoxies* (n 17) 161.

in God entails faith in reason and the capacity of human beings to exercise practical reason, that is, to engage with reference to the first principle of practical reason and the first principle of morality whereby one grasps the intelligible point of certain possible actions for ends (goods, values, purposes) which *qua* intelligible provide 'reasons for choice and action'[203] concerning law. Here we can see that George downplays the significance of divine revelation in relation to human reason and comes close to Finnis' position as will be outlined below.

Chapter 1 has shown that at the very base level, George's system is a tripartite distinction between law, morality and reason, providing reason for action. Freedom, guided by practical reason, supplements a basis for George's theory of human nature within naturalism. For George, the 'natural order' is normative precisely in as much as it provides moral norms for free human choice.[204] For this reason George's approach is very different to a reading of the natural law participating in the eternal law and connecting beings in contemplation with God as presented in the *Summa Theologica.*[205]

Two different systems for human reasoning

Now that George's approach to moral reasoning has been shown, Finnis' 'natural reason' approach will be presented to draw a contrast. As shown in chapter 1, Finnis' interpretation of divine law/reason takes a particular reading of Aquinas and is drawn from a form of moral reasoning termed 'natural reason'.[206] For Finnis, as we have already seen above, rationalist argument resolves any conflict between divine and philosophical conclusions termed 'natural reason'; natural reason is understood as philosophical reasoning based on the ordinary experience of natural things, unaided by divine revelation.[207] Finnis uses 'natural reason' to reconcile revelation and rationality in moral reasoning by 'natural reason' taking precedence over revelation. Hence, this is why *Natural Law and*

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[203] George, *The Clash of the Orthodoxies* (n 17) 65.
[204] George, *In Defense of Natural Law* (n 7) 40, 41.
[205] MacIntyre, *Whose Justice? Which Rationality* (n 2) 191-192 quoting Aquinas, *Summa Theologica* (n 4) *I-IIae*, 3, 7.
[206] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 295. The concept of 'natural reason' was introduced in chapter 1. Finnis, as we have seen, interprets Aquinas as suggesting that the role of reason in NNL takes a forward role to divine revelation - Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 296.
[207] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 296.

Natural Rights provides a proselytising argument for the existence of a transcendent source similar to Aquinas' 'Five Ways'.[208]

Two different systems have emerged: the first is George's combination of law, reason and morality, and the second is Finnis' 'natural reason'. Both Finnis' understanding of 'natural reason' and George's combination of law, reason and morality can be seen as controversial. For instance, Lloyd Weinreb is aware of these tensions and discusses how philosophers of the law who have interests in natural law reasoning negotiate the relationship between divine law and human reason. This has led Weinreb to deny that such reason-dependent ends or purposes exist within legal idealism.[209] Both approaches to moral reasoning further place a high reading of human nature – one that can be rejected on the Biblical basis of total depravity (Romans 3:23) in the formation of choice common to man in moral reasoning discourse.[210] This is traditionally a Protestant Christian critique.[211] It has been argued that neither George nor Finnis hold appeal to revelation in claims made about moral reasoning. Here George's reading places excessive weight on moral choosing and Finnis likewise relies heavily upon the role of 'natural reason'. This section has criticised George's dependence on human reasoning. The next section will consider if a way forward can be provided by comparing Robert George's method of reasoning to Ronald Dworkin's conception of value as a form of moral reasoning.

Value as a form of moral reasoning

Central to this chapter is the use of practical reasoning. The previous subsection showed that practical reasoning encounters trouble concerning human nature. If practical reason works in the way outlined above to form conclusions based upon law, reason and morality, then could the concept of value be assessed objectively

[208] Finnis, *Natural Law and Natural Rights* (n 30) Ch. XIII. Finnis observes that Aquinas also emphasised certain moral principles, such as those in the Ten Commandments. These are conclusions from the primary self-evident principles and reasoning to reach conclusions. Here Finnis outlines how Aquinas connected with the Decalogue. For Aquinas moral norms and moral judgements need to be followed. This requires a degree of practical wisdom - Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 101. This practical wisdom, termed as we have seen 'natural reason', works to establish and secure both divine and philosophical conclusions. Finnis' interpretation of Aquinas relies upon the role of reason taking a forward role to divine revelation in NNL to secure these conclusions.

[209] L L Weinreb, *Natural Law and Justice* (Harvard University Press, 1987) 126.

[210] A similar critique will be made about 'natural rights' discourse in chapters 4 and 5.

[211] Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 40, 43–44. See: See: K Barth, *Church Dogmatics II/2* (G W Broiley tr, T. &. T. Clark, 1957) 528-535; S Hauerwas, *The Peaceable Kingdom: A Primer in Christian Ethics* (University of Notre Dame Press, 1983) 50-64.

to form an analogous basis for moral reasoning? If so, can this provide an account of morality that depends upon value and religion, drawing a comparison to George's Roman Catholic account of morality, which is contingent upon the value of religion? It will be shown in this section first, that value, like practical reasoning, can be assessed as a form of moral reasoning. This will be shown to be potentially detrimental for religion. By locating the independence of value in the FPPR, it will secondly be shown that George's value system provides a basis to engage, through practical application, conclusions reached in contemporary case law.

Both Finnis and Dworkin believe that practical reasoning precedes legal choice.[212] As such, they focus on the connection between law and morality. It is clear that within Dworkin's posthumous publication *Religion without God*,[213] Dworkin here 'publishing from beyond the grave', has for the first time focused solely on the issues of Western religion and a Judaeo-Christian God.[214] It will be shown that this is an important step. It is an important step as first, Dworkin's previous work focussing upon the relationship between law and morality will be seen in the light of his latest and last addition and secondly, Dworkin's theory has serious implications for organised religion,[215] notably Christianity, in the search for an applied form of moral reasoning in George's scholarship.

The use of 'value in Dworkin's work

In *Religion without God*,[216] Dworkin claims that value is objective, independent of mind, and immanent in the world.[217] This development, and concentration upon value, stems from Dworkin's position outlined in *Justice for Hedgehogs*.[218] This unusual title is a reference to Isaiah Berlin's distinction, drawing on an ancient Greek aphorism between those intellectuals who, like the fox, have many ideas,

[212] J Finnis, 'On Reason and Authority in "Law's Empire"' (1987) 6 Law and Philosophy 357.
[213] R Dworkin, *Religion Without God* (Harvard University Press, 2013). Ronald Dworkin died on February 14th 2013.
[214] See: The New York Review of Books, 'Religion Without God' (4th April 2013) <http://www.nybooks.com/articles/archives/2013/apr/04/religion-without-god/?pagination=false> accessed 18th February 2014; J Waldron, 'Religion Without God by Ronald Dworkin – Review' (*The Guardian*, 28th November 2013) <http://www.theguardian.com/books/2013/nov/28/religion-without-god-ronald-dworkin-review> accessed 6th February 2014.
[215] This would be organised religion reflecting the most common (and arguably largest) form of religion(s).
[216] Dworkin, *Religion Without God* (n 213).
[217] Ibid 10.
[218] R Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011).

and those who have 'one big idea'.[219] The fox knows many things, but the hedgehog knows one big thing. Dworkin is a hedgehog.[220] The hedgehog is an anti-pluralist image of scepticism. Pluralism in this context was Berlin's idea that there are truths but they conflict. Dworkin's pedagogical, prescriptive contribution was to put human dignity at the centre of his moral system, entrenched in value, for judges and for others. This provides: 'if we manage to lead a good life well,' then and only then in rare circumstances 'we make our lives tiny diamonds in the cosmic sands.'[221] Here Dworkin arguably distinguishes the good from a value consensus, by placing value as the cornerstone of his approach.

From looking at cases in their best moral light as outlined in *Taking Rights Seriously*,[222] Dworkin's view of morality in *Justice for Hedgehogs*[223] is intrinsically connected to value,[224] thus rejecting external scepticism because external scepticism is a form of scepticism that doubts value.[225] External scepticism also doubts moral value scepticism.[226] This is due to the introduction of human dignity into Dworkin's adjudicative system and, following this, value. It can be identified here that for Dworkin everything accords to value.[227] Of course, this is not new – many religious beliefs contain a structured system focused around a central concept, often a deity. For instance, in mainstream Western Christianity, belief in Christ dictates everything else within the religion. Therefore, through placing a particular focus upon moral philosophy and ethics, Dworkin is presenting an old concept in a new guise.

To draw out value and moral reasoning between Dworkin and George in this section, it is clear that Dworkin further sets a central structure of value focused upon morality, by aiming for 'a larger system of value in which our moral opinions figure.'[228] For Dworkin, moral reasoning is a form of interpretive reasoning in a

[219] I Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (2nd edn, Princeton University Press, 2013).
[220] I am grateful to Professor Simon Honeyball for pointing out that, ironically, Dworkin cannot be considered to be a Hedgehog. We should recognise implicitly that the Dworkinian hedgehog has learnt all that the fox knows in obtaining his knowledge of the one big thing.
[221] Dworkin, *Justice for Hedgehogs* (n 218) 423.
[222] Dworkin, *Taking Rights Seriously* (n 111).
[223] Dworkin, Justice for Hedgehogs (n 218).
[224] Ibid 13.
[225] Ibid 31.
[226] Ibid 40. See also R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy & Public Affairs* 87, 94.
[227] Dworkin, *Justice for Hedgehogs* (n 218) 7-8.
[228] Dworkin, *Justice for Hedgehogs* (n 218) 39.

larger system of value.[229] Convictions about value keep moral reasoning in check.[230] Dworkin adumbrates that 'moral reasoning, as I said, means drawing on a nested series of convictions about value.'[231] Indeed, Dworkin's term value explicitly refers to a broad normative category that includes reasons.[232] A connection concerning value and morality is established in Dworkin's work. This thesis attempts to analyse the right to freedom of religion by pursuing a critique of George's work. In our analysis it can be observed that religions are commonly built upon/around morality.[233] It was seen in chapter 1 that when considering religion *prudentia* is engaged to reach conclusions based upon 'the common good',[234] through practical reasoning in George's natural law theory.[235] George turns to consider morality in his 'natural law theory, as applied to problems of today'.[236] Practical reasoning arguably guides the common good in line with value to achieve human fulfilment. A central focus upon moral reasoning is evident in George's work. Therefore, at the outset both Dworkin and George adopt systems reliant upon morality and ethical consideration.

Dworkin has previously considered matters of natural law and morality.[237] However, interpretivism is Dworkin's theory of law which involves judges interpreting political morality in the adjudicative process. This had often been termed the 'third way', because it does not flow into legal idealism or positivism.[238] The 'third way' is not natural law.[239] Instead, the third way depends upon a normative approach to law, putting existing legal practice in its morally best light in adjudication.[240] George does not identify with this 'third way'. Law as integrity is the picture of adjudication that Dworkin seeks to defend. This provides a picture

[229] Ibid 38-39.
[230] Ibid 12.
[231] Ibid 118-119.
[232] W Waluchow and S Sciaraffa 'Editors Introduction', in W Waluchow and S Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford University Press, 2016) xii.
[233] Bamforth and Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (n 137) 79.
[234] See George, *Making Men Moral* (n 39) 72.
[235] See ibid 105; George, *In Defense of Natural Law* (n 7) 34, 235; George, 'Natural Law' (n 88) 189; George, *Conscience and its Enemies* (n 89) 114.
[236] George, *In Defense of Natural Law* (n 7) 236.
[237] R Dworkin, "'Natural' Law Revisited," (1982) 34(2) *University of Florida Law Review* 165, 168-170. See further, S Guest, *Ronald Dworkin* (Edinburgh University Press, 1992) 7.
[238] K E Himma, 'Trouble in Law's Empire: rethinking Dworkin's third theory of law' (2003) O.J.L.S 345.
[239] Dworkin, "'Natural' Law Revisited," (n 237) 165.
[240] Himma (n 238) 345.

of adjudication from which Dworkin 'infers his theory of legality.'[241] For our purpose to assess moral reasoning it is clear that Dworkin's interpretive approach follows judges deciding hard cases by deciding the political principles behind legal rules.[242]

Does this system of value rely upon a normative separation of law and morality? Dworkin's recognition and explanation in *Justice for Hedgehogs*[243] that the two system normative separation approach to law and morality within *Taking Rights Seriously*[244] was 'itself flawed' provided an important standpoint.[245] Dworkin acknowledged that neither the two interrelated processes of a) the separation between law and morality in *Taking Rights Seriously*[246] nor b) the presentation of the law in terms of principles would explain adjudication.[247] This is why in *Justice for Hedgehogs* he then proceeded to discuss how law and morality are not two separate systems, by using the example of a tree structure in which law is a branch of morality.[248] This branch of morality needs to be distinguished from other branches in so far as a community has rights that can be enforced on official demand through adjudicative institutions. Here an analogy with family morality in which there is a distinct institutional morality can be drawn. This would be a special morality governing the use of coercive authority within the family. There may be moral reasons for deferring to the history of how that power has been exercised, even if we can conceive of a better conception of family morality. This would not make sense, however, for the institutional morality established within the family and so both forms of morality are included together.[249] Here the connection between family and institutional morality show law to be a branch of morality, and I suggest this is in the wider consideration connecting value and morality.

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[241] Ibid 362.
[242] Dworkin, *Law's Empire* (n 112) 256-258.
[243] Dworkin, *Justice for Hedgehogs* (n 218).
[244] Dworkin, *Taking Rights Seriously* (n 111).
[245] Dworkin, *Justice for Hedgehogs* (n 218) 339.
[246] Dworkin, *Taking Rights Seriously* (n 111) chapter two. It is debatable whether Dworkin considers law and morality as separate systems in *Law's Empire* – see J Gardner, 'Law's Aims in Law's Empire' in S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP, 2006) and see Dworkin's response – R Dworkin, 'Response' in S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP, 2006) 291, 305-306.
[247] Dworkin, *Taking Rights Seriously* (n 111) ch 3.
[248] Dworkin, *Justice for Hedgehogs* (n 218) 405, 406.
[249] Ibid 407. In doing this Dworkin maintained that there can be a difference between what the law is and what it should be.

Dworkin has allowed his interpretive account of morality[250] to provide an account of religion based upon value.[251] Religion is connected to value,[252] with the 'religious attitude …[insisting] on the full independence of value.[253] Why is this important for our purposes? The independence of value[254] constituting part of religion[255] which forms the basis of *Justice for Hedgehogs*[256] and *Religion Without God*[257] is an important jurisprudential development for religion as a concept. This will be shown to be detrimental to religious believers and therefore also to religion. As we turn to an applied form of moral reasoning, can Dworkin's account of 'value laden religion' be initially used to interpret the widespread conviction that people have special rights of religious freedom?[258] This provides a distinct difference between Dworkin and George. In contrast to George, Dworkin's 'religious atheism' incorporates a place for religious experience, such as the different understandings of religion: sporting fanaticism, constitutional allegiance and the United States' recognition of 'secular humanism,'[259] as discussed in *Torcaso v Watkins.*[260] Dworkin suggests these are types of religion that flourish and do not recognise a deity; Buddhism is another example. *Religion Without God* elaborates upon this by defining religion as an interpretive concept.[261] Dworkin very clearly believes that religion is an interpretive concept rather than a criterial concept.[262] The benefit of doing so is that Dworkin does not have to rely upon the

[250] Dworkin, *Justice for Hedgehogs* (n 218) 12 – Dworkin asserts that '[M]orality as a whole is an interpretive enterprise' – ibid.
[251] Dworkin, *Religion Without God* (n 213) 22-23. See further Dworkin, *Justice for Hedgehogs* (n 218) 38-39. S Guest, *Ronald Dworkin (Jurists: Profiles in Legal Theory)* (3rd edn, Stanford University Press, 2013) 1. In *Justice for Hedgehogs*, Dworkin notes 'I suggest a value-based general theory [of interpretation]'. Dworkin, *Justice for Hedgehogs* (n 219) 7. This emphasises again the importance placed upon values in this system.
[252] Dworkin, *Religion Without God* (n 213) 10.
[253] Ibid 16.
[254] Dworkin, *Justice for Hedgehogs* (n 218) 9; Dworkin, *Religion Without God* (n 213) 10.
[255] Dworkin, *Religion Without God* (n 213) 22. The connection between value and religion is further emphasised in the two paradigm values which engage the religious attitude: 'life's intrinsic meaning' and 'nature's intrinsic beauty' – ibid 10-11. These values will be introduced and analysed later in this section.
[256] Dworkin, *Justice for Hedgehogs* (n 218).
[257] Dworkin, *Religion Without God* (n 213).
[258] S, Doughty, 'I may have been wrong to condemn Christian B&B owners for banning gay couple because people with religious beliefs have rights too, says top judge' (*The Daily Mail,* 20 June 2014) <http://www.dailymail.co.uk/news/article-2663037/I-wrong-condemn-Christian-B-amp-B-owners-says-judge.html#ixzz35NCxVQV> accessed 23rd June 2014.
[259] Dworkin, *Religion Without God* (n 213) 4-5.
[260] *Torcaso v Watkins* 367 US 488 (1961).
[261] Dworkin, *Religion Without God* (n 213) 7.
[262] Ibid.

same criteria to identify instances of the concept.[263] Instead, it allows for clarification when there is not precise agreement about its meaning.[264] It is suggested that this allows Dworkin to introduce his controversial definition for religion. As a result, Dworkin here changes the traditional criteria for Western religion by recognising no deity.

Further, Dworkin attempts to separate God from religion by 'separating questions of science from questions of value.'[265] This also importantly invokes 'religious wars' between militant atheists and those of different faiths. For Dworkin, these religious wars are 'more fundamentally about the meaning of human life and what living well means.'[266] Therefore, Dworkin's proposition at its premise is a theoretical exercise to ascertain value, which is a process to avoid religious conflict. Dworkin's value thesis is a process to avoid religious conflict. Value is all-inclusive. Here Dworkin's 'third way' is extended to a third way for religion, to ascertain value and religious conflict. This process is structured upon the independence of value precisely because of its all-inclusive nature.

A fundamental right to religious freedom requires a rights basis.[267] Interestingly, for Dworkin, like George, the question of the metaphysical is essentially connected to the question of value and human flourishing. This is a helpful observation when attempting to apply NNL thought to the right to freedom of religion. To define the religious attitude, Dworkin holds an acceptance of two central judgements about value: first, 'life's intrinsic meaning', that is, human life having the objective meaning and everyone having an innate responsibility to live well and flourish (*Eudaimonia);* and secondly, 'nature's intrinsic beauty'. In other words, what we call 'nature' is not just a matter of fact but is itself something of intrinsic value and wonder.[268] These two value judgements 'declare inherent value in both dimensions of human life.'[269] The value judgements provide paradigms of a fully religious attitude to life. It is suggested that it is a hypothesis that combines humanity and nature to secure ends. For Dworkin this is not an

[263] Dworkin, *Justice for Hedgehogs* (n 218) 158. See further Dworkin, *Law's Empire* (n 112) 70-73.
[264] Dworkin, *Religion Without God* (n 213) 7.
[265] Ibid 9.
[266] Ibid.
[267] For Dworkin, freedom of religion should flow not from a respect for belief in God but from the right to the value of ethical independence - ibid 138.
[268] Ibid 10.
[269] Ibid 11.

attempt to explain the meaning of truth in a normative/factual context. Instead, the independence of value is in the applied human construct of religion.

The Mutually Supportive Value Thesis

The important question to consider when developing a form of Protestant[270] moral reasoning within Dworkin's 'third way' is how atheists and agnostics would have knowledge of the various values claimed? Dworkin's thesis is dependent on the religious attitude ignoring forms of naturalism.[271] Would Dworkin's thesis exclude a traditional (scholastic) or contemporary (NNL) version of natural law? He rejects the self evidency of moral judgment in natural law on the basis of what I will term the 'mutually supportive value' thesis. This name arises because in the value system adopted, convictions about value are themselves mutually supportive. Value, for Dworkin, does not rely upon any preconceptions or further necessary substance. This builds upon an independence of value.[272] Value is not necessary for practical reasoning and, therefore, is independent from flourishing as a form of moral reasoning. The connection is made clear. However, within Dworkin's synthesis of value and the religious attitude, the attitude takes priority over the substance. This may be Dworkin's error. I suggest this is where Dworkin begins to take an approach that is detrimental for religion. He does not find value in duty, obedience or fulfilment in Christ. Rather, he finds value in the human construct of religion. Religion and religious freedom without God is a benign, man-made concept. For instance, what would distinguish a religious meeting from a scheduled, arbitrary social club meeting? The worship of God is for Christians not just confined to the church meeting – instead the whole of life (Romans 12:1)[273] gives purposeful value to religion. This is in stark contrast to an isolated religious meeting.

In Dworkin's opinion, the religious attitude 'accepts the full, independent reality of value.'[274] Value is objective. There is a distinction drawn here in the 'mutually supportive value thesis' though between value and fact, which differ because convictions about value are emotional convictions and 'convictions of value are

[270] By this I mean central problems of jurisprudence for the present day. As noted in Chapter 1, Coyle has observed these can be termed 'Protestant'. See Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 29) 50. See also Reed, *Theology for International Law* (n 137) 2.
[271] Dworkin, *Religion Without God* (n 213) 12.
[272] Ibid 16.
[273] Romans 12:1 - *Holy Bible, English Standard Version* (Collins, 2002).
[274] Dworkin, *Religion Without God* (n 213) 9.

also complex, *sui generis*, emotional experiences.'[275] From this value, realism must not be grounded in realism in a deity. For Dworkin, human life cannot have any kind of a meaning or value if *ceteris paribus* a benevolent God exists. The scientific part (creator God) of conventional religion cannot ground the value part (ethical responsibility).[276] Here Dworkin's idea is that a background value judgement is necessary to show why the scientific fact is relevant, without breaking Hume's law.

Crucially, Dworkin's analysis is missing a defined, background judgement for value itself, which is so prevalent when assessing moral reasoning in George's work. Applying this to religion, for instance Christianity (George's religion), this would be analogous to the death and resurrection of Jesus Christ. Christ's life and death do *a posteriori* make a difference to the truth of any religious values that a Christian would hold. For a Christian, the verification of the Cross and Resurrection are grounded upon the value of the Lordship of Christ (John 14:6).[277]

Further Dworkin's distinction breaks down when considering the science/value distinction from a Christian position. From this position the value part identified by Dworkin would be presented under God's common grace and communicated through the natural law. For instance, for George both the Resurrection and the Cross of Christ can be seen to fall within the science part of Christianity, and for this reason also within the value part. For this reason, George identifies religious freedom as flowing from a respect for belief in God which provides the right to ethical independence. Logically then, for atheists/agnostics wanting to accept ethical and moral responsibility, they do so through the common grace revealed from God and communicated in the natural law. This is a form of general revelation. In this position, there is no ultimate ground to accept this apart from a deity (the scientific part of religion). It is arguable that the intrinsic connection between God's common grace and the grace demonstrated through Jesus Christ's death on the cross fundamentally breaks down the science/value distinction offered by Dworkin.

[275] Ibid 19.
[276] Ibid 27.
[277] John 14:6 - *Holy Bible, English Standard Version* (Collins, 2002).

Through the acknowledgement that religious believers may come to similar conclusions surrounding value judgement, however, Dworkin fails to acknowledge the primacy of these conclusions. It is arguable that Dworkin's position as a non-believer leads to his failure to see the importance of these conclusions. It is this primacy and sincerity of belief that may lead religious believers to break Hume's fact/value dichotomy through an assessment of both fact and value rooted in a logical analysis.

Dworkin's position, on initial inspection, can be compared to Finnis' NNL view of religion. The common premise is that both adopt an independence of value, Dworkin in the human construct of religion and Finnis in the first principle. To start with Dworkin, as was noted above Dworkin believes that religion is connected to value.[278] With the 'religious attitude…[insisting] on the full independence of value',[279] it was suggested that this found the independence of value to be in the applied human construct of religion.[280] The limitation of this premise is that, as has been shown above, Dworkin's approach does not expressly invoke a deity[281] and so this lack of a deity (and lack of need for a deity)[282] is likely to invite objection and rejection from many religious believers.[283] Now turning to Finnis, he goes further than Dworkin: Finnis does devolve attention to the value judgement itself. Finnis' independence of value is located in the FPPR.[284] The primacy of the FPPR was maintained in chapter 1.[285] In this theory of practical reason for both Finnis and George there is a place for 'the value of what….we summarily and lamely call 'religion'.[286] Indeed, within Finnis' conception of NNL, there is expressly a place for the Christian understanding of Resurrection.[287] Finnis holds that 'God is an unrestricted, 'absolute' value.'[288] This is an important

[278] Dworkin, *Religion Without God* (n 213) 10.
[279] Ibid 16.
[280] Dworkin does assert that his approach requires values to be embraced as a matter of faith under the religious attitude; however, it is important to note that Dworkin posits that his objective approach requires no deity for religion – ibid 9, 17-18. Consequently, this distinguishes Dworkin from a Roman Catholic natural lawyer, such as Finnis.
[281] Ibid 9.
[282] Ibid 25.
[283] R Domingo, 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (2013) 2(2) Ox. J Law Religion 371, 377.
[284] J Finnis, *Natural Law and Natural Rights* (n 30) 33-34.
[285] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 95.
[286] J Finnis, *Natural Law and Natural Rights* (n 30) 89.
[287] J Finnis, *The Collected Essays of John Finnis: Volume V – Religion and Public Reasons* (Oxford University Press, 2011) 200.
[288] J Finnis, *Natural Law and Natural Rights* (n 30) 410.

observation for analysing moral reasoning. Whereas Dworkin's approach was criticised for rejecting the need for a deity, on the other hand, the limitation of this approach for Finnis is that, once again, Finnis expressly relies upon Roman Catholicism to support his jurisprudence. A Roman Catholic bias is a theme that runs through this thesis. As such, it is unsurprising that Roman Catholic religious value is again drawn upon. George, as earlier detailed in section 2.3, goes even further and applies his natural law theory to contemporary case law through the pragmatic combination of law, morality and reason.

To conclude, Dworkin's distinction is a dangerous form of value reasoning for religion, notably Christianity. How is Dworkin's value basis dangerous for religion? Dworkin asserts that the value of religion can only be manifested in personal beliefs.[289] But this approach does not satisfactorily protect personal beliefs. There are three reasons why Dworkin's approach does not adequately protect personal beliefs. First, followed to its logical conclusion, the value of religion would effectively override the value of personal belief. Even if the value of religion is linked to personal beliefs, it has been suggested that this value of religion overrides faith because this value is in the human construct of religion. A central theme in this thesis is that freedom of individual conscience is not adequately protected. This observation is overarching and will be important in the analysis of the right to religious freedom in chapter 5. If this was reflected in the law, a practical consequence is that it may provide protection for the human construct of religion and little protection for individual believers. This would not be a position endorsed by Aquinas or George. A benign theoretical position for faiths, such as Christianity, should be resisted.[290] Rather it will be argued that George's value system and understanding of religion as a basic human good provides a basis for engaging with contemporary religious case law, particularly religious liberty case law involving the Equality Act 2010. Secondly, religion without God is an arbitrary, human concept – a false religion. This would ultimately be damaging and deleterious to the continued practice of the faith because religion that involves belief in a God draws value from that belief.[291] It was shown above

[289] Dworkin, *Religion Without God* (n 213) 17-19, 28.
[290] See George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 119.
[291] For instance, in mainstream Western Christianity it was noted above that belief in Christ (as deity) dictates the focus and structure in the religion, such as teaching, organisation and worship. See P Edge, *Religion and Law: An Introduction* (Ashgate, 2006) 15; R Trigg, *Equality, Freedom and Religion* (Oxford University Press 2012) 18.

that personal beliefs may not be satisfactorily protected. Dworkin's independence of value has been located in the human construct of religion. If individual faith is dependent upon the human construct of religion, then the impact here is to deprive the substance from personal belief. The crucial part of the individual's faith is removed by the empty construct of religion. In short, the human construct of religion deprives a background judgment for value. And third, faith is dependent upon the connection between the religion and its believers. Adherents to the religion constitute the body of the religion.[292] Connection between the religion and its believers is very important for any religion. If the believers became disconnected and reject any form of established religion, such as for the reasons given above (personal belief is overridden or it has its substance deprived), then this may lead to a rejection of any form of religious imposed reasoning and belief central to the faith. Such a different connection may damage religion. For instance, religion may suffer from ever further decrease in membership. The connections established between individual adherents and the religion may be broken. Religion without God lacks any value.

'Minimum standard of reasonableness' approach to positivism/natural law

The last section argued that value, like practical reasoning, can be assessed as a form of moral reasoning and this is detrimental for religion. A 'third way' has provided key debate in the contemporary discussion of moral reasoning within adjudication. In the previous section it has been shown that Dworkin's third way is not a valid system of natural law. This notwithstanding, this section will show that a 'minimum standard' of reasonableness has been interpreted by some new natural lawyers as providing a 'third way'. This 'minimum standard' will be shown to be a clear feature of practical reasoning. Within adjudication, what is the effect of any minimum standard imposed by practical reasoning in contested litigation? This will prove important when scrutinising the application of George's NNL theory to established case law in chapters 4 and 5.

A minimum standard has been traced by NNL to Aquinas. Finnis has noted that when speaking about the natural law tradition, Aquinas stated that far from

[292] M Davies, 'Principles of a Pluralist Secularism' in R Sandberg (ed), *Religion and Legal Pluralism* (Routledge, 2015) 242.

'denying legal validity to iniquitous rules'[293] natural law explicitly (by speaking of 'unjust laws') accords to iniquitous rules legal validity. This in the sense that, first, these rules are accepted in the courts as guides to juridical decision; or, secondly, in the judgement of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules.[294] Even laws without a minimum content of reasonableness are legally valid. It is evident that this validity fills the thematic void left by downplaying moral iniquity. Jurisprudential questions concerning morality depend upon their legal defectiveness rather than their inadequacy in a moral sense. It realigns legal adherence as a process in which all adjudication and legislation is driven by process rather than the content. As such, it is not in dispute that the tradition holds a place for the role of reason and legal validity in adjudication. In support, even the weak-positivist H.L.A Hart conceded a place for a 'minimum content of natural law' in his positivist union of primary and secondary legal rules when referring to the conditions necessary for the existence of legal rules.[295]

George's conception of legal validity holds that legal positivism has been juxtaposed with natural law theory in such a way as to suggest that there is a central proposition in the affirmation or denial of the role of morality within law which places a theorist of law in one camp or the other. For instance Hittinger has identified that in the context of American law, any position that presents as an 'antipode to legal positivism' is accredited to natural law.[296] As Fuller remarked, 'natural law is the method men naturally follow when they are not consciously or unconsciously inhibited by a positivistic philosophy.'[297] However, it is important to note that work by thinkers identified with both schools of thought renders this juxtaposition dubious at best. Although the proposition that 'an unjust law is not (or seems not to be) a law' (*lex iniusta non est lex*) has been the source of much misunderstanding and confusion, George believes that work by John Finnis, Neil MacCormick, and others make plain that what is being asserted by natural law theorists; namely, that the 'moral obligatoriness which may attach to positive law

[293] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 2) 365.
[294] Ibid.
[295] H L A Hart, *The Concept of Law* (2nd edn, Oxford University Press, 1961) 193.
[296] George, *Natural Law Theory: Contemporary Essays* (n 31) 51.
[297] Ibid 68. Fuller here meant 'subconsciously'.

is *conditional* in nature.'[298] George believes that this conditional nature need not be denied by the legal positivist.[299] This is George's 'minimum standard of reasonableness'. A 'minimum standard of reasonableness' is supported by George's further belief that the natural law theorist need not denigrate law's positivity or the significance of this positivity for the study of law, or instead much less deny the relative autonomy of law as a social phenomenon and as an intellectual discipline. As such, this is held to be a central concept which will be important in the modification of George's thought necessary to provide religious equality law with a telling critique.

George has been criticised for using a 'minimum standard of reasonableness'. This follows from George's conditional nature of obligation viewpoint, which suggests that all the natural law theorist wants to do in affirming a connection between law and reason is to issue a reminder that adherence to some laws would constitute such a departure from reasonableness that there could not be adequate reason to obey them – the only law that merits our obedience is law that meets a certain minimum standard of reasonableness.[300] George believes that legal validity depends upon law that contains a 'certain minimum standard of reasonableness'.[301] For Murphy, this forms the 'moral reading' of the natural law thesis.[302] This reading is an important way George is distinguished from Finnis.[303] This 'minimum standard of reasonableness' has been interpreted by George as providing a 'third way' solution to the traditional natural law/legal positivism debate. This has found support, first, by Brian Bix and Philip Soper who have agreed with George in holding that this is the point that classical natural law views intended to emphasise.[304] Secondly, MacCormick has praised the NNL thesis for

[298] See also George, *The Autonomy of Law: Essays on Legal Positivism* (n 164) VIII.
[299] George, *Natural Law Theory: Contemporary Essays* (n 31) 68.
[300] Ibid 51.
[301] Murphy, *Natural Law in Jurisprudence and Politics* (n 122) 9.
[302] Ibid.
[303] To critique George's thought it is here important to restate that, within Murphy's categorisations, George's 'moral reading' of the natural law theory differs from Finnis' 'weak reading' of the natural law theory, this is because of the 'minimum standard of reasonableness' approach - Murphy, *Natural Law in Jurisprudence and Politics* (n 122) 9. Murphy aids the critique in this thesis by here distinguishing George's and Finnis' theories of natural law.
[304] B Bix, 'Natural Law' in D Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996) 223-240, 246. See also N Kretzmann, '*Lex Iniusta Non Est Lex:* Laws on Trial in Aquinas' Court of Conscience' (1988) 33(1) Am. J. Juris. 99.

putting forward practical reason, from which the minimum standard of reasonableness derives, as something of fundamental importance.[305]

George's 'third way' approach is, however, questioned because in contemporary jurisprudential literature doubt surrounds whether anyone held the '*Lex iniusta non est lex*' view. George has considered whether an unjust law should be considered a law, for the purposes of legal validity. George has correctly noted that this view is found in Aristotle and Cicero, as well as Augustine and Aquinas.[306] Murphy has also suggested that it does seem to 'have been pretty clearly affirmed by Blackstone.'[307] In contrast to George, Murphy relies upon Norman Kretzmann's assertion that 'no occurrence of the sentence *lex iniuista non est lex* appears either in Aquinas or Augustine, whom Aquinas cites in introducing the idea into his discussion of law.'[308] Murphy believes that George is particularly confident that Aquinas did not mean to assert 'so stark a claim about the connection between law and practical reasonableness that the slogan suggests.'[309] Indeed, for George, the notion of an 'unjust law is not law' carries self-contradiction and so should 'not be considered an accurate statement of the natural law position.'[310] This conflicts with the majority of the natural law tradition which downplays the moral criterion of legal validity through simplifying it merely as defective law.

A similar position is adopted by Finnis, who holds that the scholastic natural lawyers were concerned with explaining the *moral* force (or validity) of law, and were not concerned about providing a conceptual account of *legal* validity. To quote Finnis: 'the principles of natural law explain the obligatory force of positive laws, even when those laws cannot be deduced from those principles'.[311] For George, the fact that Aquinas was perfectly willing to talk about unjust laws shows

[305] George, *Natural Law Theory: Contemporary Essays* (n 31) 120. MacCormick believes this provides the basis of the claim that there is a necessary connection between law and morality – by both being modes of exercise of practical reason, while concurrently being different modes, through having different criteria of validity for the norms or rules they apply - ibid. Natural law is therefore once again centred upon practical reason.
[306] George, *The Clash of the Orthodoxies* (n 17) 139.
[307] M C Murphy, 'Natural Law Jurisprudence' (2003) 9 Legal Theory 243.
[308] Ibid 243.
[309] Freeman (ed) *Lloyd's Introduction to Jurisprudence* (n 209) 193.
[310] Ibid 193.
[311] Finnis, *Natural Law and Natural Rights* (n 30) 23-24.

that the paradigmatic natural law position does not affirm the *lex iniusta* thesis.[312] By taking this view, it is clear that George further attempts to strengthen his position surrounding a minimum standard of reasonableness.

A minimum standard of reasonableness does not expressly invoke a concept of legal validity. Murphy has commented that the core of this strong view can 'remain without the paradoxical formulation.'[313] In his opinion, all one needs to do is 'restate the position as the claim that no norm or social result (etc.) that is unreasonable can be law.'[314] This modern misconception about legal validity goes further than George's position.

It was seen in chapter 1 that within NNL legal validity instead follows correct procedure, dependent upon reason, rather than normative obedience. This is because Finnis' theory of practical reason does not deny the thesis of the separation of positive law from morality in the form often ascribed to legal positivists. In chapter 1 it was argued that, for Finnis, it logically follows that the classical doctrine does not hold to there being a simple and universal moral criterion for the validity of every law.[315] Some natural lawyers may flatly deny the existence of an unjust law, but NNL differs here and Finnis has put it beyond denial that the 'mainstream of the Natural Law tradition ... affirms the existence of such laws, while denying or downgrading their morally compelling quality and insisting on their essential defectiveness as law.'[316] To elaborate, George believes that the teaching that 'an unjust law is no longer legal but rather a corruption of law'[317] is a teaching of Aquinas. George draws upon Finnis distinguishing that Aquinas' teaching here is *not* a thesis about the validity of law in the technical sense.[318] As established in chapter 1, validity follows the observance of correct procedure by persons having appropriate competence rather than the normative injustice which arises from obediently interpreting unjust statutes. This was identified as the 'weak reading' of the natural law theory

[312] R P George, 'Kelsen and Aquinas on "the Natural Law Doctrine"' (2000) 75 Notre Dame L. Rev. 1625, 1641-1643 here quoting T Aquinas, *Summa Theologica* (n 4) I-II q. 96 a.4; II-II q. 60 a.5.
[313] Murphy, 'Natural Law Jurisprudence' (n 309) 244.
[314] Ibid 244.
[315] George, *Natural Law Theory: Contemporary Essays* (n 31) 108.
[316] Ibid 109.
[317] Ibid.
[318] Finnis, Natural Law and Natural Rights (n 30) 357–360.

earlier in this thesis.[319] Finnis believes the creation of defective instances of legal rights and duties weakens, and in George's case negates, any moral case for obedience.[320] This is the key to George's 'minimum standard' of reasonableness, which will be important when reviewing religious equality law.

From this basis of obedience, George has suggested that belief in natural law or other forms of legal idealism entails the proposition that law and morality are connected in such a way as to confer upon judges a measure of authority to enforce the requirements of the natural law, or alternatively, legally invalidate provisions of positive law they judge to be in conflict with these requirements. George notes that the truth of the proposition *lex iniusta non est lex* is a moral truth. This is a moral obligation created by authoritative legal enactment – by positive law – one conditional rather than absolute: our 'prima facie obligation to obey the law admits of exceptions.'[321] The implicit difficulty lies within the conditional nature, which involves moral obligation dependent upon enforcement under parliamentary sovereignty. Through this basis of applied Thomist moral reasoning, one that George would believe was endorsed by the Roman Catholic Church, is it acceptable that moral obligation focused on both legal obligation and legal validity is conditional and, thus, defensible?[322]

We have seen that for George it is acceptable that moral obligation focused on both legal obligation and legal validity is conditional and thereby defensible.[323] The ability to defend moral obligation will be important when analysing religious equality law later in this thesis. This position raises two key points: first, this moral obligation to obey can be defeated by a natural right to disobey in order to avoid

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[319] See Murphy, *Natural Law and Practical Rationality* (n 129) 26; J Crowe, 'Between Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller' in 'Review Symposium – K Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Hart Publishing, 2012)' (2014) 5(1) Jurisprudence 96, 114–115.

[320] George, *Natural Law Theory: Contemporary Essays* (n 31) 108.

[321] George, *In Defense of Natural Law* (n 7) 227.

[322] George, within *Natural Law Theory: Contemporary Essays*, draws upon Pope John Paul II's understanding that the democratic construction of a law does not render its power to impose obligations indefeasible. Even a law enacted by correct democratic procedures can be unjust and so fail to create an obligation to obey, such as those imposed by the Nazi regime upon soldiers in the Second World War. Certain sorts of unjust laws may not be obeyed. For example, it is morally wrong to comply with laws requiring people to perform acts that are unjust or immoral such as the abhorrent persecution of the Jews in the Second World War - George, *Natural Law Theory: Contemporary Essays* (n 31) 139, 140. From the moral point of view, people subject to such laws do not have the option of obeying them. This was the line of jurisprudential thought, frequently referred to in undergraduate Jurisprudence classes, taken in the Nuremberg trials.

[323] George, *Natural Law Theory: Contemporary Essays* (n 31) 139, 140.

or evade an injustice being committed; and secondly, the injustice of a law or a system of laws can destroy its power to bind those subject to it. Once again, for George this conditional nature is definitively the central core of *lex iniusta non est lex.* The conditional nature ensures that moral obligation is defensible. Although this may enforce obligations that exist under a moral formulation, a problem is that laws *inter alia* create prescriptive moral obligations - moral obligations which require adjudicative power to enforce and create binding precedent.

George's approach has predictably been criticised. The main problem with this position is, first, according to Bix, that George's understanding effectively 'makes the natural law thesis excruciatingly uninteresting.'[324] It is not merely that the natural law theorists would have no basis to disagree with the legal positivists. Rather, a central natural law focus has been to emphasise that the rightness of compliance with the law depends on an evaluation of the law's merits. This is the earlier identified 'moral reading' of the natural law thesis. If the moral reading was all there was to the natural law thesis, then the natural law theorist would 'have almost no one to disagree with in the entire history of philosophy.'[325] Second, Murphy claims that the moral reading transforms the thesis from a claim belonging to analytical jurisprudence into a claim belonging to moral philosophy. Rather than defining the conditions for law, the focus is transferred to the action one should take towards the law's demands.[326] Third, this position may be compatible with legal positivism. If legal positivism tells us what law is, and natural law tells us what constitutes good law, then natural law is an outdated positivist viewpoint. Natural law is instead necessary to draw the connection *between* positive laws and morality. This is a significant criticism of George's thesis. However, the criticism remains largely unfounded because it is based upon solely one aspect of George's NNL formulation and NNL is not exclusively founded to reconcile problems with legal positivism. In George's *In Defense of Natural Law*,[327] the 'moral reading' is vividly apparent. However, this moral reading is only to be seen as a smaller part of his work as a proponent of issues such as the

[324] Freeman (ed), *Lloyd's Introduction to Jurisprudence* (n 209) 198, 199. The same criticism is made by Murphy: Murphy, *Natural Law in Jurisprudence and Politics* (n 122) 9.
[325] Freeman (ed), *Lloyd's Introduction to Jurisprudence* (n 209) 198-199.
[326] Murphy, *Natural Law in Jurisprudence and Politics* (n 122) 9.
[327] George, *In Defense of Natural Law* (n 9).

incommensurability thesis;[328] the value of the common good as a rights basis;[329] and the application of practical reason in contested religious liberty law in order to later analyse religious liberty (all of which will be examined later in chapter 4.) From this position the 'minimum standard of reasonableness' plays a lesser role.

2.3 Conclusion

In conclusion, it has been demonstrated above that NNL moves beyond Aquinas in the debate about legal validity. It has been shown in this section, first, that Finnis' reliance on 'natural reason' and George's combination of law, reason and morality render metaphysical conclusions unnecessary in favour of a focus upon practical reason. Secondly, Dworkin's third way, buttressed by the mutually supportive value thesis, provides a comparison to the minimum standard of reasonableness approach provided by George. George's theory nevertheless may fail on its own terms because the principles on which it relies do not meet the test of objective validity. Instead, would it be appropriate to term this a theory of morality rather than a Thomist theory of natural law? To term this theory only one of morality is denied because George's minimum standard of reasonableness adopts practical reason as the guiding principle and NNL regards practical reasonableness *as* the natural law.[330] This circumscribes the traditional trappings of law and morality and provides an innovative theory of practical reason. This theory is derived from a contemporary dependence on practical reason to foster legal validity, through obligation, in contested adjudication. This innovative theory of practical reason will be analysed in the application of George's NNL views to religious equality law in order to analyse religious liberty in the later chapters. To conclude, within the sources of George's approach to moral reasoning, it has been shown that George does not solely hold appeal to revelation in his claims about moral reasoning. Instead, George, unlike Aquinas, depends upon moral and human reasoning based upon practical reason to support legal validity.

2.4 Robert George's challenge to Public Reason

[328] George, *Natural Law Theory: Contemporary Essays* (n 31) 92.
[329] George, *Making Men Moral: Civil Liberties and Public Morality* (n 39) 105.
[330] Finnis, *Natural Law and Natural Rights* (n 30) 1.

The rejection of Rawlsian Political Liberalism

The purpose of this section is to first further analyse George's use of practical reason through his rebuttal of Rawlsian political liberalism. Secondly, it will develop George's expansion, rather than rejection, of public reasoning by taking public reasonableness towards a religious consensus. The section will finally end with a 'religious based reasoning' approach combined with George's concept of 'common human reasoning' to further critique George's approach to practical reason, in order to later provide a telling analysis surrounding the right to religious freedom within equality law.

As such, this section will engage the two main approaches: George's reasoning and a version of modern social contract reasoning, and it will engage the relevant literature that highlights this debate. George's NNL position has often been contrasted with the modern social contract theory of John Rawls.[331] For instance, a significant part of the work within practical reasoning, for George, has centred round the defence of practical reasoning from other conflicting, differing forms of reason, such as social contract reasoning. A central challenge to George's use of moral reasoning, and so any later use of George's thought to analyse religious liberty, can be seen in the liberal critique of practical reasoning provided by the presentation of 'political liberalism' and the subsequent Rawlsian conception of public reason.[332]

These terms need to be explained in reference George's understanding of Rawls's liberal theory of political morality, which was first outlined by Rawls in *A Theory of Justice*[333] and then modified in *Political Liberalism*.[334] According to George, 'political power may not be exercised on the basis of controversial judgments of what makes for, or detracts from, a valuable and morally worthy way of life.'[335] This definition of public reason was outlined in an edited work

[331] Porter has termed Rawls' work in moral philosophy a social contractarian theory - Porter, *Nature as Reason: A Thomistic Theory of Natural Law* (n 2) 237. See also: *Oderberg, Moral Theory: A Non-Consequentialist Approach* (n 140). Rawls's famous 'difference principle' - every legitimate social arrangement should guarantee the greatest benefit for the least well off - is a good and admirable example of this modern social contractarianism - J Rawls, *A Theory of Justice* (Harvard University Press, 1971) 206-207.

[332] The concept of 'public reasonableness' was argued by John Rawls most famously in J Rawls, *A Theory of Justice* (n 423) 221 and J Rawls, *Political Liberalism* (Columbia University Press, 1993) 7.

[333] Rawls, *A Theory of Justice* (n 423) 221.

[334] Rawls, *Political Liberalism* (n 423) 7; see also: J Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) University of Chicago Law Review 765.

[335] R P George (ed), *Natural Law and Public Reason* (Georgetown University Press, 2000) 1.

devoted to the same subject, namely *Natural Law and Public Reason*.[336] For Rawls, political liberalism follows social contractarianism because the government should take a neutral stance between competing conceptions of the goods. Following from this, George believes that public reason was introduced in 'support of the political liberalism he [Rawls] espouses.'[337] Finnis rather defines public reason based upon reciprocity – political questions that depend upon constitutional issues or issues of justice that will be settled only if by principles and ideals that can be reached that 'all citizens may reasonably be expected to endorse.'[338] This begins the way that NNL has modified political liberalism. It will be argued that George's rebuttal of the concept of Rawlsian political liberalism has proven to be a central part of his jurisprudence.

The identification of non-instrumental reasons for action in NNL leads George to directly reject Rawlsian political liberalism. In *The Clash of Orthodoxies*, George identifies the 'political liberalism' of Rawls and then proceeds to identify reasons for rejecting Rawls's liberalism. It is suggested that George places particular emphasis on Rawls's conception of 'public reason(s)'; that is, reasons which may legitimately be introduced in political advocacy and acted upon legislatively. These reasons are termed as unreasonably 'narrow and restrictive.'[339] This is because the concept of public reason is a concept dictated by principles and ideals that are endorsed by all. In other words, it provides for a mainstream consensus, dictated by cultural trends: this is rule by the majority.

In a contemporary, democratic society should there not be ideals formed by a majority consensus? This idea does, however, conflict with the natural law approach that is criticised in this thesis. George agrees that there may be correct answers. However, these may not be shared by the majority.[340] If this is not the case, then public reason may restrict these correct answers from being realised. For instance, when critiquing public reason, George gives an example asserting that NNL theorists (and others) maintain that on certain fundamental moral and political issues there are uniquely 'correct answers'. Public reason is rejected because NNL theorists can often give 'correct answers' supported by minority

[336] Ibid.
[337] Ibid 1.
[338] J Finnis, 'Abortion, Natural Law and Public Reason' in R P George (ed), *Natural Law and Public Reason* (Georgetown University Press, 2000) 78.
[339] George, *The Clash of the Orthodoxies* (n 17) 45.
[340] Ibid.

opinion. For example, NNL theorists believe that approaching questions such as whether there is a human right against torture, embodied in Article 3 of the European Convention on Human Rights 1950, or being punished for one's religious beliefs, provides a 'uniquely correct answer which is available to every rational person.'[341] The self-evidency and incommensurability of the basic goods, in conjunction with practical reason, are key to providing the correct answer in areas of moral application. As such, George views public reason as narrow and restrictive because it may prevent the correct answers from being reached. Is this not a call for minority opinion to dictate controversial moral issues? For instance, public reason has led to calls for mainstream consensus to make minority opinion far more readily available.[342] If minority opinion was not accessible, then would public reason actively prevent George's thought from being analysed in an equality law context?

John Rawls' *A Theory of Justice*[343] contains a defence of substantive principles of liberal justice: the inviolability of certain basic liberties.[344] One method to achieve this is 'public reason', as outlined above. For George, the concept of public reason presents the most contentious aspect of John Rawls's account of political liberalism.[345] It has been established that the Rawlsian version of public reason is particularly unreasonable because it demands that complicated factual questions and moral truth be excluded from public discourse; for instance, religious opinion being removed from public discourse.[346] Public reason has long been seen as problematic for religious adherents.[347] This concept would, of course, restrain the work and influence of natural law theorists.[348] It was shown above that substantive legal positions are taken by NNL, which depend on contentious moral issues. These positions can be used to criticise public reason. One such position is the right to religious liberty, which may not be shared by a

[341] Ibid 53, 54.
[342] J P Sterba, 'Reconciling Public Reason and Religious Values' (1999) 25 *Social Theory and Practice* 1, 13.
[343] Rawls, *A Theory of Justice* (n 423).
[344] Ibid 61.
[345] George, *Natural Law and Public Reason* (n 430) 171.
[346] Ibid 84.
[347] Bamforth and Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (n 137) 37. See further D Hollenbach SJ, 'Contexts of the Political Role of Religion: Civil Society and Culture' (1993) 30 San Diego L. Rev. 877, 895-896.
[348] George, *Natural Law and Public Reason* (n 430) 84.

majority consensus.[349] If this were the case then NNL would view the basic liberty of religious liberty as not being protected. George's views analysing the right to religious liberty find no place in this system. This criticism is further borne out by Porter, who notes that the problem with public reason is that 'it leads all too readily from respect for rational agents as they ideally are to a disregard for the views of men and women as they *actually* are.'[350] Public reason seeks to reach an idealised consensus which can ignore the opinions, experiences and realities of individuals.

A challenge for natural lawyers

In his critique of the Rawlsian social contract, George has suggested in *Natural Law and Public Reason*[351] that proponents of natural law doctrines often go in two ways regarding public reason.[352] First, if interpreted broadly without application, natural law theorists believe that natural law theory is to all intents and purposes the philosophy of public reason.[353] Secondly, however, public reason can be interpreted in a narrower sense, rejecting reliance on 'comprehensive moral, philosophical and religious doctrines'.[354] If this is the case, then natural law theorists reject the idea of public reason because public reason would seek to reject the expression of moral convictions in public discourse. It has been argued in this thesis that Roman Catholic teachings directly lead to natural law theorists expressing religious moral positions. The public rejection and suppression of religious expression is likely to have the impact of undermining support for religious institutions.[355] It is clear that under this second reading a prohibitive form of reasoning is present. For many, therefore, public

[349] George, *The Clash of the Orthodoxies* (n 17) 50.
[350] J Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Wm. B. Eerdmans, 2010) 172.
[351] George, *Natural Law and Public Reason* (n 430).
[352] Ibid 26.
[353] Even George accepts that, on a broad reading, the point of public reasonableness is to accept the facts of public reasonable pluralism: to discern principles that can be assessed and accepted by individuals who are committed to differing ideals in life (Ibid). Acting according to right reason provides a good summary for natural law. George would be in favour of excluding contentious moral positions (racism, sexism, homophobia) which are irrational principles 'so deeply misguided and wrong as to be unworthy of respect.' Ibid 42. Like Rawls, George is correct in showing reasonableness and good will to the neighbour, while rejecting an approach to intolerant positions.
[354] Ibid 2 - the 'moral, philosophical and religious' doctrines would be those offered by NNL.
[355] S Freeman, 'Congruence and the Good of Justice' in S Freeman (ed), *The Cambridge Companion to Rawls* (Cambridge University Press, 2003) 305.

reason is unreasonable because it discards important questions of the common good and justice, as revealed by human rationality and special revelation.[356]

This dual reading creates a difficult position for George. George believes that, for instance, the theorist Stephen Macedo, using the Rawlsian social contract theory, attempts to establish a Catch 22 situation[357] for natural law theorists: Macedo views that if natural lawyers do not put forward an intellectually sophisticated argument for their positions regarding moral issues and life, then they fail the requirement of reason. If, on the other hand, natural law theorists do provide powerful reasons for their positions, then they go beyond the limits of public justification, because their arguments become too complicated and controversial.[358] This constraint is enabled by Macedo's reliance on the conception of public reason.[359] Macedo's primary claim against natural law ideas is that they fail to meet the requirements of public justification; this follows from the 'large gap between the first principles of natural law and actual moral norms.'[360] George correctly identifies that contemporary NNL theorists would argue there is sometimes, although not exhaustively, a 'large gap' between the first principles of natural law and actual moral norms. As shown in 2.2 above, this derives from the mistaken belief that in the natural law theory of Aquinas there is a movement from the first principles of natural law to actual moral judgements and action in concrete cases because the first principles are known by everyone.[361] As such, this is an instance where the concept of public reason causes problems when applying George's theory of practical reason. It is not to be considered too large a problem. This is because it is hardly a Catch 22 situation to require that an idea be both reasonable and coherent.[362] In order to rebut public reason here it is perfectly acceptable to appeal to the coherent and admirable achievements secured by religion (in particular Christianity), for instance: the abolition of slavery and efforts to reduce poverty.[363] It will be shown

[356] Ibid 2.
[357] S Macedo, 'Reply to Critics,' (1995) 84 Georgetown Law Journal 329.
[358] George, *Natural Law and Public Reason* (n 430) 65. The self-evidency is crucial in limits of public justification for NNL.
[359] Ibid 65.
[360] Ibid.
[361] Ibid 55.
[362] Bamforth and Richards, Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law (n 137) 42.
[363] A Lister, *Public Reason and Political Community* (Bloomsbury, 2013) 6-7.

that George does not rely upon an approach like this to overcome the challenge from public reason. It will instead be argued that George's approach creates further flaws in his jurisprudence.

The challenge presented by public reason is further evident because Rawls thinks that doctrines like natural law should be excluded from public reason because of what Rawls calls the 'burden[s] of judgment.'[364] Rawls's 'burden of judgment' provides significance for a democratic ideal of toleration, by impacting upon public reason's 'exercise of political power in a constitutional regime'[365] to affirm reasonable comprehensive doctrines and provide division over contentious religious claims such as those made in natural law.[366] The burdens of judgements are the sources, or causes, of disagreement between reasonable persons.

In my view George has responded to this challenge. A later principle advocated by George and Finnis follows a broad tradition of natural law thinking that proposes its own principle of public reason. If this principle is coherent it allows a place for George's contentious thought to analyse the right to religious freedom, despite the challenges posed by Rawls. This principle asserts that questions of fundamental law and basic matters of justice ought to be decided in accordance with natural law, natural right/s and/or natural justice[367] because in the public political state appeals to natural law impact positively upon judgement.[368] It is important to remember that George's interpretation of Aquinas requires that something is good, right or just 'by nature' insofar as it is reasonable.[369] Thus the good of the human being, and enforcement of morality, accords with practical reason. This common link between the good and human reason is indicative of natural law. McInerny notes, for example, that the other goods are not properly to be considered human goods unless pursued in accordance with reason: 'goods come to be constituents of the human good insofar as they come under the sway of the distinctive mark of the human agent; reason.'[370] George's earlier established dependence on Thomist rationality distinguishes George's

[364] George, *Natural Law and Public Reason* (n 430) 110.
[365] Rawls, *Political Liberalism* (n 424) 54–58.
[366] Ibid 81.
[367] George, *In Defense of Natural Law* (n 7) 202.
[368] George, *Natural Law and Public Reason* (n 430) 110.
[369] Finnis, *Natural Law and Natural Rights* (n 30) 36. Originally discussed within: J Rawls, *Political Liberalism* (n 424) 54-58.
[370] R McInerny, 'The Principles of Natural Law' 25 Am. J. Juris. 14.

conception of public reason from that of Rawls and shows the centrality of this debate to George's jurisprudence. As such, an important development in George's use of practical reason is present. The next section will further develop George's modification to public reason, which is an important factor when seeking to improve upon George's thought.

The expansive pluralist modification to public reasonableness

From this basis of difference that I have established between George's and Rawls' social contractarianism, it will be shown that George accepts differing ideals and proposes an expansion to public reason. Natural law theorists may welcome this modification as establishing a level playing field of public policy truths that cover a wide spectrum of differing opinions and beliefs.[371] To achieve this expansion, George believes that the point of public reasonableness is to accept differing ideas in life and this is to be achieved through a pluralistic form of public reason. As such, George rejects Rawls' 'reasonable pluralism'[372] because he believes that Rawls' goal is to conversely limit the morally acceptable doctrine of political morality in circumstances of moral pluralism to the earlier identified political liberalism.[373] Instead George's modification lies in the belief that the point of public reasonableness is to accept the facts of public reasonable pluralism. This will involve discerning principles that can be assessed and accepted by individuals who are committed to differing ideals in life.[374] This encourages diversity within society and expands public reason. However, while an admirable stance, arguably differing motives and goals within living require differing subjective goods. George's expansion may fail for two reasons: first, it is arguable that the Rawlsian version adopts a closer mirror to Aristotle's ideal of universal flourishing defeating the purpose of an expansive form; and, secondly, reasonable pluralism within society necessitates a form of majority or public consensus to decide upon and adopt basic forms of morality within moral paternalism – ultimately a form of political liberalism.

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[371] George, *Natural Law and Public Reason* (n 430) 70.

[372] Rawls, *Political Liberalism* (n 424) XX. A concept dependent upon majority consensus to decide political morality.

[373] George, *The Clash of the Orthodoxies* (n 17) 51.

[374] George, *Natural Law and Public Reason* (n 430) 26. See also G Newey, 'John Rawls: Liberalism and the Limits of Tolerance' in S P Young (ed), *Reflections on Rawls: An Assessment of his Legacy* (Ashgate, 2009) 131.

I suggest that George's modification contradicts postmodernist Rawlsianism through the emphasis of the 'reason' within public reason. 'Postmodernist Rawlsianism' nullifies the active role the public communication and activity of religion plays in the public discourse of a liberal democracy. It is nullified to the degree that religion is considered to be non-rational.[375] The 'public' part of public reason furthers this process as religion is deemed to be a set of beliefs based on 'private revelation.'[376] However, George rebuts this criticism: if religion is to be deemed rational then 'the revelation to which it responds is in the most important aspect fully publicly accessible.'[377] A Rawlsian approach would only reject differing ideals here, such as religious views. This defeats the 'non-rational role' of religion prescribed by Rawls in a public discourse. It flows from the expansion to public reason previously outlined and provides George's moral reasoning expansion to pluralist public reasoning.

Public reasoning oriented towards a religious consensus

This chapter has argued that George does not reject totally the Rawlsian notion of public reason but instead develops a modified conception of public reason. This is evidenced by the fact that in the 2011 'Anscombe Memorial Lecture' George publicly backtracked on his firm rejection of public reason. He admitted to having 'some sympathy' for the matters of basic justice and George conceded that appeals to religious authority and political advocacy ought to be based on public reason to 'buttress, illuminate and motivate people to act for the sake of ends.'[378] This would be the 'broad conception' outlined above. This surprising stance, however, depends upon a deft alteration of the Rawlsian conception. As part of the analysis of George's approach, for George, I suggest that political claims can be put forward as a proposition under 'common human reason'.[379] This is a form of reasoning drawn from George's interpretation of practical

[375] Ibid.
[376] Ibid 67.
[377] Ibid.
[378] R P George, 'Science, Philosophy, and Religion in the Embryo Debate' (Anscombe Memorial Lecture 2011, 21 October 2011) <http://www.bioethics.org.uk/page/resources/multimedia> accessed 1st August 2012. Also see, R P George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 125.
[379] Epistemology requires jurisprudential inquiry, derived from the natural law, to form an understanding of revelation. George holds special revelation directs us as individuals and communities in upright living, in accord with the concept I have identified to be central to George's political theory: 'common human reason.' George, 'Science, Philosophy, and Religion in the Embryo Debate' (n 430). Also see, George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 125.

reasoning within Aquinas. However, George's modification of Thomas's use of practical reason importantly involves a democratically informed opinion on which 'reasonable people of goodwill across the religious and political spectrums should agree on',[380] as exercised by state power. Although this is a form of social contract theory I argue that it is broader than public reason.

This is because a process of 'common human reason' expressly includes a place for metaphysical reason, an integration of religion and also an appeal to the concept of a Judaeo-Christian God to reveal 'some polities or some policy' and provide conclusive reasons for action.[381] For George, it is this God who wills the integral good of human beings and is attentive to a society's public policy on morally significant questions and who does so at least in part for reasons accessible to individuals as rational creatures. This would include morally significant questions specified by various dimensions of the good, a process which is arrived at by human rationality. The key differentiating factor between George and Rawls here lies in the fact that, unlike public reasoning, common human reason includes contribution from both the minority and the majority[382] to achieve justice and rights.

Through this integration of the metaphysical and 'common human reason', I argue that George has presented a dual synthesis in relation to morally significant issues between broader reasons (apart from revelation) for policy positions. For George, the identification of these reasons by philosophical theological inquiry and analysis, supplemented sometimes by knowledge derived from the natural and/or social sciences, 'is critical to an accurate understanding of the content of revelation in, say, the Bible or Jewish or Christian tradition.'[383] Thus faith and reason are mutually supportive: 'criticism of secular liberal views is not that they are contrary to faith; it is that they fail the test of reason.'[384] Placing reason as an affront to militant secularism provides a nuanced tactical reversal of contemporary reasoning.

[380] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 125.
[381] George, 'Science, Philosophy, and Religion in the Embryo Debate' (n 430).
[382] K Greenawalt, 'On Public Reason' (1994) 69 Chicago-Kent L. Rev. 669, 672.
[383] George, *The Clash of the Orthodoxies* (n 17) 64.
[384] Ibid xiv.

Moreover, as has been shown in 2.2, George believes that reason can be identified and acted on independently of revelation from a Judaeo-Christian God: 'they typically believe, as I do, that the precise content of what God reveals on the subject cannot be known without the application of human intelligence, by way of philosophical and scientific inquiry, to the question.'[385] This is helpful because philosophical inquiry is important for ascertaining rationality. On first glance, this approach would be similar to the Rawlsian reason led approach. George considers it reasonable to suggest that public policy ought to be based on public reason. Distinctively, however, this concept of public reason would be far wider than the limiting version of public reason espoused by Rawls. George asserts that:

> … Anyone who believes that God has revealed that the public policy of a certain polity must be settled in a certain way has … an absolute, indefeasible reason for supporting that way of whether there are any grounds apart from revelation for the policy.[386]

For George, this is not because Christianity *prima facie* must accord with philosophical reasonableness, or because it is inherently logical. Rather, it represents a Roman Catholic understanding of 'truth' that should be in accord with the most substantively recognised form of epistemological reason. The particular use of reasoning here provides a key role in George's theory and so will be helpful for the later applied analysis, in this thesis. It is one built on practical reason to accommodate each person and provide opportunity for the majority, without obscuring the minority. This gives a reasonable perspective to informed philosophical belief.[387] The place given to reasoning by George here fundamentally changes the ground rules from which public reason operates.

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[385] Ibid 67.

[386] George, *The Clash of Orthodoxies* (n 14) 63, 64.

[387] George's connection to philosophical belief is no longer to be viewed as legally obscure as it once was: following *Maistry v BBC* [2011] ET 1313142/2010, an Employment Tribunal considered that a journalist's belief in the "higher purpose" of public service broadcasting was a protected philosophical belief under the Employment Equality (Religion or Belief) Regulations 2003 because the philosophical belief was of a 'sufficient cogency, seriousness, cohesion and importance and…worthy of respect in a democratic society'. See *Grainger Plc v Nicholson* [2009] UKEAT 0219/09/ZT [24].

Religious reasoning

From this position, public reason can be reconciled and modified within a legal theory that advances religion, including overtly theological natural law reasoning, rather than public reasoning always remaining secular. As such, Jonathan Chaplin argues for a new form of public reasoning, a version of public reasoning in the form of 'religiously based reasoning,'[388] which I will argue can be interpreted positively within George's system to include a platform for religion in the public debate. Chaplin has cogently articulated for two essential foundations of liberal democracy: 1) 'the principle of state neutrality towards religion; and 2) the principle that public reasoning must be secular.'[389] Secular public reasoning, for Chaplin, is seen to be 'invalid and illiberal.'[390] Finnis' list of basic goods expressly include a place for religion, as does George's.[391] In any public debate forwarded on behalf of NNL, religion is undoubtedly important. Once again, this invokes the earlier identified criticism that Roman Catholic bias is present when attempting to integrate religion within public debate. Nevertheless, a religious consensus formed by this position would provide a basis for reasoning to include religion in the public debate.

This is not to suggest that a form of religiously based public reasoning is not already evident and manifestly present in many liberal democracies. Tertiary level education involving theology and ethics provides a good example, and here it actively contributes to the public debate. Instead, the point of this is that this presence does not pose any threat to the creation or stability of states.[392] From this basis, public good may be evident in public reasoning. This is very similar to George's approach, as will be seen in chapter 3, as one which draws upon the secular humanist scholars.[393] Democratic reasoning provides a form of common

[388] J Chaplin 'Law, Religion and Public Reasoning' OJL&R (2012) 1.
[389] Ibid.
[390] Ibid.
[391] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 119.
[392] Chaplin 'Law, Religion and Public Reasoning' (n 480).
[393] George's approach would subtly reject any form of public reasoning in favour of 'common human reason'. However, Chaplin emphasises that John Locke within *A Letter Concerning Toleration* was correct to insist that public good is the rule and measure of all law makers: '[n]either the right nor the art of ruling does necessarily carry along with it the certain knowledge of other things and least of all the true religion.' (J Locke, *A Letter Concerning Toleration* (first published 1689, Merchant, 2011) 36, 39). This draws from a basic law making a distinct form of reasoning. This form of reasoning would be a specific public good, and is an important observation for the overarching presentation of human reasoning connected specifically with the public good in this thesis. The interpretation given here conflicts with Finnis' reading of the public good [bonum publium] in Aquinas, in that the public good, as an element of

human reason in George's method to engage the right to freedom of religion in equality case law, as will be shown in chapter 5.[394]

If Chaplin's religiously based reason could incorporate the specific good of religion, then this provides a potential link between the divide of Rawlsian public reason and Georgian practical 'common human' reasoning. A connection here is being drawn from religious reasoning. I suggest that George's thought can be improved upon by further integrating religion by adopting this amalgamation of moral reasoning and including religion as a public good.[395]

This connection is indicative of George's wider approach to the challenge of public reason and subsequent rejection of political liberalism. George invokes a pluralist perspective within a liberal democracy, which necessitates the influence of many conflicting forms of morality to provide a sphere for 'religious' based public reason. By doing so, this section has identified that this efficiently provides a sly alteration to the public reasoning provided by Rawls. As a final observation, it is unsurprising that both Rawls and George seek to present the idea that public policy ought to be based on varying degrees of social contract reasoning based upon 'public' reasons. The fact that George feels it necessary to revert to a modified understanding of public reasonableness[396] shows both the failure of George's rationalist, pluralist approach and the success of Rawls in reaching a reasonable informed consensus, to the exclusion of dissenters.

2.5 Conclusion

This section has addressed challenges made by the Rawlsian social contract critique from political liberalism. It has been suggested that the challenge provided by Rawlsian public reasonableness is a central feature in George's understanding surrounding practical reason. It was therefore surprisingly

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the specifically political common good, is an intrinsically valuable object for the relevant state because it marks out the domain of the coercive jurisdiction of state government and law - J Finnis, 'Reflections and Responses' in J Keown and R P George (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford University Press, 2013) 514. The jurisdiction of the state's government and law is not defined by the all-inclusive common good, rather the jurisdiction is defined by the public good - ibid 511. But in contrast to Locke, and closer to George, for Aquinas this type of public good is 'the things which everyone ought to believe and practise, such as matters of faith and divine worship, and other things of that sort.' T Aquinas, *Summa Contra Gentiles* (first published 1270-1273, Aeterna, 2015) III c.80 nn. 14, 15, 2559-2560.

[394] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 125.

[395] This will be further discussed in chapter 5.

[396] George, *Natural Law and Public Reason* (n 430) 70.

identified that George sees much merit within public reasoning through his own 'common human reason'. This was argued to be integrated with George's practical reasoning expansion to pluralist public reasoning[397] joining with a religious consensus from 'religiously based reasoning'.[398] The approach that I suggest here expressly allows the integration of religion, and so permits the connection between public reason and religion (particularly religion as a public good). It is therefore shown that this expansive pluralist modification to public reasonableness is supplemented with a concept orientated towards a religious voice. The move towards a religious voice is enabled through this process. As such, reasoning no longer requires restraint to remain on the use of religious reasons.[399] The idea of religion as a public good will form a central part of chapters 4 and 5.

2.6 Conclusion

In conclusion, this chapter has shown the influence of practical reasoning with George's NNL jurisprudence and that, for George, NNL holds practical reasonableness *as the* natural law.[400] Section 2.2 showed that George's understanding of practical reasoning departs from Thomist thought in several key respects. While the influence of Aquinas overall to NNL is seen to be vital, George's literature departs from Thomist thought in the following ways. First, George's movement from the 'good' to the basic goods. Second, the modification of the FPPR. Third, the elevation of the principle of ethical autonomy; and fourth, the inclusion of the basic good of religion within George's understanding of practical reasoning. It was here argued this presents a basis for practical application within George's NNL, for instance when critiquing religious equality law.

Section 2.3 argued that the existing literature establishes that George moves beyond Aquinas in other ways. To convey this, four sources of George's NNL approach to moral reasoning were considered: a) divine revelation; b) moral

[397] Ibid.
[398] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 89) 125.
[399] J Donald Moon, *John Rawls: Liberalism and the Challenges of Late Modernity* (Rowman & Littlefield, 2014) 54.
[400] Finnis, *Natural Law and Natural Rights* (n 30) 1.

realism; c) human rationality and d) Dworkin's concept of value, which it was established can be assessed as a form of moral reasoning. Two conclusions were drawn: first, Finnis' reliance upon 'human reason' and George's combination of law, morality and human rationality exclude references to divine revelation within moral reasoning. Secondly, it was considered that George's 'minimum standard of reasonableness' approach towards legal validity adopts practical reasoning as a guiding principle. This was shown to be preferable to Dworkin's value 'third way' thesis.

Finally, section 2.5 portrayed George's rejection of Rawlsian political liberalism and modification of public reason through George's understanding of practical 'common human reason[ing]'. It was argued public reason in the form of 'religiously based reasoning' could be a more appropriate form of reasoning for George.

The centrality of practical reason to George's approach is shown here. This chapter has analysed the concept of practical reason which will be key to the critical application and reformulation of George's NNL views to religious liberty law in chapters 4 and 5. It will be argued in chapters 4 and 5 that the difficulties outlined above do not prohibit the critique of George's thought from successfully providing a way forward for natural law reasoning. Next chapter 3 will move from practical reasoning to consider the influence of the secular humanist tradition upon George.

Chapter 3 - Robert George as New Natural Lawyer: Source and Development of Legal Rights

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Chapter 3 - Robert George as New Natural Lawyer: Source and Development of Legal Rights

3.1 Introduction

The purpose of this chapter is to convey Robert George's narrowing of natural law jurisprudence towards a natural rights discourse. To achieve this aim, this chapter will analyse the influence on George of the modern, 'Western' secular humanist tradition and its move from theological conceptions of natural law to non-theological designations of natural rights.

For present purposes, the term 'secular humanist tradition'[1] refers to both the distinct philosophical transformation of natural law reasoning into natural rights jurisprudence associated with Hugo Grotius (1583-1645), Thomas Hobbes (1588-1679), Samuel Von Pufendorf (1632-1694) and John Locke (1632-1704). Other phrases have been used to describe this concept: Richard Tuck has termed this scholarship as part of the 'modern humanist tradition/Renaissance lawyer(s)';[2] Quentin Skinner uses the label 'rationalist' tradition;[3] and Sean Coyle refers to these theorists as members of the 'natural liberty school'.[4] Esther D. Reed has noted a characteristic of this tradition to be the 'progressive reduction of natural law reasoning to an extremely narrow set of rights.'[5] The purpose of this chapter is to trace the extent to which George stands in this tradition that secularizes natural rights talk. This chapter will analyse the direct references that George makes to the relevant theorists. It will also analyse and critique the clear influences and themes derived by George from the secular humanist tradition that informs his new natural law (NNL) thought. This will allow the later application of George's thought to analyse the right to religious freedom (see chapters 4 and 5).

Section 3.2 will highlight the view that the secular humanist tradition has embraced the interplay between the Roman Jurists' classifications of laws into natural rights jurisprudence.

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[1] The terms 'secular humanist tradition', 'secular humanist scholars' and 'seventeenth century theorists' will be used interchangeably throughout this chapter.
[2] R Tuck, *Natural Rights Theories: Their Origin and Development (*Cambridge University Press, 1979) 13.
[3] Q Skinner, *The Foundations of Modern Political Thought, Volume Two: The Age of Reformation* (Cambridge University Press, 1978) 347.
[4] S Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (Ashgate, 2007) 54.
[5] E D Reed, *Theology for International Law* (Bloomsbury, 2013) 136.

Section 3.3 will demonstrate the influence upon George of Hugo Grotius' jurisprudence. First, this section will show that George was largely influenced by seventeenth century natural law philosophy, which following scholasticism, stressed natural rights and proposed a justification for a system of international law based around human nature.[6] This is important because it will be shown that George's NNL adopts Grotius' views concerning human nature. Secondly, this will also establish the nexus point for George at which natural rights are linked to property rights. To establish George's movement from natural rights jurisprudence, it will be demonstrated that, for George, Grotius provides the break between the scholastic understandings of natural law into a natural rights basis centred upon property.

Turning to Thomas Hobbes in section 3.4, it will be shown that George's understanding of the common good has been influenced by Hobbes, and further that Hobbes provides a basis for George's move towards liberty as seen in the introduction of rights being asserted against the state.

Section 3.5 will begin by showing a rationalist basis[7] features in the basis of Pufendorfian thought – a basis which has been largely modified by George. For Pufendorf, removing a Judaeo-Christian God as the provider of natural law; subordinating the place of religion and providing more emphasis upon human rationality as the base of obligation, allowed natural law to become accessible through human nature. Following from this, it will be argued that George has been influenced by linking human nature and morality to modify the self-preservationist/social contractarian thought taken by Hobbes and Pufendorf.

Finally section 3.6 will demonstrate that George draws from Locke's narrowing of natural law in natural rights themes in two ways: first, Locke's property rights, leading to George presenting his own rights discourse while adopting the Lockean property right of liberty; and second, Locke's combination of right reason and reflection, presents a moral process similar to that found in George's conception of 'public morality'. From this, George will be shown to draw a 'goods based opposition' towards certain state made law. This will feature prominently

[6] Ibid 32, 33.

[7] Rationalism was determined in chapter 2 to be a concentration upon human reason which excludes divine influence – see R McInerny, *A First Glance at St. Thomas Aquinas: A Handbook for Peeping Thomists* (University of Notre Dame Press, 1990) 26.

in the applied critique of George's NNL views to analyse the right to freedom of religion in the Equality Act 2010 that will be described in chapters 4 and 5. As such, the sections in this chapter will show that George's development of natural rights has been influenced by the secular humanist tradition. To show that George's work can reflect the narrowing of natural law jurisprudence into a natural rights discourse following the secular humanist tradition; however, it will first be necessary to reflect upon a key understanding within that tradition: a tradition that has embraced the interplay between the Roman Jurists' classifications of laws to narrow natural law themes into natural rights jurisprudence. The next section will identify this interplay.

3.2 Natural rights jurisprudence: an interplay between the classifications of laws

The influence derived by George from the jurisprudential development of the classification of laws draws from a long lineage: the concept of a universal and eternal law was adopted by two notable groups, the Roman Empire and the Christian Church, who then bequeathed this tradition to medieval Europe.[8] The Roman jurists' classified laws into different types[9] and importantly from this Aquinas, and scholasticism, latterly adopted a division between the law of nations (*jus gentium);* the civil law (*jus civile)* and the natural law (*jus naturale*).[10] These categories will be important in this chapter because according to this position, the law of all nations is derived from the first principles of natural law.[11] It will also be shown that these concepts underpin natural rights scholarship and the interplay between these three related concepts directly contribute to the narrowing of natural law into natural rights jurisprudence in the work of the secular humanist scholars.

These concepts are directly applicable to natural law because the direct interplay from the two key concepts of *jus naturale* (natural law) and *jus gentium* (law of

[8] M Shaw, *International Law* (5th edn, Cambridge University Press, 2003) 32. While the European Middle Ages are commonly referred to as the great age of natural law thought, it needs to be remembered that the idea was not, arguably, Christian in its inception. It was rather a legacy of the Stoic, Roman and Greek legal traditions.

[9] The *jus natural, jus gentium* and *jus civile* – M P Zuckert, *Natural Rights and the New Republicanism* (Princeton University Press, 1994) 129.

[10] Reed (n 5) 103.

[11] Shaw (n 8) 32.

nations) allowed the natural law to be applied to human affairs and law,[12] which is very important in the work of Robert George.

Jus natural and *jus gentium* are distinct concepts, although they are often so interconnected that differences were frequently ignored. Stephen Neffdistinguishes the two concepts as follows: 'Natural law [*jus naturale]* was the broader concept ... [T]he *jus gentium* was the human component, or sub-category, of it.'[13] The *jus gentium*, as an application of the broader natural law to human affairs, provided general norms of conduct. If one views the *jus gentium* as a prescriptive ethical system, a collection of laws common to all nations, then, according to Neff, it affects individuals in/of all walks of life and all aspects of human affairs, such as: contract, crime, etc.[14] This presents a malleable system that could be applied to a wide range of human affairs in differing situations and internationalised contexts. George's interrelated theory of morality and ethics shows this system.[15] This is because George has sought to provide a NNL system that rationally guides and structures human choosing[16] - a normalised application of laws common to all nations, that has narrowed into the NNL approach for George.

As such, this interplay between the natural and human laws has impacted the understanding of contemporary natural law jurisprudence in the moral philosophy of George and will be shown later to feature in the Hobbesian liberty right. It will next be shown that this interplay directly contributes to the narrowing of natural law.

[12] Latterly *jus gentium* was commonly known as the law of nations and the law of people.
[13] S Neff, 'A Short History of International Law' in M Evans (ed), *International Law* (2nd edn, Oxford University Press, 2006) 32.
[14] Ibid.
[15] J Crowe, 'Natural Law Beyond Finnis' (2011) 2(2) Jurisprudence 293, 297.
[16] R P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press, 1994) 93.

Robert George's significant influences – the development of natural rights jurisprudence within Grotius, Pufendorf, Hobbes and Locke

3.3 Grotius

The imposition of Grotian human nature upon George: the grounding of a natural law theory upon human nature leading to flourishing

The section will show that, despite many traditions of natural law,[17] George was largely influenced by seventeenth century natural law philosophy, which following scholasticism, stressed natural rights and proposed justification for a system of international law based around human nature.[18] This is important because it will be shown that George's NNL adopts Grotius' views concerning human nature. It will also be shown that the interplay between the three classifications of law in the previous section contributed to a system of international law that narrowed the natural law jurisprudence in the work of the seventeenth century theorists.

The secular humanist scholars, particularly Hugo Grotius and Thomas Hobbes, proposed a system of natural law that stressed natural rights, one which Sean Coyle has identified as shifting the emphasis 'away from the idea of law as a collection of remedies to the idea of law as a system of interlocking rights.'[19] According to Coyle, these scholars approached the question of the basis and justification of a system of international law,[20] drawn from the interrelation of Roman conceptions of law as outlined above. Michael Zuckert has further identified this to be particularly relevant for Grotius and has suggested that his entire presentation of law is shaped by the Roman jurists' classification of law into the aforementioned three types: *jus natural*, *jus gentium*, and *jus civile*.[21]

The secular humanist tradition's derivation from the Roman conceptions of law is relevant for George because the development of contemporary legal theory and international law was dependant on the interrelated development of natural law

[17] An incorrect assumption runs through natural law scholarship that there is only one tradition of natural law, rather than many. Reed has criticised this misinformed position of a single natural law tradition, which fails to recognise the significant differences between 'natural right'; 'natural rights'; 'natural right' according with right reason and 'natural law' which draws uniformity to a universal law – Reed (n 6) 32, 33. This draws a distinction between natural law and natural rights. There is no one single natural law tradition. This chapter will dispel the incorrect notion and attempt to posit a clearer, more distinct understanding of the tradition NNL has drawn from and situate this to the correct natural rights discourse.

[18] Ibid 32, 33.

[19] S Coyle, *Modern Jurisprudence: A Philosophical Guide* (Hart, 2014) 14.

[20] Ibid 21.

[21] Zuckert, *Natural Rights and the New Republicanism* (n 9) 129.

and natural rights jurisprudence.[22] It is for this reason that this section will trace George's use of the secular humanist scholars, who are in turn leading natural rights scholars, such as Hugo Grotius.[23]

In *Aquinas: Moral, Political and Legal Theory*, Finnis argues that, for Grotius, what is right and wrong depended upon the nature of things and not a decree of God.[24] This followed the *'etiamsi daremus'*.[25] As such, if *natural law is valid even if there is no God*, NNL draws from this the moral obligation: to do 'right' and avoid 'wrong'.[26] Grotius' basic thesis is that the binding obligation of the natural law also implies that nature is a sufficient condition for the natural law, which, in turn, leads to human flourishing. This is similar to George, who denies that NNL is a theory of natural law without nature.[27] Within *In Defense of Natural Law*, George integrates the good of religion and divine obedience in his theory by suggesting that such is a reason for political action and an aspect of the common good of civil society.[28] Religion is a basic reason for action to ascertain truth and establish peace with God. While the theory presupposes existence of a God, much like Grotius, George's understanding of natural law is that it is not dependent, and would nonetheless exist, even if there were no God.[29] George takes from Grotius his reliance upon nature. This reliance upon nature is central in determining obligation within George's NNL approach, for our later purpose to deploy George's thought to the right to religious liberty within the Equality Act 2010.

For both George and also the secular humanist tradition, including Grotius, the law of nature was a law of *human nature*. Grotius successfully introduces establishing the natural law to allow for human collective flourishing.[30] An element of human nature is also reflected in George's intrinsically basic *human* goods. For George, 'moral norms are … implicit in, and derivable from human nature'.[31]

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[22] Shaw (n 8) 53.
[23] Legal scholars of the nineteenth century conferred onto Grotius the retrospective title of 'father of international law.' Ibid 135.
[24] J Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998) 43, 44.
[25] H Grotius, *De Jure Belli ac Pacis*, [The Law of War and Peace] (F W Kelsey tr, 1625, 1912 edn, Lonang Institute, 2011) Prolegomena [11].
[26] Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (n 24) 43, 44.
[27] R P George, *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992) 33.
[28] R P George, *In Defense of Natural Law* (Oxford University Press, 1999) 108.
[29] As established in chapter 2.3 and 2.4.
[30] Grotius (n 25) Prolegema 8-9.
[31] George, *In Defense of Natural Law* (n 28) 40.

Whereas for Grotius, according to Coyle, human nature is reflected more in collective social arrangements (including the law).[32] This is because, as Coyle has elsewhere written, 'Grotius had grounded the basic properties of human nature in natural rights so that law could "reflect" aspects of human social nature.'[33] For Grotius, natural law is 'a law that is natural in virtue of being a law of human nature.'[34] In contrast to a social understanding of law, the new natural lawyers would be more focused upon intrinsic moral choice that resulted in external choice, as shown above, namely the basic human goods. This understanding of nature will be established in the next section. It is one that flows from a move from scholastic natural law to a subjective natural rights basis built upon reasoning and property rights.

George's movement from Grotius: the break between the scholastic understanding of natural law into a natural rights basis centred upon property

Turning first to human rationality seen within practical reasoning, Grotius provides the basis from which the new natural lawyers draw the distinctive independence of the rationality driven natural law from a traditional conception of divine origin. For instance, Ernst Bloch has suggested that Grotius was the first to clearly separate human natural law as a creation of human reason from the theological context.[35] This is why Grotius termed natural law an 'intuitive judgement' because things were made known from their own nature. Chapter 2, meanwhile, identified that George and Finnis both accept religious doctrine within NNL. The leading jurisprudence textbook editor Michael Freeman has identified that "like Grotius he (Finnis) believes that a theory of natural law does not have to stipulate God."[36] This approach may have arisen following the secular humanist tradition. Reed has noted that, following Grotius, the development of natural law reasoning, such as that provided by secular humanist scholars, became detached from a Christian confession of the law of nature and once more became associated with secular rationalism.[37] Following chapter 2, the influence of reason, in the form of practical reasoning, has been clearly established within NNL. This is why George within *In*

[32] Coyle, *Modern Jurisprudence* (n 19) 64.
[33] Coyle, *From Positivism to* Idealism (n 4) 74.
[34] H Grotius, *Mare Liberum* (RVD Magoffin tr, Oxford University Press, 1916) 5.
[35] E Bloch, *Natural Law and Human Dignity* (D Schmidt tr, Massachusetts Institute of Technology, 1987) 49.
[36] M D A Freeman (ed), *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet and Maxwell, 2008) 132.
[37] Reed (n 5) 140.

Defense of Natural Law notes Grotius' influence, and work upon reason, as a key contributor to the natural law tradition, a tradition that the revival of interest in practical reason has once again revived interest in.[38]

Richard Tuck has observed that Grotius separated the law of reason from the imposition of divine duty and/or obligation.[39] As seen above, Grotius believed the natural law brought with it analogous duties to divine duty. However, the knowledge derived from human nature inherently involved human rationality, providing a duty to follow the same imposed by scripture.[40] George's practical reasoning, as that which engages the basic human goods, and acts in line with special revelation, would reach a similar conclusion. In other words, George outlined in *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism*: 'moral truths … can also be grasped … by ethical reflection apart from revelation.'[41] For George, therefore, it is possible for natural law reasoning to be distinct from revelation.

George's approach can be seen to draw from Grotius' own method. This is because the latter followed the law of nature, then the law of nations, and finally the law of God.[42] Arising from this separation, Grotius' rule of nature now reverted to being founded exclusively upon reason. Zuckert has identified that Grotius revised the Roman *jus naturale* doctrine in the same direction as Roman Catholic scholastic natural lawyers. For both, a combination of human nature grounded in reason provided a basis to approach the rule of nature.[43] Robert George here would partially agree with the rationale of Grotius. This is because NNL is based upon the self-evidency of goods realised through practical reasoning, rather than the dependence upon any form of deity. For George, in *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism,* the 'basic norms against murder and theft, are knowable even apart from God's special revelation.'[44] In *The Clash of Orthodoxies: Law, Religion and Morality in Crisis*, George further states: 'the natural law is … in principle accessible to human

[38] George, *In Defense of Natural Law* (n 29) 31.
[39] Tuck (n 2) 68.
[40] This would reject natural law identification with the Christian Decalogue and Sermon on the Mount.
[41] R P George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Isi Books, 2013) 83.
[42] Zuckert, *Natural Rights and the New Republicanism* (n 9) 104.
[43] K Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge University Press, 1996) 29.
[44] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 83.

reason and not dependent on … divine revelation'.[45] Accordingly, for George, following Grotius, the rule of nature is founded on the role of reason rather than faith.

In *Natural Law and Public Reason*, George defines action in accordance with right reason as a 'good summary'[46] of his conception of natural law, one in which acting upon reasons provided by the basic goods of human nature is a law of practical reasonableness.[47] Alternatively for Grotius, the law of nature was: 'a dictate of right reason, which points out that an act, according as it is or is not in conformity with rationalistic nature, has in it a quality of moral baseness or moral necessity.'[48] A direct comparison can thereby be established between the dictates of right reason in both Grotius and George. In the case of Grotius, within the secondary literature Buckle has shown that the dictates of right reason entails those principles that cannot be denied without doing violence to ourselves, and to the fundamental characteristic of sociableness in particular.[49] This follows Aristotelian teaching, in that for the purposes of flourishing the nature of the good is essentially social in nature.[50] Thus while George's understanding of acting against right reason would contradict all the basic goods, Grotius is more concerned with the good of sociability in particular. This distinction will be unpacked further below.

To show the narrowing of natural law into natural rights jurisprudence in the work of Grotius and the direct connection this has to George, the second issue of property rights will now be considered. Chapter 1 introduced a focus upon rights within George's work. Whether this focus be George in his work referring to 'fundamental human right[s]'[51] within *Embryo: a Defense of Human Rights* or that 'every human being is subject of rights'[52] in *Body-Self Dualism: Contemporary Ethics and Politics*, which shows that a rights discourse underlies his jurisprudence. NNL has been linked to natural rights ever since the publication of

[45] R P George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (ISI Books, 2001) 169.
[46] R P George, *Natural Law and Public Reason* (Georgetown University Press, 2000) 42.
[47] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 161, 162.
[48] H Grotius, *De Jure Belli ac Pacis* (n 25) I.I.X.I.
[49] S Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon Press, 1991) 25.
[50] S Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 19) 28.
[51] R P George, *Embryo: A Defense of Human Life* (Doubleday Books, 2008) 208.
[52] R P George and P Lee, *Body Self Dualism in Contemporary Ethics and Politics* (Cambridge University Press, 2008) 88.

Natural Law and Natural Rights.[53] In order to analyse George's thought for later application to the Equality Act 2010 in chapters 4 and 5, George will be shown to draw influence in a rights based approach.

However, this rights based influence upon George can be more clearly seen in the conceptual development of 'ius'. In contrasting a rationalist position with medieval scholasticism, Tuck has argued that from the fourteenth century it was possible to show that to have a right was to be the Lord or dominus of one's relevant moral world, 'to possess dominium that is to say property.'[54] Tuck has suggested the 'medieval lawyer always regarded dominium as *ius* [right], and hence was prepared to talk about property right.'[55] Rights are therefore linked to property. For Grotius property law provided the basis for natural law.[56] The law of nature for Grotius depended on dominium as *ius*. This was represented for Grotius in property rights which provide a basis for the natural law. Grotius distinguished 'another meaning of *ius*'[57] 'by reference to the person … [as] a moral quality of the person enabling him to have or to do something justly'.[58] As such, Coyle has observed that this may be the basis of the NNL argument that there is no intellectual breach between the natural law/natural rights tradition so that 'everything that has been claimed about justice in discussion of the basic goods can be suitably expressed in the language of rights; the reference to law in natural law being "analogical"'.[59] If natural law and natural rights are so closely linked, may property rights provide the basis for George's approach to natural law?

Looking further at the secondary literature, in *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law*,[60] Brian Tierney argued that through the rights development in Grotius 'one can find natural rights and natural law existing side by side, both associated with traits of human nature that were

[53] J Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980).
[54] Buckle (n 49) 3.
[55] R Tuck (n 2) 13. Tuck modifies this position slightly, in that for neither the Romans nor early medieval lawyers could liberty be *ius* (a right) - ibid 26.
[56] Ibid 8.
[57] Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 19) 60.
[58] H Grotius, *De Jure Belli Ac Pacis* [The Law of War and Peace] (n 25) I.1.3.
[59] S Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 19) 60, quoting Finnis, *Natural Law and Natural Rights* (n 53) 210.
[60] B Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Wm. B Eerdmans Publishing, 1997).

taken to be implanted by God.'[61] As such, Tierney suggests that for Grotius the concept of natural law was derivative from rights.[62] This once again indicates a basis for George's approach to natural law.

To assess whether property rights provide the basis for George's approach to natural law, Grotius once again plays an influential role. Grotius can be seen as contributing to the defining break between the Scholastic understandings of natural law into a natural rights basis, centred on the basis of property.[63] This defining break occurred with the secular humanist tradition moving away from older medieval conceptions of natural law towards the enlightenment learning and the embrace of property rights.[64] Here marks the transformation of natural law reasoning into natural rights jurisprudence.[65]

The law of nature, seen as necessitating property rights, is vital to Grotius: property was at the heart and root of his political system, forming the foundation of the state.[66] The fact that property, for Grotius, was connected with equality,[67] can be considered pivotal for modern comparisons with NNL. In other words, the equality garnered by property implied a system of coherent rights, providing a basis for NNL.

Further support for a natural law basis and for George's conception of rights as being linked to property rights stems from Grotius' conception of self-ownership. Through self-ownership, rights were given and protected in the name of the good for Grotius.[68] Coyle has claimed that Grotius' recognition of the *suum*[69] as a form of self-ownership provided individual property rights free from interference in the name of the common good.[70] This is because the *suum* included a natural faculty

[61] Ibid 319.
[62] Ibid.
[63] It will subsequently be argued that Hobbes and Pufendorf also contributed to this development.
[64] Tuck (n 2) 8.
[65] Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (n 4) 52. As such, an important point for George's jurisprudence is that Coyle believes Grotius provides a basis to 'detach the juridical framework of rights and duties from the theological moorings of natural law' - ibid.
[66] Coyle, *Modern Jurisprudence: A Philosophical* Guide (n 19) 60.
[67] Ibid.
[68] Buckle (n 49) 76.
[69] An Aristotelian concept, the *suum* is an internal domain of self-ownership, which through inward reflection reveals individuals interests and goals - Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (n 4) 51.
[70] S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart, 2004) 35; Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (n 5) 51.

or power to 'take and use things, especially those things needed for preservation'.[71] The concepts Domain (*suum ius*) and the earlier considered 'dominium' established protective property rights.[72] George's similar focus upon the common good is apparent.[73] This is because secondary literature has established that for Grotius each person enjoys a foundation of 'fundamental right' in the *suum* as a template for human flourishing.[74] This natural rights basis focused on the *suum* is at the outset very similar to George's approach: in the name of the good, the basic goods present basic reasons for action as constituent aspects for flourishing[75] – the highest form of the good.

Grotius attempted to adapt Aristotle to the seventeenth century situation[76] and for this reason is a rights thinker. However, Grotius moved beyond scholasticism, breaking with Aristotelian philosophy 'which was effectively decisive for all later political philosophy'.[77] This was because, as Coyle suggests, Grotius detached the juridical framework of justice and rights from broader ethical questions of virtue and excellence: 'Questions of the good are therefore no longer central to law, but belong to that inner-dimension of the person, the *suum,* and the manner of its flourishing.'[78] Coyle here identifies that Grotius re-introduced the Aristotelian suum, and connected this with the good and the highest good – human flourishing. This is because the Aristotelian 'good life', as that which is natural for man, can also be said to be good for him; it is what is required for flourishing.[79]

At this point divergence occurs between George and Grotius over human ends. For Grotius the contents of rights arose from reflection on human nature. This reflection required flourishing for each individual and so 'each person enjoys a foundation of 'fundamental right' in the *suum*.'[80] In particular this is built upon the earlier identified characteristic or 'good' of sociableness,[81] as that which is

[71] Buckle (n 49) 76.
[72] Coyle, *Modern Jurisprudence: A Philosophical* Guide (n 19) 60.
[73] George and Lee, *Body Self Dualism in Contemporary Ethics and Politics* (n 52) 108.
[74] Coyle and Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (n 70) 35.
[75] George, *In Defense of Natural Law* (n 28) 229.
[76] Coyle, *Modern Jurisprudence: A Philosophical* Guide (n 20) xviii.
[77] Ibid xviii.
[78] Ibid 64.
[79] Ibid 28.
[80] Ibid 67.
[81] Buckle (n 49) 25.

essentially outward-facing and social in nature. Coyle argues that Grotius' basic premise and the good of sociability gave rise to forms of political society.[82] This good followed Aristotelian teaching to secure flourishing at a societal level.[83] George differs from Grotius in that his self-evident basic good - 'friendship of personal community'[84] - is both an external and, more importantly, an *internal* reason for action to promote flourishing. It is in this sense that George has re-interpreted Grotian rights discourse. This development is here built upon Grotian property rights as a form self-ownership to secure flourishing, in the name of the good.[85]

For George, this section has established the key point where natural rights are linked to property rights within his jurisprudence. The crucial role that Grotius played in the development of natural law to natural rights jurisprudence has been shown at the nexus where proprietary rights develop from the *suum* in the name of the good.

3.4 Hobbes

Introduction

Grotius has influenced George's approach to natural law and natural rights. Turning to Thomas Hobbes, another member of the secular humanist tradition, it will be shown that Hobbes has influenced George's understanding of the common good. It will be seen that Hobbes also provides a basis for George's move towards liberty, seen in the introduction of rights being asserted against the state. This will be important for the deployment of George's thought in chapters 4 and 5.

Hobbes' focus on positive law followed Grotius' law of nations (voluntary law) of the seventeenth and eighteenth centuries.[86] Stephen Neff has identified that Hobbes provided laws with a practical and utilitarian character – making new law,

[82] Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (n 4) 30 – see S Pufendorf, *De Iure Naturae et Gentium* (CH and WA Oldfather, tr, 1688 edn, Oxford University Press, 1934) 1. 3. 8.
[83] Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 19) 28.
[84] George and Lee, *Body Self Dualism in Contemporary Ethics and Politics* (n 52) 91. *Natural Law and Natural Rights* identified Finnis' equivalent basic good to be: 'friendship and community' - Finnis, *Natural Law and Natural Rights* (n 53) 85-90.
[85] A motif of self-ownership to secure flourishing will be developed further in this chapter.
[86] Neff (n 13) 29.

rather than simply determining the natural law.[87] As we shall see this will be important for the discussion of law's creation/validity in the work of Robert George.

George's understanding of the common good: the rejection of the Hobbesian classification of law into realist social contractarianism

George's approach to the FPPR and basic goods differ from Hobbes' first conception of natural rights. For George, natural rights are enforced through the attainment of the basic human goods. For instance, George holds that 'norms of natural law can provide the basis for a common understanding of human rights.'[88] George further states in *The Clash of Orthodoxies* that 'rights are rooted in intelligible and basic human goods.'[89] This establishes natural rights on the basis of basic goods. Hobbes' basis for natural rights involves a conception of the pre-political state as chaotic, even violent. The first foundation of natural right thereby follows that 'each man protect his life and limbs as much as he can'.[90] This is important for our discussion because Hobbes' natural law,[91] construed as a right to self-preservation,[92] secured a lawful rights discourse to provide resistance.[93] This echoes with the preservationist nature of Grotius and provides a basis for Hobbes. Analogous to the thought of Grotius, Hobbes' right of nature is also rooted in the *suum* insofar as it is a right to self-preservation.[94] Once again this achieves an Aristotelian motif of flourishing. However, this is closer to a rights basis rather than a concentration on the goods. As such, an important factor for the later application of George's thought to the Equality Act 2010 is that George extends natural rights to flourishing - 'flourishing [as] the ultimate reason'[95] over and above mere preservation.

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[87] Shaw (n 8) 36.
[88] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 84.
[89] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 19.
[90] T Hobbes, *On the Citizen* (R Tuck and M Silverthorne eds, Cambridge University Press, 1998) 27.
[91] T Hobbes, *Leviathan* (C B Macpherson ed, Pelican, 1968) Ch. XIII – The natural law of self-preservation is pursuant upon Hobbes' discussion of the laws of nature where men live in 'that condition called Warre' - ibid Ch. XIII, 62.
[92] Ibid Ch. XIV.
[93] Skinner (n 3) 178.
[94] Coyle and Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (n 70) 29 quoting Hobbes, *Leviathan* (n 91) I.6.120.
[95] George, *In Defense of Natural Law* (n 28) 264.

Another difference between George and Hobbes is that, for George the Church is 'the principal institution bearer of the tradition of natural law theorizing in the modern world.'[96] Whereas Hobbes' views surrounding human nature, according to George, do not depend on the Christian Church.[97] Shaw has argued that the Hobbesian social contract basis of sovereignty, developed through the introduction of the natural rights thesis, was conceived out of an individualistic assertion of political supremacy rather than Christian values.[98] Sovereignty, for Hobbes, was aligned to the concept of natural right. Sovereignty was aligned by forms of authority, government and law, through social contractarianism, preserving the boundaries over individual rights. Natural law was thus employed to preserve the absoluteness of sovereignty,[99] which brought about a natural rights basis.

The basis of reciprocity and utilisation of the natural law within the Hobbesian social contract is, however, similar to the dependence upon Papal authority within the work of Robert George. Who would be the sovereign for George in this situation? Within the modern setting, a mode of obligation would here be owed to the state for both Hobbes and George. If the state adversely impacted Roman Catholicism, for instance negating religious liberty, the difference is that George may reject state jurisdiction and authority in favour of post-Vatican II Roman Catholic teaching.[100] This is in line with the Roman Catholic bias that was identified earlier in the thesis.

This importantly shows the development within natural law reasoning. This development is a demarcating line drawn from the division between church and state, from authority founded in state sovereignty to church teaching often in contradiction with state mandate, in a post-secular setting. A Hobbesian influence can be seen in George's insistence of individual rights used against the state. For instance, to give a privileged position to religion, within *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism*, George has drawn influence from Hobbes by insisting on natural rights held by the individual against

[96] Ibid 229.
[97] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 267.
[98] Shaw (n 8) 25.
[99] Ibid 25. This draws links with the earlier section because it is an extension of Grotius' philosophical alignment in putting sovereignty under the concept of natural right – Reed (n 5) 233.
[100] George, *In Defense of Natural Law* (n 28) 229. N Bamforth and D Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge University Press, 2008) 169.

the state, in particular against 'overreaching governments.'[101] George's inspiration can be seen in cases of civil action being taken by the individual against the state in the context of religious human rights violations. This is seen in, for example, the case of *Eweida and Others v The United Kingdom.*[102] From this influence it may be argued that the individual should be protected against the state in cases of, for instance, indirect religious discrimination.[103] As we will see in chapters 4 and 5, George's approach can be applied to religious liberty conflicts between Christian believers and the enforcement of contentious laws; this will be further demonstrated in chapter 5.2. As such, this focus on the individual relationship with the state is an important development for George and one that will be important in the deployment of George's thought to analyse the right to religious liberty.

The theories of George and Hobbes diverge, however, when it comes to their approaches to the so-called 'state of nature'. For Hobbes' hypothetical condition, the state of nature existed when 'there were no common power able to restrain individuals, no law and no law enforcement',[104] something not considered by George. By contrast, when considering human nature, George's anti-consequentialist NNL approach is not imposed upon a lawless state but rather upon a 21st century system of law – one governed by statutory law – and so his method furthers moral deliberation that leads to flourishing. As highlighted in *The Clash of Orthodoxies*, for George, 'moral norms govern free choices by excluding possible actions that are incompatible with such a will'.[105] George therefore discusses ethical choice rather than focussing upon the human condition. For Hobbes, if restraint were removed (i.e., there was no law), to prevent invasion of personal property, individuals should do whatever was necessary to avoid entering into this dark, repressive state of nature.[106] Hobbes thus opts for a hypothetical situation to improve the human condition while George focuses on the refinement of and explanation of ethical choice.

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[101] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 114.
[102] *Eweida and Others v The United Kingdom* (Application no 48420/10) (2013). See chapter 1 for an overview of this case.
[103] J Davies and T Heys, 'Reinventing indirect discrimination', 26th September 2012 <http://www.lewissilkin.com/Journal/2012/September/Reinventing-indirect-discrimination.aspx> accessed 28 January 2015.
[104] Hobbes, *Leviathan* (n 91) 40.
[105] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 16.
[106] Hobbes, *Leviathan* (n 91) 41.

A further difference between the two theorists is George's rejection of the realist social contract theory of Hobbes. As discussed earlier, George uses Hobbes' theory to highlight the notion that political orders are often never really supported by a shared and justified morality.[107] Labelling Hobbes a 'realist', George suggests that the only way to give moral words a common meaning, and to establish common standard of just and unjust, would be for all to defer to the sovereign a will that is authorised to set the terms of political and social co-operation.[108] Coyle has observed that it was from this understanding that Hobbes based his theory of equality.[109] George views that in this realist situation there is no possibility of shared moral standards as apart from the law made by the sovereign 'citizens are not allowed to criticize the law based on moral standards.'[110] Therefore George's conclusion is that it is impossible on Hobbes' view to say that law is unjust, for 'the law is the only public morality that we can have.'[111] Under this reading, morality is dictated by the law. George believes that laws shape morality – *Brown v Topeka Board of Education*.[112] For this reason the Hobbesian social contract theory is untenable as it does not accommodate, as seen in chapter 2, the 'minimum content of reasonableness' thesis. As such, George disagrees with the Hobbesian presentation of equality regarding having no shared moral standards. Here George places limits on the possibility of sovereign authority and the Hobbesian embrace of morality within nature.

For George law is a public morality, rather than vesting power to govern morality in the sovereign. We need law to protect the boundaries over our natural rights. *Making Men Moral*[113] is based upon the central belief that natural law can inherently contribute to making man moral: for George, although laws cannot make humans moral 'in any direct or immediate way',[114] the natural law can legitimately contribute to the legal enforcement of morality.[115] It is for this reason that the narrow Hobbesian social contract theory is rejected.

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[107] George and Wolfe, *Natural Law and Public Reason* (n 46) 20.
[108] Ibid.
[109] Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 19) 60.
[110] George and Wolfe, *Natural Law and Public Reason* (n 46) 20.
[111] Ibid.
[112] *Brown* v *Board of Education* 347 US 483 (1954). See further George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 2-3.
[113] George, *Making Men Moral: Civil Liberties and Public Morality* (n 17).
[114] Ibid 2.
[115] Ibid.

George's conception of public morality is founded upon, and finds expression in, the human good and revealed truth. This differs from Hobbes in that George does not base public morality upon the two defining standards of the current age: equality and liberty.[116] To this extent, George can be termed counter-cultural in that his distinctive stance rejects equality and liberty as individual class preferences and interests.[117] Instead, in *Natural Law and Public Reason*, George suggests political arrangements should be based on an objective account of the highest human good or from religious or philosophical truth.[118] This is not to be found in the Hobbesian social contract theory. George proposes a public morality with a variety of different religious and philosophical commitments and, a 'reasonable consensus on certain shared matters of urgent concern'.[119] This is preferred to the state of nature. Despite George's claim to objectivity, this position is necessarily contingent upon cultural circumstance and popular concern. Two problems arise: a) how does a political moralistic arrangement account for a multicultural, pluralistic account of religion and b) in a system of basic, incommensurable goods what can be termed the highest human good? Both these questions form the subject of discussion in chapters 4 and 5, when using George's thought to analyse religious freedom in the Equality Act 2010.

George's interpretation of Hobbesian reliance upon reason, nature and self-preservation

George's interpretation of the key concepts of reason, nature and self-preservation within Hobbes' work will now be considered to see if this has influenced George's natural law understanding. It was earlier shown that George has adopted facets of natural rights teaching from the secular humanist tradition's development of natural rights discourse.[120] Reed has suggested that the theoretical construct of the 'state of nature' was Hobbes' 'starting point for natural law teaching.'[121] This introduction provides an exercise that draws comparison with practical reasoning: for Hobbes 'right' was connected to liberty and demonstrated through reason. From this state of nature, 'right' was defined as

[116] See J Rivers, 'Good News for Law?' (2014) 19(5) KLICE Ethics in Brief, 1. This argument will be developed further in chapter 4.
[117] George and Wolfe, *Natural Law and Public Reason* (n 48) 20.
[118] Ibid.
[119] Ibid 27, 28.
[120] Tuck (n 2) 13.
[121] Reed (n 5) 264.

'the liberty that each man has of using his natural faculties in accordance with right reason,' from which it follows that, right can be exercised for self-preservation. The right of nature, commonly called the *jus naturale* was the liberty each person has for self-preservation.[122] From this, Reed suggests, right can be connected to liberty, performed through reason.[123] Hobbes' natural law of self-preservation,[124] construed as a right to self-preservation,[125] is connected to, but distinct from, liberty.[126]

In the work of Hobbes, the state of nature fundamentally underpins the basis that liberty is built on right(s). For Hobbes, rights were intrinsically linked to liberty, of which the law played a crucial constraining part. This is because of Hobbes' distinction between the *right of nature* (liberty) and *law of nature* (obligation/determination).[127]

Hobbes' idea that the state of nature was home to the *law of nature*/*jus natural*[128] has been largely rejected by George. This is because, if right leads to an understanding of the concept of liberty,[129] the natural law is seen to both enable value liberties and, through the legal enforcement of morality, restrict certain libertarian positions.[130] That said, do the use of reason and liberty within Hobbesian thought find any overt parallels to George's method of reasoning?

I have suggested that George differs from Hobbes in his adoption of the good as the basis of rights reasoning. This is opposed to Hobbes, for whom liberty based upon self-preservation is the key. Why is this the case? There is a significant shift between the Hobbesian understanding of natural right from that of the scholastics,[131] such as Aquinas. As was shown in chapter 2, Aquinas considered natural law to be a function of reason, focused on the common good.[132] Hobbes

[122] A Brett, *Liberty, Right and Nature* (Cambridge University Press, 1997) 91.
[123] Reed (n 5) 264. This reading would be in line with Coyle's reading which identified that Hobbes has equality at the basis of his system of political thought - Coyle, *Modern Jurisprudence: A Philosophical Guide* (n 19) 60.
[124] Hobbes, *Leviathan* (n 91) Ch. XIII.
[125] Ibid Ch. XIV.
[126] Brett (n 123) 22.
[127] Tuck (n 2) 130.
[128] Zuckert, *Natural Rights and the New Republicanism* (n 9) 138.
[129] Which results in a method of reasoning to form a social contract.
[130] George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 2.
[131] Reed (n 6) 264; 140-143.
[132] '[P]romulgated by the very fact that God instilled it into man's mind so as to be known by him naturally; wherein any claim to self-defence is conceived judicially and never far from reference to the

rejected the Scholastic understanding of reason focused on the good and instead advocated liberty based upon autonomy and self-preservation. For Hobbes, unlike Aquinas, natural law was no longer dependent upon the common good, or the Eternal Law. Instead, liberty provided the individual with a greater source of autonomy and self-preservation.[133] Within this system, however, there was still a place for natural reason - an inviolable observation arising from the condition of human nature and laws divine.[134] It is clear that while this would refute George's approach to the good,[135] the approach to reason may need more investigation to discern the level of disagreement.

Despite the assumption that George rejects an approach of rationality based on self-preservation, in contrast, this line of thought has influenced George. George believes that because of the influence of Thomas Hobbes, the view that human nature is ultimately constituted on emotional desires is prominent in the intellectual life of modern culture. Though this basis is ultimately refuted because as a conservative Roman Catholic, George accepts the Roman Catholic Church's view of human good and nature, in that natural goods give reasons for action, rather than liberty based upon self-preservation.[136] Yet, the dual presentation of rationality driven by desires and revelation has found modern application in NNL. Even George admits that 'there are aspects of human nature that are relevant to practical thinking and can indeed be known prior to practical reasoning.'[137] Reason, in the form of practical reason, and revelation in the form of Papal teaching has been modified and further developed to become a large factor in George's work.[138]

On this basis, George within *Making Men Moral* has criticised the position of Hobbes, who, in line with his theoretical successor David Hume, believed that 'the Thoughts are to the desires as Scouts and Spies to range abroad, and find the way to things desired'.[139] This view is that desires are prior to and determine

common good.' T Aquinas, *The Treatise on Law* (R J Henle ed, University of Notre Dame Press, 1993) *ST I-II*, q.90, a.4.

[133] Reed (n 5) 140-143.

[134] Hobbes, *Leviathan* (n 91) 409, 728. With clear reason given by, and representing, the Word of God – ibid 209.

[135] R P George, *Natural Law, Liberalism, and Morality* (Oxford University Press, 1996) 95.

[136] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 266, 267.

[137] George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 89.

[138] See generally - R P George, *Natural Law Theory: Contemporary Essays* (n 27) chapters 2 and 6.

[139] Hobbes, *Leviathan* (n 91) pt. 1, ch. 8.

our thoughts. Instead George has suggested the intrinsic human goods and basic reason for action can be sought as *ends* in themselves. This prevents practical reason being merely dictated by reason/emotions, a 'mere instrument in the service of desire, which would prevent rationally motivated choice guided by practical intellect.'[140] Practical reason is dictated by the good.[141] As has been shown, the basic goods engage the practical reason, and provide reasons for action 'precisely insofar as *they* are constitutive aspects of human flourishing.'[142] This is a conclusion Hobbes could never reach based on the necessity of self-preservation in the state of nature. For such self-preservation is intrinsically self-centred towards mere protection rather than the selfless, flourishing nature of the good.

This section has identified the influence drawn by George from Hobbes. It will next be argued that a modified concept of reason, as shown in chapter 2, is evident in a natural rights basis adopted against the state and plays a significant role in the work of Robert George for the deployment of George's thought in chapters 4 and 5. Following chapter 2 it will here be argued that practical reason has a large part to play in this process.

Public reason morality: George's modification of the Hobbesian 'state of nature' position arising from liberty

Within George's theory is modern application of Thomas Hobbes' approach to reason to be found? How do both George and Hobbes approach limits to governing authority? For Hobbes, we have seen that the right of nature was contrasted with the law of nature (*lex naturalis*). Hobbes stated this was a rule found out by reason towards self-preservation in the state of nature.[143] It would be reasonable in the state of nature to transfer power to gain protection by authority. This is because the transfer of these rights constituted individual obligation being transferred to the recipient authority. Hence, the transferee to whom these rights/powers would be transferred was the sovereign.[144] It is from this position that Hobbes' escape from the state of nature required handing over

[140] George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 12.
[141] George, *In Defense of Natural Law* (n 28) 85.
[142] George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 103.
[143] Hobbes, *Leviathan* (n 91) Ch. 14, 64.
[144] Ibid 44.

all rights and powers to the sovereign[145] in the earlier identified social contract basis of sovereignty.[146] This natural law theory of the state has an emphasis upon the original liberty and freedom of the people abrogating their sovereignty to the state. As such, in Hobbes' natural law theory of the state it can be identified that the state was primarily responsible for the enforcement of liberty.

This is very different from the position developed by George who recognises a more nuanced, limited role for government. For George, the natural law acts as a guiding limit upon authority. In *The Clash of Orthodoxies*, George asserts that the natural law 'does not dictate an answer to the question of its own enforcement.'[147] For George, the 'natural law itself requires that some-one (or some group of persons or some institution) exercise authority in political communities'.[148] As such, the authority to enforce the natural law may be vested exclusively or primarily with the legislature. Moreover, a significant measure of such authority may be granted to the judiciary, via the natural law, as a check on legislative power.[149] George recognises the authority of law to restrain authority based upon law's inherent nature for the good. For instance, in the context of the American government's approach to abortion following *Roe v Wade*,[150] George suggests that the 'failure of the American democracy to fulfil their responsibilities has created what is truly a crisis'.[151] Consequently, for the purposes of the larger thesis in chapters 4 and 5, George provides a wider limit to the scope of the natural law to constrain government than Hobbes.[152]

In response to Hobbes' state of nature, George proposes a public morality with a variety of different religious and philosophical commitments. With a 'reasonable consensus on certain shared matters of urgent concern', this morality is preferred

[145] In a similar state/public divide to that of NNL, this handing over of power to the sovereign was conditional: all things were owed by the subject to the sovereign when that obedience did not conflict with the Laws of God. They key difference here is the notion of sovereign control - ibid 395.
[146] Shaw (n 8) 25.
[147] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 179.
[148] George, *In Defense of Natural Law* (n 28) 107-108.
[149] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 179.
[150] *Roe* v *Wade* 410 US 113 (1973)
[151] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 135.
[152] For instance, to highlight the limits of moral paternalism, George draws upon Hobbesian thought in the Hart/Devlin debate. This is to suggest that HLA Hart's view of the moral paternalist position offered by Lord Devlin would be akin to Hobbes' state of nature. From this position George effectively critiques both the liberal paternalist position adopted by Hart and the State of Nature provided by Hobbes. George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 67.

to the state of nature.[153] As shown in chapter 2.5, George rejects the Rawlsian concept of 'public reason' in favour of his modified social contractarian 'common human reason',[154] to provide a wider that consensus accommodates religious belief.

George's public morality is employed here to refute the 'Hobbesian invitation to abandon our moral aspirations in favour scepticism, will, and power.'[155] On George's own terms it would here be better to use the expanded practice of practical reasoning for a 'common human morality', instead of the Hobbesian state of nature, in order to prevent untamed executive power.

George has further modified Hobbes' understanding of liberty. This understanding of liberty arose from Hobbes' contractarian movement from the law of nature. Hobbes used the words *Lex Civilis,* and *Jus Civile,* which for Hobbes were *law* and *right civil* accordingly*.* These are promiscuously used for the same thing: for Hobbes, *right* is *liberty,* namely that liberty which the civil law leaves us.[156] But for Hobbes:

> *Civil Law* is an *Obligation*: and takes from us the Liberty which the Law of Nature gave us. Nature gave a Right to every man to secure himself by his own strength, and to invade a suspected neighbour … but the Civill Law takes away the Liberty, in all cases where the protection of the Law may be safely stayd for. Insomuch as *Lex* and *Jus*, are as different as *obligation and liberty*.[157]

Here Hobbes shifted his definition of liberty as something that arises from the law of nature to a primary right of nature. Self-preservation is the primary right of nature - an innovative right that leads to liberty.[158]

George has interpreted Hobbes' innovate right to self-preservation by, as noted earlier, rejecting social contractarianism. However, he does endorse liberty

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[153] George and Wolfe, *Natural Law and Public Reason* (n 46) 27, 28.
[154] R P George, Anscombe Memorial Lecture 2011, "Science, Philosophy, and Religion in the Embryo Debate" - Friday 21st October 2011, Oxford <http://www.bioethics.org.uk/page/resources/multimedia> accessed 1st August 2012. Also see George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 125.
[155] Ibid 21.
[156] Hobbes, *Leviathan* (n 91) 334.
[157] Ibid 334. [Emphasis added].
[158] Tuck (n 2) 120.

arising from the nature of the human good within natural law.[159] As can be seen in Hobbes' *Leviathan*,[160] further developments are imposed upon the right of liberty when contracting in a civil society. Here in the development of '*ius*', the terms *lex* and *jus*, can also be seen: '[f]or right is that liberty which law leaveth us; and laws those restraints by which we agree mutually to abridge one another's liberty.'[161] George's presupposition towards liberty may draw from Hobbes intrinsically linking rights to liberty, of which the law played a crucial constraining part. Liberty and right arise here, for Hobbes, from nature. From this, George recognises that liberty can be protected via laws 'as a common good, and thus as an aspect of *the* common good'.[162] This is also another instance where the interplay between the three related legal concepts identified by the Roman jurists (here *jus civile/jus natural)* directly contributes to the narrowing of natural law into natural rights jurisprudence in the work of the secular humanist scholars.

For George, points of inheritance have been shown from Hobbes. In *De Cive*, Hobbes categorised the first foundation of natural rights as one of self-preservation.[163] This concept is the overriding contribution of Hobbesian thought. This concept has certainly been used by George and Finnis – one of the incommensurable basic goods is 'Life' and the attaching right to protect life. This right, codified as Article 2 of the European Convention on Human Rights, and following the Universal Declaration of Human Rights 1948, has a definite natural rights basis.[164] For instance, George has regarded human rights as natural laws.[165] George here explicitly draws from a 'tradition of natural law thinking about morality, justice and human rights'.[166] These are human rights as a modern version of the natural law theory, the doctrines of which can be traced back to Judaeo-Christian sources of European culture.[167] This is a movement from divine law to natural law, via the secular humanist tradition eventually being presented in a rights discourse as human rights.

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[159] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 42) 119.
[160] Hobbes, *Leviathan* (n 91).
[161] Tuck (n 2) 120.
[162] R P George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 72. [Emphasis added].
[163] Hobbes, *Leviathan* (n 91) Ch I, 13-14; T Hobbes, *On the Citizen* (n 90) I i, 7.
[164] J Tasioulas, 'Human Rights, Legitimacy, and International Law' (2013) 58(1) Am. J. Juris. 1.
[165] R P George, 'Natural Law' (2007) 31 Harvard Journal of Law & Public Policy 171, 176.
[166] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 51.
[167] L Kolakowski, *Modernity on Endless Trial* (University of Chicago Press, 1990) 214. See also M Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islam and Multiculturalism* (Bloomsbury, 2012) 30.

So it is argued that Hobbes' first foundation of natural right as self-preservation is analogous to George's incommensurable basic good of life. George has inherited this self-preservationist regard for life as a basic good from the secular humanist tradition. In a similar vein, Hobbes proclaimed in a way that can be now contrasted to a Hohfeldian approach, the absolute priority of rights to duties:[168] 'the doctrine of civil society as if for the preservation of peace and of government of manking there were nothing else necessary ... [This] is yet certainly false and an error.'[169]

Zuckert highlights this important distinction that Hobbes introduced between natural law and natural rights: 'Natural law is not natural moral duty; natural right, on the other hand, is permissive – a liberty.'[170] As Hobbes said, 'right consists in the fact that we have the free use of something, but law is that which either commands or forbids some action.'[171] Could natural rights discourse be responsible for introducing liberty into NNL? George's high regard for religious liberty will be outlined in chapter 4. However, here it can be stated that the presentation of human rights established and evolved from a natural rights basis, helps provide a basis in rights related discourse for religious rights. Here the *jus natural* acts as the liberty prescribed to preserve life, with individuals guided by reason.[172]

Yet Hobbes viewed natural right as a pure liberty, a faculty, power or liberty, with no subsequent correlative duty attaching to it.[173] The *jus natural* acts here as the liberty prescribed to preserve life, with individuals using their natural faculties guided by reason.[174] This further shows how for both George and Hobbes law prescribes the boundaries for natural rights. This brings us back to the notion of self-preservation and George's subsequent development via the basic good of life. This can be considered in two ways: first, if one reads Hobbes as treating natural right as a pure liberty, Hobbes' reading is potentially wider, and offers a broader scope for decision making than that offered by the conception of basic

[168] E Fortin, 'The New Rights Theory and the Natural Law' (1982) 44(4) The Review of Politics 590, 602.
[169] T Hobbes, *On the Citizen* (n 90) I 1.2.
[170] M Zuckert, 'Do natural rights derive from natural law?' (1996) 20 Hanz, J.L + Pub. Poly 696, 723.
[171] Ibid 723.
[172] Hobbes, *Leviathan* (n 91) 227.
[173] Zuckert, 'Do natural rights derive from natural law?' (n 170) 726.
[174] Hobbes, *Leviathan* (n 91) Ch 14. 64, 227.

goods provided by George. To meet this reading by Hobbes, liberty would form a basic reason for action.

Secondly, however, if one reads a natural right to liberty purely as a right to life, then this would not match George's conception for basic human goods. Because the goods are incommensurable and internally variegated, the restricted space provided here for liberty would not be analogous to the liberty Hobbes prescribed.

A reading of the former position is preferable because Hobbes' libertarian basis may involve aspects touching upon other basic goods, not just the good of life, and George's incommensurability cannot accommodate this. Instead George's modification of the Hobbesian 'state of nature' arising from liberty involves the basic good approach encompassing natural rights and reducing liberty into a basic reason for action.[175]

In conclusion, for the deployment of George's thought in chapters 4 and 5, much of George's reliance upon natural rights has been drawn from Hobbes. First, through influencing George's understanding of the common good and second, providing a basis for an embrace of reason focused on both self-preservation and a move toward liberty – liberty reduced into a basic reason for action in alignment with the basic goods. In these ways George has been subtly influenced by Hobbes. More overt influence can be seen in George's movement from Hobbes to provide individual, natural rights protection against the state. However, George's rejection of sovereignty/social contractarianism and George's concept of public reason morality diverge from Hobbes. Next this chapter will turn to Pufendorf who, like Hobbes, provided a rationalist basis that has influenced Robert George.

3.5 Pufendorf

Application of the law of nature: the influence of Pufendorf's rationality in NNL

This section will begin by showing that George has been influenced, by Pufendorf, towards creating case law solutions through applying his NNL thought. It will be shown in this section that this influence stems from Pufendorf's approach to the law of nature. Next, this section will show that a rationalist basis features

[175] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 119.

in the basis of Pufendorfian thought. This basis has, however, been largely modified by George.

Pufendorf is influential because he moved further from the other natural rights theorists by providing a law of nations that was concerned with making new law, rather than simply determining the natural law. For instance, *On the Law of Nature and Nations*[176] was Pufendorf's attempt to identify international law completely with the law of nature. As earlier identified, this arose from the direct interplay between the key concepts of *jus naturale* (natural law) and *jus gentium* (law of nations), which allowed the natural law to be applied to the human condition. It is in this sense that George has been influenced to apply the natural law to creative case law solutions.

The previous section detailed George's rejection of Hobbesian social contract theory. For Pufendorf a state's highest obligation was its natural law 'duty to itself': natural rights being powers to fulfil the duty of the natural law.[177] It is in this sense that the social contractarian duty of self-preservation arose.[178] Yet Pufendorf's 'state of nature' was effectively a state of war, a selfish, inward looking notion.[179] George once again takes this duty further, and has externalised this idea as a natural rights defence against the state.[180]

This natural rights basis has so far in this chapter been shown as a defining characteristic within the secular humanist tradition. George's natural rights basis can be drawn from Pufendorf's belief that the divine will was accessible no longer merely by the natural law's participation in the eternal law. Instead, the natural law became accessible through human nature: 'natural theology' as reasoning to the divine from the nature of the world.[181] A form of Protestant Aristotelianism, similar to scholastic Aristotelianism, was the source of this view that rejected the possibility that men could have any rational knowledge of God's nature on the

[176] Neff (n 13) 29.
[177] Haakonssen (n 43) 55.
[178] In the preface to his *De Officio Hominis et Civis*, Pufendorf offers elaboration upon this duty. He argues that the light of reason; the civil laws, and the particular revelation of the divine authority should be sources for our knowledge of our duties - T J Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge University Press, 2000) 106.
[179] Reed (n 5) 143. This is detailed in Kant's short essays 'Idea for a Universal History with a Cosmopolitan Purpose' (1784) and 'Perpetual Peace' (1795), which reshaped the modern debate about the law of nations. Ibid 143.
[180] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 114.
[181] R Trigg, 'Religion in the Public Forum' (2011) 13(3) Ecc. L.J. 2011 274, 281.

basis of which they could draw moral lessons for themselves.[182] It is expressed, for example, as a denial that we can know that the natural law 'participates' in God's eternal law.[183] On this reading, Pufendorf sought to reconcile the normative character of natural law with a view of nature by deriving morality's binding force from the divine will. This was an ambitious compromise.[184]

Pufendorf here follows Grotius in that the above position draws natural law and natural rights away from a divine source. Knud Haakonssen has argued that in Germany Pufendorf was a Lutheran reaction to Grotius.[185] In other words, his adherence to a secularist position distinguished Pufendorf from scholasticism which led to the precepts of the natural law being 'accessible via examination of the nature and disposition of human kind'.[186]

This rationalist basis has overtly influenced Robert George. Pufendorf achieved a secularist transition by first removing a Judaeo-Christian God as the provider of natural law and, second, providing more emphasis upon human rationality through human nature. By doing so, this removed any point of external moral reference which transcended the legislative obligations of human nature.[187] This depended upon a reliable, consistent form of human nature to suggest a rationalist basis in which contents of the natural law would be susceptible to discovery through human reason rather than revelation.[188] With the natural order providing moral norms for free human choice, in this sense knowledge of the human nature is key to George's moral philosophy[189] which will be later deployed to resolve tensions facing religious liberty in the application of the Equality Act 2010.

In *The Clash of Orthodoxies*, George has drawn upon Pufendorf to present human nature as a law of practical rationality.[190] Accordingly, George's reliance upon human nature derives from Pufendorf's transition from divine influence as

[182] Hochstrasser (n 178) 2.
[183] Haakonssen (n 43) 36.
[184] N Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007) 114.
[185] Hochstrasser (n 178) 2.
[186] S Pufendorf, *On the Duty of Man and Citizen According to Natural Law – De Officio Hominis et Civis Juxta Legem Naturalem Libre Duo* (F G Moore tr, Wildy & Sons, 1964), bk I, ch. II, S1, 17.
[187] Hochstrasser (n 178) 105.
[188] Shaw (n 8) 32.
[189] George, *In Defense of Natural Law* (n 28) 40, 41; George, *Natural Law Theory: Contemporary Essays* (n 27) 33.
[190] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 161, 162.

the base of obligation in the natural law, towards rationality as the base of obligation.

George and Pufendorf both further embrace human nature to generate a similar understanding about morality. Within *De Jure Naturae et Gentium*, Pufendorf's remarks on the nature of law paints laws as moral entities.[191] Both George and Pufendorf maintain a position that human nature *creates* morals. In that Pufendorf with his 'science of morals'[192] approach, like Grotius, draws a distinction between the clarity of moral concepts and the complex circumstances to which they must be applied. This is similar to Grotius' own understanding of moral uncertainty and so likewise Pufendorf maintains that human nature creates morals. From this Nigel Simmonds believes that Pufendorf's writings represent a shift towards the idea of morality as a distinct and autonomous outlook on the world in line with human nature.[193]

For Pufendorf, all acts were morally indifferent before the imposition of a divine law: '[t]hat reason should be able to discover any morality in the actions of a man without reference to a law, is as impossible as for a man born blind to judge between colours.'[194] Laws, for Pufendorf, as moral entities, had a material element: the most important set of just laws (the natural law) being the will of a superior.[195] Unlike positive laws, their formal element lay only in the will of the divine superior. For this reason, unlike positive law, natural law had a 'necessary agreement ... with its subjects.'[196] As such, mirroring Hobbesian teaching, Pufendorf believed morality was constituted by the individual choosing to surrender rights to society in order to fulfil self-interests.[197] This is one of the defining features of the secular humanist tradition; an agreement that has been reformulated in the relationship of law and obligation within George's work. Obligation transferred to the recipient authority as part of the social contractarian basis.

George has been influenced by this autonomous nature for fulfilment; however, as detailed, he rejects to any great extent the surrender of rights for preservation.

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[191] Buckle (n 49) 60.
[192] Ibid 54.
[193] Simmonds (n 184) 153.
[194] Pufendorf, *De Iure Naturae et Gentium* (n 82) Book 1, Chapter 2 1. 2. 6.
[195] Buckle (n 49) 54.
[196] Pufendorf, *De Iure Naturae et Gentium* (n 82) I. 6. 18.
[197] T J Hochstrasser (n 178) 98.

For Pufendorf and George human nature created morals. This has shown the influence and application George has drawn from Pufendorf's approach towards rationality and human nature. The next section will trace George's movement from Pufendorf's rational nature towards the basic goods.

Rights, religion and society: George's movement from the rational nature of Pufendorf's theory to the basic good of religion

This section will show three key ways George's NNL approach has been influenced by Pufendorf's take on natural rights. First, Pufendorf's account of human rationality arising from right reason has influenced George's own formulation of right reason. Second, Pufendorf's understanding of property rights as an aspect of a) human social life and therefore b) natural rights jurisprudence, will be shown to influence George's own understanding of natural law and natural rights. Third, George's conception of the basic goods is influenced by Pufendorf's understanding of the interaction between society and religion.

First, human rationality is central to both Pufendorf's approach and George's NNL work. Chapter 2 detailed George's approach to moral reasoning. It also detailed the central role played by practical reasoning within NNL. Following in the scholastic tradition, and seen as a defining feature within the secular humanist tradition, human reasoning is central to Pufendorf's understanding of the natural law. Pufendorf stated in *De Officio* that 'the law can be investigated by the light of reason ... the common and important provisions of the natural law are so plain and clear that they at once find assent, and grow up in our minds.'[198] Human rationality enables natural law to be a dictate of right reason. For Pufendorf '[t]he law of nature does not require divine revelation to become known or effective in human affairs.'[199] Rather, it 'can be discovered and understood from the mental endowment peculiar to man, and a consideration of human nature in general.'[200] This consideration of human nature involved an assessment of reason and so, in his rejection of innate ideas, natural law could be investigated by the 'light of

[198] Pufendorf, *On the Duty of Man and Citizen According to Natural Law – De Officio Hominis et Civis Juxta Legem Naturalem Libre Duo* (n 186) I. 3. 12.
[199] Ibid.
[200] Ibid. This is further endorsed by Zuckert who believes that Pufendorf was keen to stress dictates of right reason discover the law - Zuckert, *Natural Rights and the New Republicanism* (n 9) 191.

reason'. Therefore human reason is central to an understanding of the natural law – rationality enables natural law to be a dictate of right reason.

Within the secondary literature Brian Tierney supports this conclusion. He argues that Pufendorf, following the medieval scholastics, believed that right reason reflected revealed truth, and provided the basis for natural law and natural rights.[201] Thus highlighting again one of the most important inferences of reason in the natural rights development, reason, as previously established, is crucial in the development of the natural law and natural rights basis employed by Robert George.[202] As such, it will be important when critiquing George's approach to religion and US religious liberty law in chapter 4.3 and 4.4. NNL has also further followed this tradition. It considers practical reasonableness to be a theory of 'natural law' through the first principles identifying the basic human goods as ultimate reasons.[203] This 'light of reason' should be considered analogous to practical reasoning.

Further influence regarding moral reasoning within George's theory can be seen in Pufendorf's political theory. Central to this was the understanding that natural law could be deduced from the rational social nature of humanity.[204] It was shown in the previous section that Pufendorf understood a detached, autonomous view of morality to achieve this. Pufendorf drew a distinction between the way there was a created moral world containing certain permanent features, namely those of basic human nature and a theistic creation of the physical world in a way that follows laws discoverable by human sciences: '[e]veryman, so far as in him lies, should cultivate and preserve towards others a sociable attitude, which is peaceful and agreeable at all times to the nature and end of thee human race.'[205] This led to the understanding of a divine act creating human nature and so allowed a detached application of human morals.

In my view, George adheres to this process. He argues that 'many moral truths, including some that are revealed, can also be grasped by ethical reflection apart

[201] Tierney (n 60) 128.
[202] It was earlier identified that George draws upon Pufendorf to present human nature as a law of practical rationality - George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 161, 162.
[203] J Finnis, 'Natural law and legal reasoning' in George, *Natural Law Theory: Contemporary Essays* (n 27) 135-136.
[204] K Haakonssen (n 43) 36, 60.
[205] Grotius, *De Jure Belli Ac Pacis* (n 25) II III 14 208.

from revelation.'[206] It was shown in chapter 2, and earlier in this chapter, that George's Roman Catholic ethical theory expressly includes, though is not dependent upon, a place for revelation to supplement philosophical conclusions based upon the practical reasoning.[207] In this sense, for both George and Pufendorf, morals can be accounted for as a human construct without lapsing into scepticism/relativism.[208] This approach to morality will be shown later in this chapter to be a large influence in George's view of rationality.

In contrast it was earlier shown that Grotius took a modified separatist view on the ultimate foundation for the law of nature. Though Pufendorf drew significantly on the work of Grotius, unlike Grotius, for Pufendorf the law of nature was not independent of the divine will. This is because although it is true that natural law can be correctly described as a 'dictate of right reason' this does not mean that it can have a 'degree of validity; if God is left out of [the] account.'[209] Human reason alone cannot impose obligation.[210] Pufendorf's modification was to base the obligation to obey the natural law on both the 'formal and material elements of the divine will.'[211] Now that this section has analysed Pufendorf's approach to human rationality the next will turn to property rights.

Secondly, this subsection will consider the ways Pufendorf's understanding of property rights have influenced George's own understanding of natural law and natural rights. Within rights discourse literature, Buckle has written that Pufendorf's account of property 'can be called natural.'[212] Buckle has further identified Pufendorf's requirement for natural law to be a dictate of right (or 'sound') reason. This involves the provisions of natural law being discovered by a more exacting and reflective process of rational enquiry – such as reflection upon property rights.[213] This is important as these natural property rights[214] are

[206] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 83.
[207] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 64. See also ibid 169.
[208] Haakonssen (n 43) 61.
[209] Pufendorf, *De Iure Naturae et Gentium* (n 82) II. 3. 13, 19.
[210] Buckle (n 49) 62.
[211] Ibid 127. See also S Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics* (William B. Eerdmans Publishing Co, 2006) 179.
[212] Ibid 107.
[213] Ibid 66.
[214] Importantly Pufendorf's 'correlativity thesis' is an attack on Hobbesian primary natural rights. Tuck has stated the context of this attack was actually on the Hobbesian state of nature - Tuck (n 2) 150.

natural in that they are 'either necessary to peaceful social existence, or possess a rational utility to that end.'[215]

To draw comparison with the rational reflection upon the basic human goods, property rights are natural and arise in human social life and dictate preservation.[216] In *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism*, George noted that 'these [basic] goods … are the subjects of the very first principles of practical reason that control all rational thinking with a view to acting'.[217] Like Grotius, Pufendorf regarded natural law as 'welded' to human development.[218] This shows an important modification in natural rights thought from human nature, one which incorporates social nature and governance,[219] like an old common law rule being amended to incorporate new statutory law.

Thirdly, it will now be considered whether George's basic human goods conception is influenced by Pufendorf's understanding of the interaction between society and religion. From his theory of the state,[220] Pufendorf's control of religion rested with civil society. He believed that 'historically those states have fared best that have entirely subordinated religion to the ends of the state.'[221] This was because Pufendorf regarded all disputes over religion as presenting a potential danger to public safety.[222] This is a controversial position. As noted, for George, the realisation of the good of religion is pivotal to human flourishing. It is agent dependent rather than state controlled and, as was discussed earlier, George thinks that rights arising from religion can be enforced to derive independence from the state. This position has been furthered by the concept of the basic good of religion within George's work. For the individual agent the religious good is important because 'the flourishing of a man's spiritual life is integral to his all-round well-being and fulfilment'.[223] Pufendorf's approach is to be contrasted with George's understanding of the religious good that rests with the human agent

[215] Buckle (n 49) 81.
[216] Ibid.
[217] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 115.
[218] Coyle and Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (n 70) 34.
[219] This conclusion will be further drawn out in chapter 4.
[220] Skinner (n 3) 184.
[221] Pufendorf, *De Iure Naturae et Gentium* (n 82) 108.
[222] Buckle (n 49) 108.
[223] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 119.

rather than society. George's approach to NNL rejects the Pufendorfian place for religion. As such, no direct or indirect influence can be found here. The privileged place given to religion by George will form discussion in chapters 4 and 5 when considering what George might think about religious liberty cases taken under the provisions of the Equality Act 2010.

George has again narrowed natural law themes into natural rights jurisprudence following Pufendorf. This is because it has been shown that, for Pufendorf, in removing a Judaeo-Christian God as the provider of natural law; subordinating the place of religion; and providing more emphasis upon human rationality as the base of obligation, this led to natural law becoming accessible through human nature. Following from this, George has been influenced by linking human nature and morality. However, George provides a higher place for religion and further rejects the surrender of rights for self-preservation. This use of natural rights will now be seen in light of John Locke.

3.6 John Locke

Introduction

This section will show that George has drawn upon John Locke, the final secular humanist scholar to be discussed in this chapter. Specifically it will detail that George has drawn inspiration from John Locke's development of the Protestant natural rights discourse: George has been impacted by Locke's narrowing of natural law in natural rights themes. It will demonstrate this in two ways: first, through Locke presenting property rights, this being influential in the common law development of a social contract theory focused upon human flourishing, and second, Locke's combination of right reason and reflection presenting a moral process similar to that found in George's NNL.

George's basic good method: deriving human sociability from human nature can be seen as an escape from the state of nature

It has been shown that George modifies the self-preservationist/social contractarian thought of Hobbes and Pufendorf. The latter's natural rights jurisprudence was clearly a precursor to John Locke's work in the *Essay Concerning Human Understanding.*[224] In George's interpretation of the 17th

[224] Haakonssen (n 43) 38.

century condition Locke is a leading figure. Once again, Locke followed the trend within the secular humanist tradition, by identifying in the *Second Treatise of Government*[225] that the fundamental law of nature is to preserve humanity in others as well as in oneself, through this basis 'natural rights are powers to fulfil the fundamental duty of natural law.'[226]

Coyle has observed that through the focus upon humanity by the secular humanist scholars, property rights emerged from the focus upon humankind's relationship with the natural world.[227] This basis, and influence upon George, has already been discussed earlier in the chapter; however, Locke explored property in terms of its theological origins and the role in human social life.[228] From this position Locke's four notions of property rights – life, health, liberty and the state – provided an approach to human social life from a basis of human nature. Property rights enabled Locke, like Grotius, to approach human sociability from human nature.[229]

For George, moving from the natural rights discourse brought about by the secular humanist tradition and focusing upon contemporary liberty provides that 'where it [religion] flourishes and is healthy, [it] is among the key institutions of civil society providing a buffer between the individual and the state.'[230] This basis derives from the basic human goods. Here it may be shown that George's basic human goods: life, knowledge, play, religion, aesthetic experience, practical reasonableness and sociability, arguably encompass all of Locke's property rights, with the exception of the state. The reason for this lies in George's rejection and modification of the seventeenth century social contract theory. In *Making Men Moral*, George notes that Locke presented a familiar theory of the social contract.[231] Locke used a language of rights interchangeably with the language of property: by human nature beings exist in a 'state of nature' based upon equality and liberty.[232] Locke's conception of natural law provided a contractual agreement with the government to escape the state of nature: '[t]he *State of*

[225] J Locke, *Second Treatise of Government* (first published 1690, Hackett 1980).
[226] Haakonssen (n 43) 55.
[227] Coyle and Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (n 71) 83.
[228] Ibid 83.
[229] Grabill, (n 211) 178.
[230] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 114.
[231] George, *Making Men Moral: Civil Liberties and Public Morality* (n 16) 139.
[232] Zuckert, *Natural Rights and the New Republicanism* (n 9) xviii.

Nature has a Law of Nature to govern it, which obliges every one'.[233] This method of escape, based upon the social contract theory, has led George to view Locke as the '*par excellence*' natural law thinker.[234]

George ultimately regards Aquinas as being the classic pre-modern natural law thinker but here holds Locke in high regard.[235] Why does George hold Locke in such high regard in *The Clash of Orthodoxies*? The reason lies in Locke's natural law basis providing a bulwark against the oppression of the state. It has earlier been shown that in specific circumstances George would use the natural law against the state's legal enforcement.[236] Locke's escape from the 'state of nature' arising through liberty has led to this conclusion by George. Here George enlarges the good to encompass the natural rights discourse, via the work of the secular humanists, to provide a 'good based opposition'.[237] George believes that the good encompasses the (natural) right to provide this 'good based opposition'.[238] Importantly for analysing the right to freedom of religion in chapters 4 and 5, George employs a basic good method to a) escape a contemporary 'state of nature' and b) provide opposition towards the enforcement of laws restricting liberty imposed by the government.

However, a warning is provided by Zuckert who identifies natural rights, in their Lockean version, to be theoretically different from Thomistic natural law and they are further different from 'those versions of natural rights theory that quasi-Thomists such as Finnis are promoting.'[239] As such, Zuckert identifies that Locke's natural rights differs to those of NNL because of their embrace of nature. This fails to appreciate the basic nature of the good and, as identified in this chapter, the level of influence drawn from secular humanist tradition's move towards human nature.

[233] J Locke, *Two Treatises of Government* (first published 1698, P Laslett ed, 2nd edn, Cambridge University Press, 1967) 289.
[234] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 163.
[235] Ibid 162, 163.
[236] George, *In Defense of Natural Law* (n 28) 229.
[237] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 41) 114.
[238] This concept will be further developed in chapter 4 and 5.
[239] Zuckert, 'Do natural rights derive from natural law?' (n 170) 730.

The response to the seventeenth century situation: Robert's George's application of right-reason towards Locke's modified rationalist basis

From Locke's position of self-preservation, human knowledge discerned the natural law through right reason.[240] George will in this chapter be shown to draw further influence from this understanding of human reason. Locke identified that the law of nature and the law of reason are combined,[241] indeed 'the Law of Nature … is the Law of Reason.'[242] Coyle and Morrow have, however, disagreed and identified Locke's denial of the Hobbesian belief that the natural law could be 'simultaneously binding upon human beings and traced back, as a while, to the principle of self-preservation.'[243] Is there general agreement that the source of human knowledge is the base of reasoning?

This approach to reason can instead be narrowed in focus here, as it has been observed Locke avoided speaking of natural law as a dictate of right reason. Alan Watson has identified that the process should more aptly be understood as the requirements of natural law being worked out in the process of reasoning.[244] This is a matter of word play: both right reason and reasoning apply law to human nature. Both of these processes may have influenced George presenting human nature as a law of practical rationality.[245] This is because human nature is contingent within the approach. Human nature was earlier identified as key to Robert George's moral philosophy.[246]

George can be seen to draw further influence from Locke's modified rationalist basis. Roger Trigg has insightfully noted this modified rationalist basis, which, for Locke, held that 'reason was not intrinsically opposed to religion but was itself founded on it.'[247] As such, Locke argued knowledge of the natural law arose partly from revealed truth (special revelation), and partly from natural law itself (general

[240] Watson has identified, in contradiction, Locke tends to avoid speaking of natural law as a dictate of right reason. Although natural law is a 'law of reason' and a 'dictate of reason', founded in human nature and implying sociableness, reason discovers innate law within the person - A Watson, *The Nature of Law* (Edinburgh University Press, 1997) 139. This fails to understand Locke's higher dependence for rationality, grounded in an objective nature, which ensures 'right reason.'
[241] Locke, *Two Treatises of Government* (n 233) i, 101; ii. 63, 124, 136.
[242] Ibid.
[243] J Locke, *Essays on the Laws of Nature* (W Von Leyden ed, Clarendon Press, 1954) Essay VI, 181. 44.
[244] Watson (n 240) 146, 147.
[245] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 161, 162.
[246] George, In Defense of Natural Law (n 29) 40, 41; George, *Natural Law Theory: Contemporary Essays* (n 27) 33.
[247] Trigg (n 181) 274, 275.

revelation).[248] This allowed independent justifications for self-preservation based upon reason: 'whether we consider natural *Reason,* which tells us … *Or Revelation,* which gives us an account.'[249] This has contributed to the position outlined by George earlier in section 3.3, one which allows a place for revelation to supplement philosophical conclusions based upon the practical reasoning.[250]

In my opinion George takes a very specific approach to this Lockean methodology. He draws upon a passage in which Locke wrote: '[A person] is a thinking intelligent Being, that has reason and reflection'.[251] George has termed this approach 'Lockean Dualism'.[252] Writing in *Embryo: A Defense of Human Life*, George believes this approach to be close to the view given by NNL. This is because Locke's modified rationalist argument accessed the divine through unassisted human reason.[253]

However, George believes 'Lockean Dualism' requires reason and reflection to be 'actively possessed'. It separates entities from their bodies, which come to exist 'when an entity more or less immediately capable of reason and reflection begins to exist.'[254] This is a refinement of Lockean theory, focused upon the embryonic stage of development.[255] Locke's view of body-mind dualism involving the person as the subject here provides an analogous interpretation to the approach adopted by George.

Locke's *Essay Concerning Human Understanding*[256] further ensures that natural law is part of the divine law. Hence, the dualistic approach. Buckle has identified this to be through use of our natural rational faculties. From the combination of the law of nature and law of reason, Locke's method provides a source of knowledge of the human condition which is distinct from, but in accord with, divine revelation.[257] NNL also depends on the divine will but uses natural rational

[248] Coyle and Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (n 70) 83.
[249] Locke, *Two Treatises of Government* (n 233) Ii. 25.
[250] George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 64.
[251] J Locke, *An Essay Concerning Human Understanding* (H P Nidditch ed, Clarendon Press, 1979) Essay II, xxvii, 9, 246.
[252] George, *Embryo: A Defense of Human Life* (n 51) 64-65.
[253] Zuckert, *Natural Rights and the New Republicanism* (n 9) 189.
[254] George, *Embryo: A Defense of Human Life* (n 51) 64-65.
[255] *Thornborough v American College* 476 US 747 (1986). See George, *The Clash of the Orthodoxies: Law, Religion and Morality in Crisis* (n 45) 71.
[256] Locke, An *Essay Concerning Human Understanding* (n 251) I.3.6.
[257] Buckle (n 49) 125.

faculties to engage basic goods. Yet rather than innate, these basic goods are *self-evident.* It is in this sense that while NNL could be considered similar to 'Lockean dualism', the approach differs.

This self-evident approach is teased out by Weinreb in George's *Natural Law Theory: Contemporary Essays.*[258] Weinreb has written that natural law is self-evident to the reasonable person.[259] Arguably, this is the process by which Locke referred to natural law to support his natural rights argument – a Judaeo-Christian Creator's telos self-evidently being the law of his creation: 'Reason…is that law'.[260] If correct, this line of thought about natural law can be also be found in George's thought – George is applying Locke's natural rights conclusions by appealing to the self-evidency of right reason. Chapter 5 will show the fruits of these conclusions through critical treatment of George's NNL views towards case law application, in order to analyse religious freedom related to the Equality Act 2010. The next subsection will show how George achieves natural rights conclusion through embracing the Lockean property right of liberty.

George's understanding of public morality invokes Lockean sociability

In addition to George's identification of 'Lockean dualism', in George's edited volume, *Natural Law and Public Reason,* Stephen Macedo views Locke as providing a base of 'civil interests' which depict religious and other fundamental differences which provide 'an adequate base for 'social unity'.[261]

In response to Locke's civil interests, George has provided a further conception of morality. This follows George's understanding that morals concern our day to day life, while ethics provide a theoretical reflection on morals.[262] It was earlier identified in this chapter that George adopts a concept of public morality to reject the Hobbesian state of nature.[263] For George, law, by shaping morality prescribes a public morality, this is a public morality "based on certain civil interests."[264] These civil interests are those reasonable people share and certain principles of

[258] George, *Natural Law Theory: Contemporary Essays* (n 27).
[259] Ibid 33.
[260] Locke, *Two Treatises of Government* (n 233) bk. 2, sect. 6, 311.
[261] S Macedo, 'Are Slavery and abortion hard cases?' in George, *Natural Law and Public Reason* (n 46) 19-20.
[262] P E Devine, *Natural Law Ethics* (Greenwood Press, 2000, USA) 1.
[263] George, *Natural Law and Public Reason* (n 46) 20.
[264] Ibid 27.

liberty and equality that reasonable people are prepared to affirm.[265] George proposes a public morality based upon reasonable liberty.

This is because George's conception of morality equally invokes a sense of sociability concerning daily existence and embraces one of Locke's property rights – namely liberty. Jeremy Waldron has highlighted the concept of liberty within Locke's famous passage in the *Two Treatises of Government*: 'That all Men by Nature are Equal … which was the Equality I there spoke of … being that equal Right that every Man hath, to his natural freedom'[266] and so Waldron suggests that Locke's doctrine of natural rights conferred liberty as a property right.[267] Following in his rejection of the Hobbesian understanding of liberty, George's public morality also rejects Lockean liberty as a personal class preference and interest.[268] However, George here differs in his approach to Locke: George's conception of public morality invokes Lockean sociability and right reason which leads to George embracing the Lockean property right of liberty in the human condition.

In summary, George has further refined his conception of NNL through drawing upon Locke. This has been achieved in two ways. First, through drawing upon Lockean property rights to provide a rights discourse grounded in a 'good based opposition'. This has led to an escape from the state of nature and provided resistance against the state. Second, George's conception of public morality invokes Lockean sociability which has led to George embracing the Lockean property right of liberty.

3.7 Conclusion

George's natural rights development has been influenced by the secular humanist tradition. George draws upon the secular humanist tradition – a tradition that has embraced the interplay between the Roman Jurists' classifications of laws so as to narrow natural law themes into natural rights jurisprudence.

In this chapter it was shown that George's work reflects the narrowing of natural law jurisprudence into a natural rights discourse by, first, embracing Grotius'

[265] Ibid.
[266] Locke, *Two Treatises of Government* (n 233) II, sect. 54. 322.
[267] J Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, 1987) 53. See Locke, *Two Treatises of Government* (n 233) II, sect. 95. 348.
[268] George and Wolfe, *Natural Law and Public Reason* (n 46) 20.

methodology surrounding human nature to link natural rights into property rights. This invoked Grotius' views concerning human nature.

Second, it is from Hobbes that George has derived a basis for an embrace of reason focused on both self-preservation and a move toward liberty – liberty reduced into a basic reason for action in alignment with the basic goods. This also detailed George's movement from Hobbes to provide individual, natural rights protection against the state. This will be important for chapter 5's applied critique surrounding religious equality law. George was shown, however, to reject Hobbesian social contract theory.

Thirdly, it was highlighted that George has drawn influence by accessing the natural law via human nature and the human condition. Here George follows Pufendorf. Through Pufendorf removing a Judaeo-Christian God as the provider of natural law and further providing more emphasis upon human rationality as the base of obligation, this has contributed to the modified rationalist basis adopted within NNL.

Finally George was shown to draw upon the Lockean property right of liberty to provide a 'goods based opposition' in further opposition towards certain state made law. George's 'opposition' will find fruition when applied to analysing the right to religious freedom in religious equality law in chapters 4 and 5.

A motif of fundamental rights to secure liberty has repeated throughout this chapter. This chapter has shown the influence and comparisons George has drawn from the secular humanist scholars to move from natural law to natural rights. From this basis, chapter 4 will critique George's approach to religious equality law by engaging with a concept which will be termed 'legal liberty'. This concept will be introduced and shown within George's work to display the American Constitution as a paradigm for the discourse of natural rights built upon reason.

Chapter 4 – Robert George's Approach to Religious Discrimination and Equality Law

Table of Contents

Chapter 4 – Robert George's Approach to Religious Discrimination and Equality Law

4.1 Introduction

This chapter will consider Robert George's approach to equality law, his understanding of and contribution towards both the basic good of religion and religious liberty discrimination case law. It will show that, for him, law is the medium in which it is possible to talk about the good and, more specifically, about religion not only as a basic human good but also a public good in the sense that the good is prior to the right and rights within equality law. As such, it will demonstrate George's approach to discrimination and equality law. I analyse George's new natural law (NNL) thought and this will be shown to engage the public good of religion in order to provide a more effective approach towards discrimination law.

In this thesis I refer to 'religious equality law' when speaking about the sense of equality in relation to the Equality Act 2010 (EqA 2010). This is a branch of the larger concept of equality. The concept of equality itself is a very welcome concept and other derivations such as gender equality are racial equality are especially welcome. The critique in this thesis will only focus upon equality as it relates to religion. Religious equality law is law attempting to protect all people equally, regardless of religion or belief. Religious equality law governs the legal recourse that can be taken by individuals attempting to both assert and protect religious belief. Religious equality law will the term that I use in the remainder of this thesis and is a term that is only applicable to the religious liberty law that will be analysed, this is why the term religious equality law is used when talking about the EqA 2010 and related cases. Integral to this critique is the EqA 2010. The aim of the EqA 2010 can be identified to 'achieve the harmonisation, simplification and modernisation of equality law.'[1]

An example of this harmonisation in the EqA 2010, is that religion or belief sits alongside eight other 'protected characteristics'.[2] An important consideration in this thesis is whether such harmonisation aims and attempts to change the

[1] B Hepple, *Equality: The New Legal Framework* (Hart, 2011) 173.

[2] The protected characteristics are listed in the Equality Act 2010 s.4: 'age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.'

standing of religion or belief by modernising religious equality law and putting it on a similar footing (or even below) the other protected characteristics.

Bob Hepple has termed the only type of equality to be considered by the EqA 2010 as *status* equality.[3] This is the association between one or more of a limited number of characteristics and the treatment afforded to the individuals to which they belong – here being the protected characteristics. This is noteworthy for two reasons: first, because there are concerns that religion or belief is different from the other characteristics and thus ought to be protected differently. Secondly, within the EqA 2010, the characterisation of the protected characteristics has caused confusion in that, unlike the duty to advance equality in respect of sexual orientation, the inclusion of religion encourages, according to Lord Lester, 'division, not cohesion.'[4] Why does the inclusion of religion cause such concern and division? Throughout this chapter religious equality law will be shown to be engaged through George's work and approach to religion. This chapter will examine the conflict caused by religious equality law and suggests a way out of the division through critiquing George's theory, which will be analysed within both an American and English context.

First, section 4.2 will begin to show George's approach towards religious equality law. It will do this by discussing the public sector equality duty. Section 4.2 will also turn to the requirement of 'due regard' within this public sector equality duty. In this section it will be argued that any discussion of NNL is now dictated under the banner of equality and enforced by a 'due regard' public sector duty. This section will also consider whether a focus upon the concept of human dignity, rather than equality, is a better method to use to talk about the good of religion. The concept of liberty will further be used to show some of the current tensions within religious equality law. It will be argued that George views liberty in the form of religious liberty as intrinsically linked with the public good of religion. This section will also show why, in part, the analysis and application of George's thought showing religion as a public good is a more effective approach towards religious equality law.

[3] Hepple (n 1) 17.
[4] Ibid 135.

Second, George's views on the US Constitution will be conveyed in 4.3 through analysing George's writing and litigation in American Courts. The way George applies his thought to American religious liberty case law will be assessed. This will expose and critique the weaknesses in his theory. Section 4.3 will further show that George holds the US Constitution as a paradigm for a natural rights discourse. This provides authority to enforce the natural law and to protect the natural rights held by the legislature or judiciary.

Next section 4.4 will demonstrate George's approach to discrimination law by considering the juxtaposition in his work between the three constitutive aspects of religious liberty: first, the basic/public good of religion; secondly, the connection between human flourishing and religion; and thirdly, the role of common human reason in the good of religion. This last constitutive aspect (the role of common human reason) will produce a 'reasonableness test'. Through combining this test with a 'responsibilities discourse', which will also be outlined in this chapter, it will demonstrate George's unique approach to religious liberty adjudication. This will detail the tensions within NNL. This will be further applied in the fifth chapter.

Throughout all these sections, in order to demonstrate understanding and application of George's approach, there will be a critical application of George's NNL views to substantive religious discrimination law. This will be achieved through considering statutory and case law. Turning first to statutory law, an examination of statute (predominantly the EqA 2010) which replaced the Employment Equality (Religion or Belief) Regulations 2003,[5] will be considered throughout the chapter. This will begin to show what George might think about the religious liberty cases taken under the provisions of the EqA 2010. Turning next to the case law: first, section 4.3 will focus on the American case law that George has frequently dealt with at length in constitutional matters, ethics and religious communication – (*Romer v Evans* (1996) US 620; *Griswold v Connecticut* 381 U.S 479 (1965)); and second, it will focus on the leading case

[5] The Equality Act 2010 is not, of course, the only source of equality (for instance, Article 157 of the Lisbon Treaty and Article 14 of the European Convention on Human Rights) but for the purposes of this thesis the EqA 2010 provides a contentious case law base.

within equality/religious liberty law – (*Eweida and Others v The United Kingdom*[6] and conjoined cases).

So in order to analyse George's basic good approach to religious equality law in section 4.2, I will critique George's approach towards the public sector equality duty; evaluate the requirement to have 'due regard' to the public sector equality duty; consider the concept of dignity towards the wider understanding of equality; and criticise George's views concerning the concept of liberty within equality law. Section 4.3 will display analysis and application of George's approach to American religious liberty case law, and finally section 4.4 will construct the 'natural rights and the common good' approach that George applies to American and European constitutional case law to highlight the tensions within applied NNL. This will determine whether a unique approach can be brought out from a reconstruction of both George's NNL case law analysis and George's jurisprudence in the application of the EqA 2010.

4.2 Equality and Discrimination on grounds of religion and belief: a basic good approach to religion

Introduction

Both substantive equality law and academic approaches towards equality law are problematic as applied to religion or belief. Religion or belief is the most fertile protected characteristic, with the most relevant claims being taken under this ground in English anti-discrimination law claims.[7] It will be shown in the subsection 'Public Sector Equality Duty' that this difficulty for religious equality law arises because equality law now applies to different conceptions of the good under a different approach to religion. This discussion will also ask whether equality law's struggle to incorporate the public good of religion leads to a hierarchy emerging in the balancing of protected characteristics within the EqA 2010.

[6] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This case will form the subject of critical analysis in chapter 5 and it was introduced in chapter 1.

[7] M Gibson, 'The God 'Dilution'? Religion, Discrimination and the case for Reasonable Accommodation' (2013) 72(3) CLJ 578, 590.

This section will turn next to the requirement of 'due regard' within the public sector equality duty. In this subsection it will be shown that any discussion of NNL is now dictated under the concept of equality and enforced by the said duty. Following this, the subsection 'Dignity within Equality' will consider whether a focus upon the concept of human dignity, rather than equality, is a better method to talk about the good of religion. For the purposes of the central thesis, it will be argued that human dignity is a branch within the wider tree of equality that exists in the goods based approach to protected characteristics. This is because human dignity allows individual flourishing by exercising religious conscience in accordance with a NNL approach. This subsection will also show why my modified natural law critique, portraying religion not only as a basic good but also as a public good, is a more effective approach towards religious equality law. Finally, the subsection entitled 'Liberty within Equality' will show that George views liberty in the form of religious liberty as intrinsically linked with the public good of religion, and also that through the lens of liberty, law is the medium in which it is possible to talk about the good.

Public Sector Equality Duty

This section will demonstrate and analyse George's approach to discrimination and equality law as it relates to religion. Law, and equality law in particular, following the passage of the EqA 2010, is becoming increasingly important in the 'public life of developed liberal democracies such as the United Kingdom'.[8] Within this public life, equality and diversity are becoming the dominant jurisprudential concepts[9] of public discourse.[10] That said, there are numerous problems with the concept of 'equality' impacting religious liberty, both in relation to substantive religious equality law and with the public sector equality duty.

For instance, Rivers has suggested that one problem with the concept of equality is that it reverses a traditional understanding of law within a democratic state by 'justifying new restrictions on the civil liberties of individuals and groups who

[8] J Rivers, 'Good News for Law?' (2014) 19(5) KLICE Ethics in Brief 1. Sandberg has termed the Equality Act 2010 to be one of the 'most important statutes' in domestic law - R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 128.
[9] T Etherton, 'Religion, the Rule of Law and Discrimination' (2014) 16 (3) Ecc. L.J. 265, 269.
[10] As a leading concept, Roger Trigg has interestingly noted that equality originated as a Biblical teaching – R Trigg 'Religion in the Public Forum' (2011) 13(3) Ecc. L.J. 274, 276.

adopt a different ethical foundation.'[11] This is the inherent nature of the public sector equality duty.[12] Statutory duties brought about by ss.149-157 of the EqA 2010[13] provide for a respected, individualised authenticity. This is prescriptive to the extent that it narrows the options and opportunities of difference. As such, the duty imposed by equality law is a negative one.[14] In other words, the duty has a negative impact, and an opportunity to prescribe preferred conceptions of equality is enabled. This theme will be developed throughout this chapter.

George's views on equality and human worth stem from the conclusion that the 'good is prior to the right, and, indeed, to rights.'[15] This is what I will term the **'**goods-rights synthesis'. The right to religious liberty is preceded and legitimised by the basic good of religion. The 'goods-rights synthesis' will be the focus of this section and also s4.4 where this approach will be criticised. The connection between religion and religious liberty is legitimised for George by two factors: first, the fact that the concept of human dignity includes religious freedom: 'to respect people, to respect their dignity, is to, among other things, honour their rights, including the right to religious freedom'.[16] Secondly, it follows for George that, 'human rights, (including the right to religious liberty) are shaped, and given content, by the human goods they protect.'[17] Here the right to religious freedom is seen to be a branch of morality dependent on the good. George further elaborates upon this conclusion:

> Because faith of any type, including religious faith, cannot be authentic – it cannot be faith – unless it is free, respect for the person (that is, respect for his or her dignity as a free and rational creature) requires respect for his or her religious liberty.'[18]

[11] Rivers, 'Good News for Law?' (n 8) 2.
[12] A public sector equality duty is imposed upon public sector authorities to 'reduce the inequalities of outcome which result from socio-economic disadvantage' – s.1(1) of the EqA 2010. Further the statutory duties to advance equality in ss. 149-157 include the protected characteristics (s.149(1)(a)-(c); s.149(7)) and focus upon both 'public authorities' (s.149(1)) and individuals who exercise 'public functions' (s.149(2)) .
[13] The public sector equality duty has been identified as one of the prime ways in which the EqA 2010 aims to buttress the law to support progress on equality. See S Fredman, 'The Public Sector Equality Duty' (2011) 40(4) ILJ 405.
[14] J Rivers, 'Promoting Religious Equality' (2012) 1 Ox. J Law Religion 2, 386.
[15] R P George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Isi Books, 2013) 117.
[16] Ibid.
[17] Ibid.
[18] Ibid 119.

Accordingly, any right to religious liberty is governed by equality[19] and the good of religion,[20] and so the connection between religion and religious liberty is further strengthened. The 'goods-rights synthesis' will be used to assess other viewpoints towards equality impacting religion throughout this section, in order to provide a critique of George's thought regarding freedom of religion.

The good of religion has been applied to equality by Rivers who understands juridification as the breaking down of the familiar distinction between, *inter alia*, law and ethics in public discourse.[21] This distinction is dependent upon the public promotion of equality and diversity, for instance, via the public sector equality duty. Rivers' approach is close to my analysis of George's thought because Rivers sees equality as a framework no longer for the pursuit of private ends (rights) or as a tool to achieve democratically agreed public good (liberties). Instead, for Rivers, the law 'becomes the medium in which we talk about the good'.[22] This approach is used by Rivers to criticise the jurisprudential impact made by equality law. George does not explicitly state that law is a medium in which it is possible to talk about the good of religion. However, as the preceding chapters have shown, work here can build on Rivers' approach because analysis indicates that NNL is focused upon the good and there is sense in the suggestion that law is the medium for such. This chapter will then seek to provide a basis for viewing both substantive equality law and also academic approaches towards equality law as problematic for conceptions of equality when applied to religion and belief. This is because it will be shown that religious equality law now applies to different conceptions of the common good.

Would George be satisfied by the approach taken to prevent discrimination within the EqA 2010? This section will argue that equality law now applies to different conceptions of the good, whereas George adopts a different approach. Under the analysis of George's NNL thought, practical reason highlights that religious freedom and/or freedom from religious discrimination should be treated as a right supported by the state. The methodological basis under the EqA 2010 arguably does not go far enough, as it does not explicitly mention a form of positive

[19] This will be developed in section 4.4.
[20] Later in this subsection it will be shown that the good preceding the right to religion provides for a public good of religion.
[21] Rivers, 'Good News for Law?' (n 8) 1.
[22] Ibid 2.

discrimination for religious believers (e.g. conscientious objection). As such, s.149(3) of the EqA 2010 could go further to promote a form of 'justified proportionate inequality'.[23]

However, O'Cinneide and Liu have argued that the EqA 2010 is designed to give effect to the 'principles of equal treatment, non-discrimination and respect for human dignity'[24] guarded by the state. *Prima facie* these broad principles in the EqA 2010 may appeal to George's NNL approach. This is because religious liberty, based upon the good of religion, also depends upon action taken by the state but it is shown that this may not go far enough to enable, for instance, positive discrimination for religious liberty.

For George, there is a 'distinct' basic human good of religion.[25] This is George's basis to prevent discrimination. It follows that religion is a legitimate concern for the common good of political society.[26] The basic human good of religion is to be held as a superior good because it is 'uniquely architectonic in shaping one's pursuit of and participation in all the basic human goods.'[27] For this reason, George's understanding of the basic good of religion will be termed a 'public good'.[28] This terminology is used because the good of religion is constituted by 'a good whose pursuit is an indispensable feature of the comprehensive flourishing of a human being'.[29] The definition for flourishing, and human flourishing, will be explained and analysed in section 4.4 'Religious liberty leading to human flourishing'. In this section, however, it becomes apparent that the public good of religion is enabled by the good preceding the right to religion. The 'goods-rights synthesis' is here integrated, providing a basis for law to be the medium under which it is possible to talk about the good of religion as, in particular, a public good.

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[23] This will be the subject of discussion in the subsection: 'Public Sector Equality Duty 'Due Regard' in Equality Law'.

[24] C O'Cinneide & K Liu, 'Defining the limits of Discrimination law in the United Kingdom: Principle and Pragmatism in Tension' (2015) 15(1-2) IJDL 80, 95.

[25] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 119.

[26] R P George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (DPhil Thesis, University of Oxford 1986) 219, 373-374. George suggests that the basic good of religion 'is a reason for political action and an aspect of the common good of civil society.' R P George, *In Defense of Natural Law* (Oxford University Press, 1999) 132.

[27] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 119.

[28] This concept will further be developed in s4.4 and chapter 5.

[29] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 119.

As shown in chapter 3, the basic human good of religion is important because 'the flourishing of a man's spiritual life is integral to his all-round well-being and fulfilment'.[30] This is significant because, first, it demands a higher position as a public good to enable pursuit of the other goods. Second, a public good of religion ensures that religion takes a higher position in criticism of the law, a 'new natural law' to critique positive law that would seek to restrain liberty. Given this presentation of the good of religion the EqA 2010 presents a conflicting view of religion to that taken by George. This is because equality and discrimination law on grounds of religion or belief, within a state that seeks to promote equality and diversity, presents a public discourse at risk of minimising the good at the expense of religious liberty. Later in this subsection and in the final subsection of s4.4 this claim will be established and it will be shown whether the 'public sector' enforcement of equality can be criticised by my analysis of George's thought.

The public sector equality duty and religion

Does the public sector equality duty work for religion and belief? If we were to apply George's understanding of a NNL approach to religious equality law, does the public sector equality duty enforce and implement an understanding of religion as a public good? I will discuss whether the protected characteristics allow for George's understanding. Under s.149(7) of the EqA 2010 religion or belief is only one of the protected characteristics. Indeed Rivers has observed that it is already the case, and is likely to continue, that equality arguments tend to win over human rights arguments because the legal obligations in equality arguments are much more precise.[31] It leads to claimants being unable to effectively rely upon Articles 9 and 14 of the European Convention on Human Rights 1950 (ECHR). The precise scope of this will be seen in chapter 5. This unsatisfactory solution has led Hepple to argue that through equality legislation the harmonisation of equality law within the area of religion and belief has progressed too far.[32] Religious equality law may be seen to be dominant over

[30] Ibid.
[31] Rivers, 'Promoting Religious Equality' (n 14) 399. It is ironic that equality legislation that has been termed by Hepple as a method to 'change organisational policy and behaviour, so as to remove what is loosely described as 'institutionalised' status equality', because Hepple's definition may in fact be actually *contributing* to a categorised enforcement resulting in inequality - B Hepple, 'Enforcing Equality Law: two steps forward and two steps backwards for reflective regulation' (2011) 40(4) ILJ 315.
[32] Hepple, *Equality: The New Legal Framework* (n 1) 177.

matters involving religion and belief. These points made by Rivers and Hepple indicate that the public sector equality duty is not beneficial for religion.

A further problem for religious freedom within the EqA 2010 is that it does not introduce a notion of anti-discrimination arising from religion or belief. In other words, with religion or belief sitting alongside the eight other 'protected characteristics' in s.4 of the EqA 2010, this prescriptive approach fails to distinguish religion as an objective characteristic. Sedley LJ held in *Eweida v British Airways Plc* that while all of the other protected characteristics 'apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice.'[33] Sedley LJ here distinguishes religion as an internal, higher level of good within the basic goods, a matter of choice. This may be necessarily incorrect because arguably gender re-assignment[34] and marriage/civil-partnership are all matters of choice. Moreover, in *R (RJM) v Secretary of State for Work and Pensions,*[35] Lord Neuberger stated that: 'I do not accept that the fact that a condition has been adopted by choice is of much, if any, significance.'[36] Here, Lord Neuberger describes religion (and even the protected characteristic of sex) to possibly be matters of choice within equality law. This shows the current confusion surrounding the protected characteristics within this area of law.

Hierarchy and the public sector equality duty

Hepple has also noted the failure of the EqA 2010 to introduce a notion of 'discrimination arising from religion and belief' and has called this a missed opportunity because it avoids the need to make 'hair-splitting distinctions between direct and indirect discrimination.'[37] The EqA 2010's failure to introduce

[33] *Eweida v British Airways PLC* [2010] EWCA Civ 80 [40] 48. Vickers has also suggested that age is also a characteristic which is different from the others in the EqA 2010. This is to be doubted because following the distinction of choice, apart from the fact some lie about their age, age is not a characteristic that can be categorised by choice - L Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' 2011 11 IJDL 43, 48.

[34] Sandberg has termed the comments of Sedley LJ to be 'somewhat of a simplification' because he draws upon Vickers (L Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc. L.J. 280, 302) who suggests that given the availability of gender reassignment procedures, it is arguable that gender can be chosen - Sandberg, *Law and Religion* (n 8) 102.

[35] *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63.

[36] Ibid [47].

[37] Hepple, *Equality: The New Legal Framework* (n 1) 43. For instance see Lady Hale's categorisation in *Bull and another v Hall and another* [2013] UKSC 73 [33].

a notion of anti-discrimination specifically targeted to a separate notion of religious belief, as opposed to one of the many protected characteristics, may explain why laws protecting religious liberty seem to be at odds with the good of religion. This creates a problem when attempting to integrate the public good of religion into equality law, for the purposes of resolving the tensions facing religion within equality law. Timothy Macklem has also questioned whether, as the EqA 2010 is designed to combat discrimination in terms of a principle of equality, then why does this not involve other 'innumerable distinctions'[38] and if inequality is objectionable, why do we treat it 'as objectionable only when it affects certain people in certain dimensions of their existence?'[39] The current failure to integrate discrimination arising from religion and belief in part explains the problems experienced within a balancing of protected characteristics, from which a hierarchy may seem to emerge and equality law may seem to struggle to incorporate or have regard for the good of religion. This seems to present a problem when applying George's thought, in particular his high regard for religion, towards religious equality law.

The idea of a hierarchy of protected characteristics may be the reason why laws protecting religious liberty seem to be at odds with the good of religion. Rivers argues that any hierarchy may be 'legitimised'[40] by the public sector duty to promote equality.[41] This may conflict with George's natural law theory because George's basic human goods are incommensurable and not hierarchical.

Lucy Vickers has noted the inevitability of a 'hierarchy of protection' being created in the implementation of the EqA 2010, with religion and belief being treated differently from equality on other grounds.[42] Logically, this would result in two contrasting possibilities: 1) a danger of levelling down of protection for the other

[38] T Macklem, *Beyond Comparison: Sex and Discrimination* (Cambridge University Press, 2003) 203. For instance, marriage and civil partnership.
[39] Ibid 204.
[40] J Rivers, 'The Secularisation of the British Constitution' (2012) 14(3) Ecc. L.J. 371, 383.
[41] For a conflicting account of hierarchies within equality law see L Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (2014) 3(2) Ox. J Law Religion 235, 257.
[42] L Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (2011) 31 LS 135, 158. The ECJ has been keen to discourage this – *Chacon Navas v Eurest Colectividades SA* (2006) C-13/05 [40], and instead attempt to reinforce the idea of a common understanding of equality with "common standards to be introduced across the different equality grounds." L Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 34) 301. Chapters 4 and 5 continue analysing religion in relation to religious equality law.

grounds; or 2) the creation of a hierarchy of protection as between grounds of discrimination.[43] This highlights a failure by the public sector equality duty to clearly define the relations between the protected characteristics.

This has led to Pitt cogently arguing against the inclusion of religion and belief as a protected characteristic. For Pitt, the inherent problem is that inclusion 'confuses a freedom guaranteed by human rights law with the need to protect individuals from less favourable treatment because of their membership of a group likely to suffer disadvantage in the labour market.'[44] This argument is misconceived. Article 9(1) and 9(2) of the ECHR seeks to prevent individuals from exactly this form of discriminatory, 'less favourable' treatment and quite rightly so in both the job market and wider society. Such treatment is exactly why religion and belief need be treated as a protected characteristic. It is also exactly why applying George's critique has utility, for instance, in order to protect religious liberty as a public good.

Fears of a hierarchy within religious equality law can be contrasted with the assessment made by Munby LJ in *R (Eunice Johns and Owen Johns) v Derby City Council and Equality and Human Rights Commission*.[45] According to Munby: '[t]he starting point of the common law is thus respect for an individual's religious principles coupled with an essentially neutral view of religious beliefs and benevolent tolerance of cultural and religious diversity.'[46]

While this sounds fairly neutral, thereby countering notions of a hierarchy, this case also sets the sign for what I term a 'characteristic bias' which favours certain characteristics at the expense of others, as is later distinguished in the judgment: '[t]he laws and usages of the realm do not include Christianity, in whatever form.'[47] A further example of this bias is the attitude shown by Sedley LJ, who stated in *Eweida v British Airways*: 'I expressed my unease that a sectarian

[43] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 34) 301.
[44] G Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (2011) 40 ILR 4, 384, 403.
[45] *R (Eunice Johns and Owen Johns) v Derby City Council and Equality and Human Rights Commission* [2011] EWHC 375 [41].
[46] Ibid [41]. See also J Munby, 'Law, Morality and Religion in the Family Courts' (2014) 16 Ecc. L.J. 131, 137.
[47] *R (Eunice Johns and Owen Johns) v Derby City Council and Equality and Human Rights Commission* [2011] EWHC 375 [39].

agenda appeared to underlie the claim.'[48] In his opinion, this led to the claim 'be[ing] framed and pursued on the footing that BA was indirectly discriminating not simply against the claimant but against all Christians in its uniformed workforce.'[49] The converse could, of course, be true: a sectarian agenda could be enforced *by* those of an atheist persuasion in the workforce, leading to a claim of discrimination being brought forward. This could lead to a prescribed conception of equality being enforced *against* Christian individuals. In this case, as was introduced in chapter 1, Ms Eweida advanced a claim of discrimination on the basis of a breach of her right to manifest her religion contrary to Article 9 of the Convention. On the balance of probabilities, it is far more likely that in the case Ms Eweida was the discriminatee rather than the discriminator. Indeed this was the Strasbourg court's conclusion. It was found on behalf of Ms Eweida that domestic law had failed to give adequate protection to her rights under Article 9, in that she was denied protection for her sincere desire to manifest her faith by wearing a cross. As such, there was found to be failure by the UK government 'to put in place legislation adequate to enable those in the position of the applicant to protect their rights.'[50] In other words, domestic equality law did not strike the correct balance between the protection of the right to manifest her religion and the rights of others.[51] Religious equality law failed to protect Ms Eweida's right to manifest her religion and belief. This dismisses any idea of a hierarchy with religion and belief placed at the higher end, or indeed anywhere near the top. If anything, religion and belief is denigrated below other characteristics.

This 'Public Sector Equality Duty' subsection has presented the current failure to integrate discrimination arising from religion and belief as problematic for conceptions of equality applied to religion and belief. This is because religious equality law now applies to different conceptions of the common good. It was discussed whether the balancing of protected characteristics has led to the emergence of a hierarchy. Although this hierarchy was denied, religious equality

[48] *Eweida v British Airways PLC* [2010] EWCA Civ 80 [25] (Sedley LJ).
[49] Ibid.
[50] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [66].
[51] Ibid [114].

law may still seem to struggle to incorporate the good of religion.[52] This provides opportunity for a natural law critique of freedom of religion within equality law.

The next subsection will turn to the understanding of 'due regard' within the public sector equality duty. It will do so to consider whether, in a society where equality is becoming a dominant jurisprudential concept of public discourse, a temptation exists to prescribe preferred conceptions of equality towards the detriment of the public good of religion. It will be considered whether this prevents law from being the medium in which it is possible to talk about the good.

Public Sector Equality Duty 'due regard' in equality law

As noted above, the public sector equality duty, brought about by s.149 of the EqA 2010, imposes a negative duty upon equality law.[53] This duty may restrict the civil liberties of people with a different ethical foundation, particularly those with a concern for religion and belief. In this subsection it will be argued that any discussion of NNL is now dictated under the concept and scheme of equality. This form of equality law impacting religion will be enforced in society by a 'due regard' public sector duty. Within the critique of religious equality law, this focus upon and understanding of 'due regard' within the public sector equality duty will consider whether preferred conceptions of equality are being prescribed towards the detriment of the public good of religion. It will also be considered whether this prevents law from being the medium in which it is possible to talk about the public good of religion.

Because there is a negative prescribed duty associated with equality law, active steps may not be taken to achieve equality. Sandra Fredman has noted that the substantive conception of equality advanced by the public sector equality duty is prescriptively worded to 'have due regard',[54] but not to take steps to achieve equality. This public sector equality duty is an admirable stance that requires public bodies to have due regard to the need to eradicate discrimination, including indirect discrimination. It is also extended by the proactive duty to have due regard to the need to 'advance' equality of opportunity (s.149(1)(a-c) EqA

[52] This 'hierarchy fear' will be discussed at length in the continued critique of equality in chapter 5.
[53] Rivers, 'Promoting Religious Equality' (n 14) 386.
[54] Fredman, 'The Public Sector Equality Duty' (n 13) 405.

2010).[55] However, Burton has criticised the equality duty for 'merely harmonis[ing] and marginally extend[ing] previous duties.'[56] On the other hand, Hepple has disagreed, noting that the duty marks a transition from the focus not to discriminate to positive duties to advance equality[57] through structural change.[58] The theoretical impact of this extension finds expression in s.149(3) of the EqA 2010, which provides that equality of opportunity involves having due regard to the following: minimising disadvantages based upon protected characteristics;[59] meeting the needs of those who share a relevant protected characteristic;[60] and encouraging participation.[61] This pragmatically advances equality but does not actively *achieve* equality.

The equality duty has now adopted a practical focus to empower proactive duties to promote equality. This will impact any application of George's NNL views to religious equality law in order to analyse religious freedom because the promotion of equality is more apparent. Sandra Fredman has observed a subtle shift away from claims being initiated by individual victims and a move towards proactive models 'plac[ing] responsibility on public bodies, employers and others who are in a position to bring about change.'[62] A proactive, empowering switch has occurred enabling others to bring claims on behalf of the individual. This proactive duty focusing upon the good has been criticised by Rivers for placing an 'unavoidable' temptation to place one's preferred conception of equality under the radar of rational justification. In other words, equality becomes 'a mask for a substantive conception of the good which informs the distinctions and values at play.'[63] Equality law becomes a tool to incorporate personal values within society. Further, this danger is particularly the case for equality on grounds of religion and belief.[64] Rivers has elsewhere written that the drive towards equality is not only a denial of reality but represents an illiberal attempt to define people's faith for them,

[55] Hepple, *Equality: The New Legal Framework* (n 1) 135.
[56] B Burton, 'Neoliberalism and the Equality Act 2010: A Missed Opportunity for Gender Justice' (2014) 43(2) ILJ 122, 134.
[57] Hepple, *Equality: The New Legal Framework* (n 1) 1.
[58] S Fredman, *Discrimination Law* (2nd edn, Oxford University Press, 2011) 279.
[59] Equality Act 2010 s.149(3)(a).
[60] Equality Act 2010 s.149(3)(b).
[61] Equality Act 2010 s.149(3)(c).
[62] Fredman 'The Public Sector Equality Duty' (n 13) 408.
[63] Rivers, 'Promoting Religious Equality' (n 14) 396.
[64] Ibid 398.

rather than allowing freedom of conscience.[65] This treats equality as a universal, univocal 'good' prone to abuse as a negative and prescriptive ideal/duty that can be manipulated. It can be manipulated as law governs notions of the good. This understanding of equality attracts criticism from George's NNL approach which has been shown arguably to be wary of any approach to equality on the grounds of religion and belief that acts as a mask to govern conceptions of the good.

Public sector equality duty 'due regard' for religion

Prescribed conceptions of equality may prevent George's public good of religion. For instance, the need to 'have due regard'[66] has been criticised for its potential impact upon religion. Rivers, for example, has identified the public sector equality duty, and more generally equality law, to be a form of manipulation when viewed through this process of having 'due regard'. The process of having 'due regard' is one that Rivers fears will make public authorities deliver prescribed conceptions of equality, and one which requires public authorities in a liberal-democratic state to pretend, even if they do not believe, that equality on grounds of religion or belief should be promoted equally within public discourse.[67] Public authorities should not be forming a view on such matters as they 'should be particularly cautious in their implementation of such duties where they touch on matters of legitimate public debate.'[68] Caution is welcomed. However, the difficulty in the suggestion made by Rivers is that the problem lies in the *implementation* of such procedures, not the individual authorities themselves – it is quite correct that public authorities should consider and impact matters of public debate.

Rivers has argued that the root of the problem with expansive, contestable, conceptions of equality is that the new positive duty for equality requires having regard to how a policy or decision might impact a group defined by reference to their protected characteristic.[69] The tendency is to reinforce patterns of understanding/norms/belief by rooting them in 'supposedly personal characteristics, beyond rational challenge'.[70] Such a temptation 'is fundamentally

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[65] R McCrea, 'Book Review: J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)' (2011) 74(4) MLR 631, 632. The concept of conscience will be introduced, and separate analysis will be given to the concept, in chapter 5.
[66] As outlined above.
[67] Rivers, 'Promoting Religious Equality' (n 14) 401.
[68] Ibid.
[69] Ibid 398.
[70] Ibid.

illiberal in ethos and tendency.'[71] This may prescribe preferred conceptions of equality impacting religious freedom under the banner of equality. In essence, equality law is prescribing normative behaviour and belief rather than a NNL approach which adopts a plurality of goods. Chapter 5 will further develop how these prescribed conceptions of equality can be seen as detrimental to the public good of religion within *Eweida*.[72]

It is arguable, however, that prescribing views upon equality was exactly the intention behind the equality provisions. Hepple, one of the key influences behind the EqA 2010,[73] has noted in *Equality: The New Legal Framework* that equality law 'is important because it seeks to use law as a means of changing entrenched attitudes, behaviour and institutions in order to secure the fundamental human right to equality.'[74] Finnis supports this by noting that the indirect strategy of anti-discrimination law and its 'capacious notions of equality have changed the law and social policy of millennia in a very few decades'.[75] It is telling that, even at the outset, the EqA 2010 was intended to be persuasive in its impact.

On the other hand, the promotion of equality, and with it the attempts to generate dialogue between grounds on the basis of religion, may 'lead to greater focus on religion in public life, leading to enhanced sensitivity to religious difference.'[76] While this is possible, the practical outworkings of equality legislation make it unlikely. For instance, within *Eweida and Others v The United Kingdom*,[77] the claimants Ms Ladele and Mr McFarlane both found that equality legislation led to the justification of discriminatory acts on the basis of the identification of a legitimate aim and a reasonable relationship of proportionality between the aim and discriminatory effect within the state's margin of appreciation.[78] This legitimate aim positively ignored their religious difference (Christian belief) in

[71] Ibid.
[72] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[73] A member of the Commission for Racial Equality and drafter of the Equality Act 2010.
[74] Hepple, *Equality: The New Legal Framework* (n 1) vii.
[75] J Finnis, 'Equality and Differences' (2011) 56 Am. J. Juris 17, 42.
[76] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 145.
[77] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This case was introduced in chapter 1.
[78] J Rivers, 'The Presumption of Proportionality' (2014) 77(3) MLR 409, 422 – see s.149(1) of the EqA 2010.

favour of a conception of proportionality favouring rights relating to sexual orientation.[79] *Eweida* illustrates that having 'due regard' does not lead to a greater focus upon religion. Rather, it conflicts with the NNL public good of religion. Gibson has also identified that UK jurisprudence concerning religious discrimination in the workplace has shown that the 'courts often marginalise religion in the face of other legitimate aims'.[80] This highlights the tensions between laws protecting religious freedom and those prohibiting discrimination on grounds of sexual orientation.[81] It should be remembered that, although the right not to discriminate on grounds of sexual orientation often trumps the concurrent rights within religion and belief, the public sector equality duty protects discrimination on grounds of religion in *conjunction* with grounds of sexual orientation.[82] Arguably this should present a level playing field at the outset.[83] The principles arising from *Eweida* will be considered at length in chapter 5 in the continued critique of George's thought towards equality law as it related to religious freedom.

It has been shown that George also views religion and belief as different to the other goods (as a public good) and so the public sector equality duty should arguably have 'due regard' towards this. Sandberg further supports this position by recognising that religion or belief, built upon an individual's autonomy,[84] is *different* to the other protected characteristics within the EqA 2010 and 'ought to be protected differently.'[85] This draws from Lord Nicholls' comments in *R* v

[79] It has further been argued that in any areas where proportionality should be applied in the court's assessment (for example, in *Ladele v London Borough of Islington* [2009] EWCA Civ 1357) the court failed to conduct the balancing exercise between the claims in the council's policy (delivering the service in a way which would not discriminate on grounds of sexual orientation) and the claims of Miss Ladele to respect for her religious views (avoiding discrimination against employees on the grounds of religion). See *Mc*F*arlane v Relate Avon Limited* [2010] EWCA Civ 880 [14] (Laws LJ) and *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [72].

[80] Gibson (n 7) 616.

[81] R Sandberg, 'The right to discriminate' (2011) Ecc. L.J. 157.

[82] Ibid 172; Sandberg, *Law and Religion* (n 8) 111. Following these calls for level protection, Westen has pointed out that the concept of equality can be used both by advocates for the protection of sexual orientation and by advocates in favour of religion and belief: 'every moral and legal argument can be framed in the form of an argument for equality' – Westen, 'The Empty Idea of Equality' (1982) 95 Harv. L. Rev. 527, 594–596.

[83] For instance Lord Dyson has held that between sexual orientation and religion or belief: 'Neither is intrinsically more important than the other. Neither in principle trumps the other' - *Black & Anor v Wilkinson* [2013] EWCA Civ 820 [35].

[84] The definition for the concept of autonomy will be given in chapter 5.4.

[85] Sandberg, 'The right to discriminate' (n 81) 170-171. See P W Edge, *Religion and Law: An Introduction* (Ashgate, 2006) 7.

Secretary of State for Education and Employment and Others, ex parte Williamson: '[f]reedom of religion protects the subjective belief of an individual.'[86] Sandberg distinguishes religion or belief on the basis that this need for the protection of subjective belief is not true of the other protected characteristics.[87] Religion or belief is arguably different and requires treatment different to the other goods within the EqA 2010.

Does the protection of religion and belief as a public good[88] hold general importance?[89] In other words, why is religion and belief protected against negative impacts and why should the public sector equality duty recognise religion and belief as different? Vickers has offered multiple reasons for this. For instance, Vickers identifies that given an element of choice, religion and belief signifies identity and self-autonomy and so should be given a large degree of respect by the legal system.[90] This leads to religion being termed a 'fundamental choice' because it is 'clearly closely related to an individual's concept of identity and self-respect, and the cost to the individual of renouncing religious affiliation should not be underestimated.'[91] This is connected to a further reason identified by Vickers: religion is understood as a key aspect of personality and autonomy, based upon choice about the good.[92]

Taken together, the public sector equality duty could be viewed here as protecting autonomy through allowing individuals within society to choose the good of religion. For George's NNL, chapter 3 has identified that human nature complies

[86] *R v Secretary of State for Education and Employment and Others, ex parte Williamson* [2005] UKHL 15 [22].
[87] Sandberg, *Law and Religion* (n 8) 102.

[89] Vickers has noted that there is a surprisingly united front in extending discrimination protection to religion and belief: while Christians fear legal decisions are marginalising the religious in legal decisions; the National Secular Society are also concerned about opt outs to the EqA 2010 by religious organisations - Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 142.
[90] Ibid 138. Vickers' first reason is that many religious adherents stay in the religious groups into which they were born – this identifies a lack of mobility and lack of choice in the adoption of religion - ibid. See further P Edge, 'Religious rights and choice under the European Convention on Human Rights' [2000] 3 Web JCLI. The theme of 'identity' was argued by counsel for Ms Ladele in the ECtHR hearing for *Eweida*. The argument followed that the protected characteristic of religion 'constituted a core aspect of an individual's identity.' *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [71].
[91] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 34) 302.
[92] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 138.

with societal governance,[93] with a proportionality assessment being the measure of its justice,[94] to suggest that society should provide space to allow individuals to pursue goods. Consequently, the public sector equality duty provides a sense of human autonomy in equality law and is focused upon the good, rather than the flourishing conception of goods. This requires a different approach towards the public sector equality duty.

Public sector equality duty viewed in line with difference

The public sector equality duty could also be viewed in line with 'difference'. The methodology taken by Macklem, in *Beyond Comparison: Sex and Discrimination*, views 'equality … to be compatible with the recognition of difference … provided that the difference to be recognised exists in respect of other that in which equality is sought.'[95] For Macklem, to pursue a policy of equality is, for instance, to remedy sex discrimination whenever the prevailing misconceptions of what it means to be a woman describes women as different from men, when in fact they are not.[96] This draws criticism from a natural law critique. Macklem's description of difference within equality may attract Rivers' earlier criticism, which is that it transposes the good to 'substantive conceptions'[97] of the good by widening equality to match subjective preferences. Macklem fails to engage or provide a platform for goods to engage and find the NNL understanding of virtue in differentiation. I suggest that it provides an inward understanding of the good: because difference is suppressed, the public good of religion would be held to conform to stereotypical understandings by Macklem. As a result, therefore, Macklem's description of difference unfortunately does not identify the required distinctions and contemporary values necessary in order to reflect a twenty-first century post-modernist society.

Rivers does not think that the public sector equality duty can be viewed in line with difference. Rather than the public sector equality duty being in line with difference, 'equality requires the suppression of difference'[98] and 'this public suppression of difference has been a high measure of pluralism in the public

[93] See N Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007).
[94] Rivers, 'Good News for Law?' (n 7) 3.
[95] Macklem, *Beyond Comparison: Sex and Discrimination* (n 38) 4.
[96] Ibid 19.
[97] Rivers, 'Promoting Religious Equality' (n 14) 396.
[98] J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 341.

domain.'[99] This is a conception of neutrality[100] which reflects the 'value of individual equality'. It is one rooted in a belief in the moral sameness of individuals.[101] Such an approach to neutrality can, Rivers argues, lead to a 'suppression of difference' as 'the State, or the public [domain] more generally is taken as a place in which [religious] difference may be avoided or subdued'.[102] This may prevent any basis for using George's thought to reach a good/public good basis for equality, as instead a public domain that seeks to recognise the value of incommensurable goods may be preferred by George.

The approach to equality differs from my reading of George's approach. We have already seen that George thinks that the public domain should recognise the value of the basic human goods. George's views on equality law draw from his views upon value, which in turn is drawn from views relating to embryo ethics. To explain, George's traditionalist view is that all human beings are intrinsically valuable, from 'the point they come into being'.[103] George follows the Roman Catholic view that the human embryo is a 'human person worthy of full moral respect'.[104] As such, the mere existence of the embryo provides value and this provides a basis to value human beings and ascribe inherent worth to individuals based upon individualism. George's approach to value in the public domain is not transferred by the protected characteristics but from inherent worth, drawn from his religious convictions. This is in contrast to a view prescribed by Laws LJ in *McFarlane v Relate Avon Limited*,[105] which does not favour inherent worth or individualism: Laws LJ would hold those who regard equality law to be protected on religious grounds as holding 'divisive, capricious and arbitrary [beliefs],'[106]

[99] Rivers, 'Promoting Religious Equality' (n 14) 397. Vickers has further criticised a position of equality based upon 'formal or symmetrical equality', this is in a way similar to Macklem's minimal difference approach because it focuses upon consistent treatment of individuals. Vickers has criticised this for two reasons: first, difficulty arises when determining whether like cases are alike and second that equally bad treatment can be pursued in the name of equality, leading to a substandard equal outcome - Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 147.

[101] McCrea, 'Book Review: J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)' (n 65) 631, 636; Rivers, *The Law of Organized Religions* (n 98) 340.
[102] Ibid 631, 636-7.
[103] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 174.
[104] R P George & C O Tollefsen, *Embryo: A Defense of Human Life* (Doubleday Books, 2008) 4.
[105] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880 [22] (Laws LJ).
[106] Ibid [22] (Laws LJ). Sandberg draws upon this case to suggest that a notion of religious equality now underlies the discourse concerning law and religion - Sandberg, *Law and Religion* (n 8) 202, 205.

because their individualism marks them as 'different'. Lord Justice Laws' position has also been rejected by Ernest Lim. He draws comparisons with NNL by arguing that claimants should adopt 'public justifications' to provide a stronger reason for the courts to take into account religious exceptions in a Protestant[107] proportionality analysis.[108] This may provide a stronger basis to assert religious value and reject the definition given by Laws LJ in *McFarlane v Relate Avon Limited*.[109]

It has further been shown that George's approach towards value in the public sector equality duty is not transferred by the protected characteristics but from inherent worth. George shows the value of the individual good by drawing an analogy between abortion and religious liberty. Because George believes human life begins at conception, debate over abortion, like religious liberty, depends on the concept of *value* being ascribed to human beings at the beginning of life.[110] This once again raises the issue about George's views being drawn from an apparent Roman Catholic bias. George believes that human beings have dignity and rights by *virtue of their humanity* interconnected with the basic goods. For instance, the good of human life itself.[111] George's approach is analogous to a rights based approach towards religious liberty – rights are conferred by dignity and value by virtue of their humanity.[112] It will be argued later in this section that the dignity and value deriving from rights take their own value from the public good of religion.

In summary, this subsection has outlined how the public good of religion, and any discussion of NNL, is now being dictated under the banner of equality and enforced by a 'due regard' public sector equality duty. This section has considered how there is a temptation to prescribe preferred conceptions of equality towards the detriment of the public good of religion. *Eweida* has demonstrated that having 'due regard' does not lead to a greater focus upon religion. In contrast, this approach conflicts with the NNL public good of religion,

[107] L Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (n 41) 249-250. Once again 'Protestant' is used to refer to the central problems of jurisprudence for the present day - S Coyle, *Modern Jurisprudence: A Philosophical Guide* (Hart, 2014) 50.
[108] E Lim, 'Religious Exemptions in England' (2014) 3(3) Ox. J Law Religion 440, 449.
[109] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880 [22] (Laws LJ).
[110] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 166.
[111] George & Tollefsen, *Embryo: A Defense of Human Life* (n 104) 103.
[112] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 167.

which limits the potential of the law as the medium in which it is possible to talk about the good of religion, for the purposes of analysing religious freedom within the EqA 2010.

The next part of this section will go on to consider and critique George's understanding of the concept of human dignity within equality law.

Dignity within equality

This part will consider whether a focus upon human dignity, rather than equality, is a better method to talk about the good. In particular whether a focus on human dignity presents religion as not only a basic good but also as a public good. George's connection between NNL and human dignity will be established. It will be argued that human dignity is a branch within the wider tree of equality that exists in the goods-based approach to protected characteristics. Human dignity will be shown to allow individual flourishing by the exercising of religious conscience. It will also be shown why the modification of George's thought displaying religion as a public good is a more effective approach towards equality law.

This section will help determine whether for George law is the medium in which it is possible to talk about the good. To do so, it will consider and critique George's approach to religious equality law. Equality law is becoming a favoured concept in public discourse. However, like all concepts, there will be a range of philosophical ideas underpinning the particular concept. For instance, integral to equality law is the concept of human dignity. The concept of human dignity as self-respect and individual authenticity was identified by Ronald Dworkin in *Justice For Hedgehogs*.[113] A focus upon human dignity within equality law draws connections with NNL. This is because a narrative based upon dignity and social inclusion would, to an extent, as stated in the Equality Review 2007, enable the public sector to create an 'equal society [which] protects and promotes equality, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish.'[114] This is an interesting position,

[113] R Dworkin, *Justice For Hedgehogs* (Harvard University Press, 2011) 203-204.
[114] Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 54. See Equalities Review Panel, 'Fairness and Freedom: the Final Report on the Equalities Review' (*Equal Rights*

one which draws upon an understanding of dignity actioned by freedom of conscience and one that results in the enhanced good of the individual through flourishing. For George, this connection can be emphasised because NNL is connected to human dignity and as such enables individuals to act upon conscience and flourish.[115]

In considering George's NNL approach towards religious equality law, dignity as a basis for equality law has certain similarities. It has been suggested that the concept of dignity 'inherently encompasses the concept of equality, as humans are equal in their humanity and moral worth.'[116] Such a controversial understanding of dignity adopts an inclusive methodology drawing comparisons towards NNL.

The idea of dignity as a basis for equality law, though, has strength. For instance, it allows a broader approach to equality as focusing on autonomy and dignity rather than mere parity of treatment,[117] or equality based upon outcomes determined by worth. This reasoning is interesting because Vickers argues that a concept of accommodation of difference, based upon dignity, is preferable to a traditional, formal equality approach based upon parity of treatment.[118]

This idea of dignity as a basis for equality law, depends upon an understanding of the role of formal equality. At the foundation of formal equality law there is a problem arising from human difference.[119] At its most basic level, formal equality ensures that 'likes be treated alike and differences proportionately to the difference.'[120] In other words, human persons are equal in dignity with the same worth, while at the same time, possessing value in their own uniqueness.[121] In contrast, Gibson has considered whether religion or belief interests should

Trust, 27 February 2007) <http://www.equalrightstrust.org/content/fairness-and-freedom-final-report-equalities-review> accessed 25th August 2015.

[115] R P George, 'Natural Law, God and Human Dignity' in R P George and G Duke (eds), *Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017).

[116] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 148.

[117] Ibid.

[118] Ibid 148-149.

[119] See Rivers, 'Promoting Religious Equality' (n 14) 386.

[120] Ibid; Rivers, *The Law of Organized Religions* (n 98) 340. Fredman has identified this Aristotelian principle (that likes should be treated as like) to form the basis of modern ideas about equality - Fredman, *Discrimination Law* (n 58) 8. This emphasises the importance of formal equality.

[121] Rivers, 'Promoting Religious Equality' (n 14) 386. See N Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press, 2010).

sometimes be treated differently from other interests precisely because religion or belief is different (substantive equality).[122] The benefit of substantive equality is that it is designed to enforce equality and reduce discrimination by providing exceptions to a blanket application of neutral laws. Substantive equality would not focus on the individual cause alone (as formal equality would do) but attempts to change society as a whole to reduce discrimination. For Gibson, human dignity has a basis in substantive equality law.[123] Such a basis provides a level of protection for religion and belief. Formal equality (a form of human dignity), in other words, protects individuals, while substantive equality (a form of accommodation) protects at the group level. Taken together, it may be better to view dignity (formal equality) as a limb of the wider equality duty, or the role of the individual in the public sector. If this is the case, then formal equality, within the wider equality duty, provides a place for human dignity.

Dignity as a basis for equality law is also supported in case law. Baroness Hale, in *Archibald v Fife County Council*,[124] emphasised the need to interpret the provisions of equality law by reference to the need to uphold human dignity through combating stereotypes and promoting individuality.[125] As shown earlier in this chapter, George's view on human worth stems from the notion that the 'good is prior to the right, and, indeed, to rights.'[126] As I once again apply George's thought to provide a greater justification for religious liberty, the 'goods-rights synthesis' necessitates and promotes the good of the individual and human dignity secures this individuality. As such, a goods based approach could lead to human dignity becoming part of the wider equality duty.

There are, however, problems with this approach. First, it is 'not necessarily virtuous … equal treatment can lead to equally bad treatment.'[127] Secondly, particularly in relation to direct discrimination, there is a focus on the need of an equal treatment model for a comparator, which is not always available.[128]

[122] Gibson, 'The God 'Dilution'? Religion, Discrimination and the case for Reasonable Accommodation' (n 7) 584.
[123] For Gibson this is human dignity incorporated via reasonable accommodation. Reasonable accommodation will be discussed at length in chapter 5.
[124] *Archibald v Fife County Council* [2004] UKHL 32.
[125] Ibid [59].
[126] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 117.
[127] M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell, 2011) 5.
[128] A good example of this is women seeking to show pregnancy discrimination - ibid 6.

Macklem's approach is relevant here – the best form of criticism to formal equality is the claimant absent the features resulting from the allegedly discriminatory treatment.[129] In cases of religion, however, individuals will often be seeking different rather than equal treatment.[130]

It has also been argued by Fredman that these limitations of formal equality have led to its abandonment and has instead led to a single focus upon human dignity as the core of a concept of equality.[131] As such, it is argued that neither substantive nor formal equality on their own provide a satisfactory model. Instead, human dignity (encompassing both formal and substantive equality) provides more opportunity for human flourishing within the natural law critique. Human dignity may contribute to individual dignity recognised in concepts of self-worth and self-actualisation, which I suggest is an autonomous public sector duty enabling individuals to exercise their religious conscience in action and flourishing in line with George's NNL thought. If this were the case, then once more human dignity within equality legislation would draw connections with a goods based approach.

Dignity within equality law – social inclusion

Problems with formal and substantive equality have, however, also led to Vickers' most recent analysis of equality: equality of social inclusion.[132] This method equates disadvantage with a lack of equality and seeks to address this. Equality of social inclusion aims for an overt concept of equality, which seeks to address disadvantage, rather than a concept based on dignity, recognition or difference. This is an inclusive basis that provides a platform for equal measure. Does equality of social inclusion reflect George's approach to equality and discrimination law? Or does it provide a better method to understand equality? Fredman has identified this vision of equality based on the need to allow all groups an equal set of alternatives, from which they can pursue their own version of the good life.[133] As a result of Fredman's vision, equality of social inclusion is

[129] Macklem, *Beyond Comparison: Sex and Discrimination* (n 38) 4.
[130] Connolly, *Discrimination Law* (n 127) 6.
[131] Fredman, *Discrimination Law* (n 58) 19.
[132] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 153.
[133] S Fredman, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda' [2010] EHRLR 290.

more developed than purely being disadvantaged based. Such an understanding of equality overcomes the problems in disadvantage and dignity based approaches by enabling the 'voices of different groups to be heard as public authorities plan service provision', while at the same time this would not show that the public authority values one group over another.[134] This 'consensus' based approach echoes a Rawlsian public reasoning approach, as that in which the majority set down a plurality of options.[135]

Does the above approach exclude George's 'goods-rights synthesis'? Vickers believes that through addressing disadvantage to redistribute the aims of equality law, social inclusion is seen to be advantageous, a 'third way', allowing for the other possibilities of equality: dignity[136] and disadvantage[137] (social advantage).[138] Therefore Vickers' analysis aims at reducing any problems associated with the public sector equality duty: public authorities would be able to 'recognise the importance of full participation in society for out-groups, including where those groups are defined by religion, age or sexual orientation.'[139] This has both attractions and limitations. Unfortunately, Vickers' approach fails to engage, or address, proportionality problems within human rights discourse – groups/individuals are commonly excluded and further disadvantage is often justified to pursue a legitimate aim.[140] As such, it would not *prima facie* help to resolve equality law tensions. However, turning to George's approach to religious equality law, social inclusion does reflect an aspect of George's approach: the inclusive nature of the goods within George's NNL[141] – placing the good of sociability prior to any legal right. This follows from chapter 3, where it was identified that George broadens the good to encompass the natural rights discourse, via the work of the secular humanists, to provide a 'good based

[134] Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 54.
[135] J Rawls, *Political Liberalism* (Columbia University Press, 1993) xviii.
[136] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 148. Vickers views that equality as dignity allows for accommodation of difference, because it focuses on the autonomy and dignity of individuals, rather than same treatment. This distinguishes equality as dignity to be preferable to difference, though still below social inclusion - Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 50-51.
[137] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 154.
[138] Ibid 151.
[139] Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 56.
[140] For instance, *Eweida v British Airways PLC* [2010] EWCA Civ 80.
[141] T Shah, 'The Anthropological Basis of Human Freedom' in M Franck and T Shah (eds), R*eligious Freedom: Why Now? Defending an Embattled Human Right* (The Witherspoon Institute, 2011) 221

opposition'.[142] As a result, social inclusion does engage the good of sociability within the goods-rights syntheses.

In contrast to George's treatment of law as a public good, Vickers accepts that a focus on social inclusion within equality may not necessarily be compatible with religion viewed as a public good. She has opined that, an equality duty model based on dignity does not result in an automatic protected mantle for religion.[143] Vickers has identified, though, that equality set upon remedying disadvantage could be positive for religion as 'it does not provide value to the characteristics that are protected.'[144] In contrast, George's 'goods-rights synthesis' does draw value because any natural rights derive from value located in the basic goods. This gives value to the natural rights underlying the 'goods-rights synthesis'.

The 'goods-rights synthesis' is also important to discussion involving religious equality law because value of the individual good was explained earlier in relation to George drawing an analogy between abortion and religious liberty.[145] It is about the nature of human dignity and the equality of human beings. This value of the good is once again applicable because dignity, as a form of value, is inherent within the good of protected human characteristics for George. The 'goods-rights synthesis' engages religious liberty: rights conferred by dignity and value by virtue of their humanity[146] in any conception of equality.

This is where any comparison between George and Vickers ends. As outlined, an equality duty model based on dignity for Vickers 'is likely to lead to the realisation of many of the concerns so far expressed'.[147] In addition, Vickers identifies that many religious groups are not themselves supportive of equality, such as those based on grounds of gender, sexual orientation or disability.[148] If protection is only provided based upon a group/characteristics outlook to others, then this *quid pro quo* approach to protection (particularly for religion) would prevent any serious comparisons with George's thought in order to critique

[142] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 114.
[143] Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 50-51.
[144] Ibid.
[145] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 166.
[146] Ibid 167.
[147] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (n 42) 157.
[148] Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 46.

equality law impacting religious liberty. In the end, Vickers' respect for an equality duty model based on dignity is not compatible with George's view of religion as a public good.

For our purposes, how does this impact George's reformulated approach to equality law? Vickers holds that under her method, religion would 'not [be] endorsed and public authorities would not have to ensure even treatment of every religious group.'[149] The problem with social inclusion is that different equality grounds are 'not always reliable proxies for disadvantage'[150] and what would be disadvantageous would also be very contentious. As has been shown, equality grounds do not match the good of religion. It is submitted instead that, following George's views, value (human dignity) is still inherent *within* the good of each individual characteristic. In this sense law is a medium to talk about the good. Human dignity is a branch of the wider tree of equality that exists in the goods based approach to protected characteristics.

To conclude, this subsection has shown that formal equality law and Vickers' various approaches to human dignity fail to engage the good of religion in a way that identifies with the flourishing of the individual. George's connection between NNL and human dignity resolves this conflict. Human dignity has been shown to allow individuals to exercise their religious conscience in action and flourishing in accordance with a NNL methodology. There is no need to focus upon human dignity as opposed to equality in relation to the good of religion. The dichotomy between human dignity and equality is a false one. Instead, human dignity is inherent within the basic human goods and thus is a branch within the wider tree of equality that exists in the goods based approach to protected characteristics. Such a connection helps establish that for George law provides a medium in which it is possible to talk about the good of religion, and so it shows that applying George's thought to religious equality law is a valid exercise.

[149] Ibid 52-53.

[150] Ibid 53. This is a position endorsed by Hepple, yet conversely Hepple believes that this is because law is related only to one element in the many causes of disadvantage, mainly *discrimination*. Hence the demand for specificity has led to a 'narrow and technical definition of this concept [discrimination].' Hepple, *Equality: The New Legal Framework* (n 1) 184. Equality aimed at removing status inequality cannot remedy this disadvantage.

Liberty within equality

This discussion will now move to survey an alternative approach to equality, which is the concept of liberty. This will be done in an effort to further understand George's thought and analyse his approach to discrimination and equality law. The concept of liberty will be used to show some of the current tensions within equality law impacting religion and belief.

Is this 'liberty' position one that George may endorse? Rights and liberties arise for George because there are basic human goods that constitute flourishing. From this position, '[t]he full defense of any particular liberty, including the freedom of religion, requires the identification and defense of those human goods'.[151] Hence religious freedom is intrinsically linked to the basic goods. Liberty is linked to the goods. Liberty within the public square, and public square limits of freedom, owe much to the secular vision presented by Isaiah Berlin.[152] Berlin presented two conceptions of freedom: negative and positive liberty. Western society promotes negative liberty as manifested in the idea that 'religion should be a purely private matter in which the state should not intervene, but which should not therefore, attempt to be too public'.[153] In contrast, George believes that consent to religion should be given to people within the populous. This provides the opportunity for people to flourish. George believes liberty, and religious liberty in particular, is necessary for individuals to flourish and thrive in accordance with the nature of law.

George's preference towards liberty is contrasted to the modified libertarian position adopted by Robert Wintemute. Considering the philosophical basis for equality law, Wintemute considers that a 'liberty approach' should be preferred to equality.[154] This is because freedom of religion receives protection under Article 9 of the ECHR (subject to the limitations in Article 9(2)) and so Article 9 actively promotes religious liberty as a right.[155] Given this, Wintemute believes that a 'liberty approach' has been the 'traditional starting point when seeking protection

[151] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 110.
[152] B Ryan, 'Good News for the Public Square' (*Theos*, 30 May 2014) <http://www.theosthinktank.co.uk/comment/2014/05/30/good-news-for-the-public-square> accessed 6th June 2014.
[153] Ibid. It is also noted that Isaiah Berlin believed equality and liberty to be important, but competing values – I Berlin, *Four Essays on Liberty* (Oxford University Press, 1969).
[154] R Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77(2) MLR 223, 226.
[155] Sandberg, *Law and Religion* (n 8) 205.

for individual and collective religious freedom.'[156] This collective approach is to be preferred because, unlike an 'equality approach', it requires no express comparison with the treatment of other religions. It has already been shown that George would go further and suggest that, as a public good, the good of religion should not be compared with other goods or rights. Should equality and liberty be contrasted in this way?

For Dworkin liberty is a crucial ingredient within a concept of equality.[157] Contrastingly, however, a Thomist understanding of the good could be said to require legal rules to maximise the degree of legal freedom that each person enjoys, while at the same time placing restrictions on that freedom/civil liberties 'in the name of equality.'[158] Wintemute disagrees with this amalgamation, and notes that while a 'liberty approach' is preferred it has rarely succeeded. Therefore, this very limited success is good reason to consider an approach based upon the concept of equality which is better to 'accommodate religious beliefs in a diverse society'.[159] This undermines Wintemute's earlier justification that sought to emphasise collective religious freedom. He fails in his conviction to follow no express comparison in order to establish the good of liberty for individual conscience objections. As such, the lack of success establishing the good of liberty instead suggests that the public good of religion is preferable.

Liberty within equality: the protected characteristics

Two different approaches have considered liberty over equality. d that the 'goods-rights synthesis' justifies the public good of religion. This is enabled by the good preceding the right to religion. For George, equality and discrimination law, on grounds of religion or belief, presents a public discourse at the risk of minimising the good at the expense of religious liberty, in a state that seeks to publicly promote equality and diversity. One reason that liberty may be preferred to equality law is that the law views individual choice within the protected characteristics of the EqA 2010 problematically.

[156] Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (n 154) 226.

[158] S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart, 2004) 63.

[159] Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (n 154) 226.

This problem surrounding choice is brought out in the context of the Court of Appeal decision, *Ladele v London Borough of Islington.*[160] This case was detailed and analysed in chapter 1. Vickers has considered two positions when reviewing the indirect discrimination claim brought by Ms Ladele: first, upholding the finding of no indirect discrimination, she considers organisations should be secular and so should not accommodate religious views.[161] Does this disregard individual choice reflected in sincerely held religious beliefs? On the other hand, it can be said that the public sector should 'reflect its community and so accommodate both sexual orientation and religion and belief.'[162] As such, this may, theoretically, have resulted in a claim of indirect discrimination succeeding. Vickers cites Rawls' *A Theory of Justice*[163] to argue that 'justice as fairness'[164] requires equal participation in the state. For example, if the public sector should be inclusive regarding sexual orientation, should it also be inclusive in terms of religion and belief?[165] Moreover, following George's 'goods-rights synthesis', could the good precede the right in cases like *Ladele*, and require equal participation in both the situation of service provision and freedom of conscience?[166] Here, the law views individual choice as problematic within equality law. In contrast, the critique brought about by a public good of religion would ensure that liberty is preferable to equality law because it can cut both ways and deliver a wider variety of scope in decisions involving choice.

Liberty within equality can, however, be criticised through the categorisation of basic goods within the EqA 2010. As noted earlier, with religion or belief sitting alongside the eight other 'protected characteristics' in s.4 of the EqA 2010, Sedley LJ held in *Eweida v British Airways PLC* that, while all of the other protected characteristics 'apart from religion or belief are objective characteristics of individuals, religion and belief alone are matters of choice.'[167] With claims made by some religions that sexual orientation is a matter of choice, does this explain

[160] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357. As outlined in chapter 1, this case was later considered in the conjoined hearing, seminal to this thesis: *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[161] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 34) 292.
[162] Ibid.
[163] J Rawls, *A Theory of Justice* (Harvard University Press, 1971) 196.
[164] This is Rawls' famous conception of justice that comprises two principles: the first principle (liberty) and the second principle (equality) within a liberal, egalitarian society - ibid.
[165] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 34) 280.
[166] This issue will be discussed at greater length in chapter 5.
[167] *Eweida v British Airways PLC* [2010] EWCA Civ 80 [40], [48].

why case law conflict has arisen between the protected characteristics of religion or belief and sexual orientation? Two points can be drawn from this. First, this distinguishes religion as an internal, higher level of characteristic – a public good. Second, this also goes some way to highlighting that the protected characteristics do not cover other distinctions of choice. The EqA 2010 does not provide for the liberty of the other protected characteristics.

Further criticism is brought out by Sedley LJ's distinction failing to treat religion as an internal point of view: the contrasting characteristics identified by Sedley LJ in *Eweida*[168] may adopt an 'external viewpoint, rather than a cognitively internal viewpoint.'[169] As a consequence, liberty may be further restricted by judges failing to understand religion from an internal viewpoint. This would be detrimental to both the religion and any manifestation of belief.

In summary, liberty, in the form of religious liberty, is intrinsically linked with the public good of religion. Through the lens of liberty, law is the medium in which it is possible to talk about the good. My critique of George suggests that this is a method to present legal rights in line with the common good – within the protected characteristics, religious liberty would be promoted as a common good in the analysis of George's thought towards religious equality law.

Conclusion

This section has begun to show George's approach towards equality law. Law has been seen to be the medium in which we talk about the good, and this good, a public good of religion, is one now dictated under the banner of equality law and enforced by a 'due regard' public sector duty. This 'public sector equality duty' highlights the failure to integrate discrimination arising from religion and belief as problematic for conceptions of equality applied to religion and belief. The measure of the 'goods-rights synthesis' was introduced. It was also denied that the balancing of protected characteristics leads to a hierarchy emerging. However, it was suggested equality law may seem to struggle to incorporate the good of religion.

[168] Ibid.

[169] C McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecc. L.J. 26, 32. This draws inspiration from Hart's external/internal influence debate. See H L A Hart, *The Concept of Law* (2nd edn, Oxford University Press, 1994).

Eweida[170] was introduced as showing that having 'due regard' does not lead to a greater focus upon religion. Rather, it may partly conflict with the NNL public good of religion.

In an effort to further criticise George's NNL and analyse his approach to religious equality law, the concept of human dignity was considered to allow individuals to exercise their religious conscience in action and flourishing in accordance with NNL thought. This is because human dignity is a branch within the wider tree of equality that exists in the goods based approach to protected characteristics.

It was further argued that liberty, in the form of religious liberty, is intrinsically linked with the public good of religion. The lens of liberty has helped display that for George law is the medium in which it is possible to talk about the good of religion.

4.3 *Griswold v Connecticut, Romer v Evans* - Robert George on American case law and religious liberty

Introduction

Now that we have seen how George approaches equality law surrounding religion and belief, this section will consider how he applies NNL to religious liberty case law within his own jurisdiction, the United States. This will allow a theoretical critique to be transferred between jurisdictions, in order to use George's thought to analyse religious freedom within equality law. For George, the American Constitution is a paradigm for natural rights built upon reason. It will be shown that this provides authority to enforce the natural law and protect natural rights and, as such, provides protection as a check on legislative power.[171]

To see how the theoretical critique can be transferred, George has argued that any healthy society rests on three pillars, which combine both political and legal theory. One of which is a fair and effective system of law and government.[172] Religion underlies and supports each of these pillars. The pillar relevant to this

[170] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[171] As such, this section will provide further material for chapter 5's critique.
[172] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 4. This pillar structure will receive more consideration in section 4.4.

section is the third tenet: a fair and effective system of law and government.[173] One of the ways in which a fair and effective system is enabled is through religious freedom secured through George's NNL process. In 'Natural Law, the Constitution, and the Theory and Practice of Judicial Review',[174] George once again addresses constitutional matters, ethics and public communication through an engagement with the following cases: *Romer v Evans*[175] and *Griswold v Connecticut*.[176] The interpretation employed by George in this article is a novel, innovative, NNL approach, which provides theoretical answers to conflicting decisions in America religious liberty case law.

To arrive at a position securing religious freedom, in chapters 2 and 3 of the thesis, the claim was made that the natural law, via the work of the secular humanist tradition (Hobbes, Grotius etc.), brought about a natural rights basis. In section 4.2, this basis was applied to substantive English and European religious liberty and discrimination law through a consideration of the relevant provisions and case law arising from the EqA 2010. From this basis, the project to analyse George's NNL critique to European religious discrimination and religious liberty case law will be continued from chapter 4 into chapter 5.

Natural law due process in American case law

This section will analyse the process by which Robert George applies NNL theory to American religious liberty case law. Focusing on the US Supreme Court case of *Griswold v Connecticut*,[177] I will argue that George, in 'Natural Law, the Constitution, and the Theory and Practice of Judicial Review',[178] maintains a dialectic approach to verify whether the American Constitution incorporates natural law in such a way as to make it a source of 'judicially enforceable, albeit unwritten, constitutional rights and other guarantees.'[179] George's position holds that the American Constitution embodies the American founding fathers' belief in natural law and natural rights. To focus this debate, George highlights two interconnected factors: first, the exchange between the majority and dissenting

[173] Ibid.
[174] R P George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (2001) 69 Ford L. Rev. 2269.
[175] *Romer v Evans* (1996) US 620.
[176] *Griswold v Connecticut* (1965) 381 U.S 479.
[177] Ibid.
[178] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174).
[179] Ibid 2275.

Justices in the 1965 American Supreme Court case of *Griswold v Connecticut.*[180] Secondly, George highlights the work of Edward S. Corwin, a constitutional law scholar, to elaborate upon American constitutional law through natural law analysis.

By drawing upon *Griswold*[181] and Corwin's thought, I argue that the analysis of George's work here provides a thesis articulating that under the American Constitution, the legislatures, not the courts, have the primary authority to give effect to natural law and to protect natural rights. This analysis provides a starting point for how the natural law process can be applied in George's thought.

In *Griswold,*[182] the Supreme Court of the United States invalidated a Connecticut anti-contraception law on the ground that it violated a common,[183] fundamental right of marital privacy, a right that, according to George, was not explicitly mentioned in the Constitution. The right was instead found in the 'penumbras, formed by emanations,' of specific 'guarantees in the Bill of Rights.'[184]

In his dissenting opinion, Justice Black accused the majority of indulging in the 'natural law due process philosophy' of judging.[185] For Black J that natural law jurisprudence within *Griswold*[186] was in principle illegitimate.[187] George correctly identifies Black J as 'unmasking' what he judged to be an implicit revival by the majority of the 'natural law doctrine.'[188] It is also clear that Black's highlighting of the 'natural law' basis in the *Griswold* decision establishes an error in the lead judgement given by Justice Douglas.[189]

The focus upon 'penumbras, formed by emanations'[190] and Justice Black's dissenting opinion are helpful in identifying a judicial 'natural law due process' approach to adjudication. It is also helpful in identifying the application of George's thought to American religious liberty case law, for the purposes of

[180] *Griswold v Connecticut* (1965) 381 U.S 479.
[181] Ibid.
[182] Ibid.,
[183] In an English context see: *KC v Westminster City Council* [2009] Fam 11; *Hudson v Leigh* [2009] 2 FLR 1129; *Official Solicitor to the Senior Courts v Yemoh* [2011] 1 WLR 1450; *R v M* [2011] EWHC 2132 (Fam).
[184] *Griswold v Connecticut* (1965) 381 U.S 479.
[185] Ibid.
[186] *Griswold v Connecticut* (1965) 381 U.S 479.
[187] Ibid 512-13 (Black J dissenting).
[188] Ibid.
[189] Ibid.
[190] Ibid.

deriving a critique that can be applied towards analysing the right to religious freedom within equality law. As such, George has identified that Black and Douglas were appointed to the Supreme Court in an attempt to appoint jurists who could be relied upon to 'oppose the judicial philosophy that had impeded the progressive legislative agenda'[191] since at least 1905. This judicial philosophy was apparent in cases such as *Lochner v New York*[192] and *Adair v United States.*[193] The important point in analysing George's thought regarding adjudication is that this apparent judicial philosophy was natural law.

The emergence of natural law jurisprudence in American case law sheds light on George's approach to natural rights jurisprudence. In *Griswold*,[194] it is important to note that by the justices refusing to rule on the morality of contraception, George believes they were unwilling to declare that anti-contraception laws violated the Constitution – they were unwilling to declare a violation of natural rights.[195] A comparison can be drawn to the UK Supreme Court's criticism in the 'assisted dying' case of *R (on the application of Nicklinson and another) v Ministry of Justice*,[196] which was directed towards another arm of the executive - Parliament. This criticism was for, first, Parliament's failure to debate upon Lord Falconer's Assisted Dying Bill and, second, Parliament's failure to direct whether an Act of Parliament is incompatible with a right under the ECHR.[197] Once again, this appears to be a failure to rule upon legal boundaries prescribing morality.

This failure to engage with the legal boundaries prescribing morality, drawing further on *Griswold,*[198] suggests that American courts appear to adopt a muddled approach to the natural law due process. It is clear that judges rarely explicitly refer to the natural law due process. Despite this, George has noted that the dissenting judges in *Griswold* did identify that natural law was to be 'superior to the statutory law to which judges may appeal in striking down a statute even where the constitutional text provides no warrant for doing so'.[199] Consequently, this shows the right to marital privacy being declared through the idea of natural

[191] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174).
[192] *Lochner v New York* (1925) 198 U.S 510.
[193] *Adair v United States* (1908) 208 U.S 161.
[194] *Griswold v Connecticut* (1965) 381 U.S 479.
[195] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174).
[196] *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38.
[197] Ibid [363] (Lord Kerr).
[198] *Griswold v Connecticut* (1965) 381 U.S 479, 512-13.
[199] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174).

law as a check upon executive power. George is correct to identify that natural law jurisprudence by any other name here remains natural law jurisprudence. Nevertheless, the identification of such a jurisprudence is helpful in establishing a natural law critique. This analysis goes some way towards establishing a 'natural law due process'.

George's approach to constitutional religious liberty

This 'natural law due process' is instructive in considering George's views on constitutional religious liberty. It is helpful when analysing George's thought within his own jurisdiction. His views can be summarised in a position termed 'legal liberty',[200] which was first coined in his DPhil thesis.[201] 'Legal liberty', for George, is 'the freedom to do as one pleases so far as the law is concerned, [this] can be understood as the absence of legal coercion.'[202] Although this concept will receive full consideration in section 4.4 below, for the purposes of this discussion, however, was Black's condemnation of the natural law here a rejection of legal liberty? George uses *Griswold*[203] to question why, if the framers of the Constitution were firm, fervent believers in natural law and natural rights, did they not find in favour of the following proposition: that the institutions of government are justified, precisely because natural rights are protected by civil authority? If so, George questions how Black J could condemn a jurisprudence of natural rights - would this lead to the conclusion that natural rights should not be protected as civil freedoms?

George has argued that 'the fabric and theory of our [American] Constitution embodies our founders' belief in natural law and natural rights.'[204] This assists in beginning to connect the American Constitution towards a paradigm natural rights basis. In contrast, it also evident that he wants to conclude that the judges interpreting and enforcing the Constitution should not interpret and enforce principles of natural law or natural rights:

> I do not draw from this [conception of the Constitution as embodying our founders' belief in natural law and natural rights] the conclusion that judges

[200] George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (n 26) 219.
[201] George, under the supervision of John Finnis, submitted his DPhil thesis to the Faculty of Law, University of Oxford in 1986.
[202] Ibid 222.
[203] *Griswold v Connecticut* (1965) 381 U.S 479.
[204] George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (n 26) 222.

> have broad authority to go beyond the text, structure, logic, and original understanding of the Constitution to invalidate legislation that, in the opinion of judges, is contrary to natural justice.[205]

Does this present a contradiction, in that following *Griswold* judges reading the American Constitution cannot enforce the natural rights paradigm upon which it is based? An analysis of George's thought here suggests that the natural law in itself confers no authority on judges to go beyond the textual understanding of the Constitution to enforce principles of natural justice. Instead, judges possess such authority, not as a matter of natural law, but rather as a power conferred upon them by the Constitution. This presents a limit upon natural law justiciability. George contends that 'natural law itself does not settle the question of whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural law and respects natural rights.'[206] Rather, this draws a compromise. He argues not only that the Constitution embodies natural law or natural rights but also that judges have no authority to enforce natural law or natural rights against legislative encroachment. Further questions arise from this: is it possible to believe that the Constitution does embody a paradigm natural law and/or natural rights discourse, and still agree with Black J's criticism against the enforcement of natural law protecting religious liberty? However is this not contradictory and can George really have it both ways?

In 'The Natural Law Process Due Philosophy'[207] George clarifies these seemingly contradictory comments on the *Griswold* case.[208] He argues that the courts should enforce neither 'liberal political judgements nor conservative ones in the absence of a warrant rooted in the text, structure, logic, or original understanding of the Constitution.'[209] For any natural law due process, the Constitution should incorporate/evidence this process. By doing so, this provides a structured process dependent upon the American Constitution.

From a position of 'legal liberty' George outlines his belief that the American Constitution leaves the matter of natural law 'to the deliberation and judgement

[205] Ibid.
[206] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174).
[207] R George, 'The Natural Law Process Due Philosophy' 69 Fordham L. Rev. 2301, 2001.
[208] In dialogue with his critic James Fleming.
[209] George, 'The Natural Law Process Due Philosophy' (n 207) 2306-2307.

of democratically constituted and accountable legislatures at the state or national level.'[210] This is because it was part of the strategy of the Constitution's framers 'for giving effect to the principles of natural law and protecting natural rights.'[211] Here I identify George's method for applying the NNL theory to religious liberty law and it is also how the Constitution presents a model for future rights integration as a paradigm natural rights discourse. This natural law and natural rights process will be critically analysed against George's approach to religious liberty in section 4.4 and will be further considered under the lead case of *Eweida*[212] in chapter 5.

Synthesis between constitutional law and the natural law

This thesis aims to critically analyse George's thought towards the EqA 2010. To see his analysis of American law, we can critique the synthesis George draws between American constitutional law and natural law. To do so, George draws upon the 1949 lecture given by the American constitutional law scholar, Edward S. Corwin. George draws upon this to synthesise the American Constitution with natural law. This synthesis explains how the natural law due process is integrated with the American Constitution and how George takes a deferential position towards American constitutional law.

It is clear that Corwin takes a similar approach to George by providing a natural law due process within American constitutional law. This is by showing that the legal tradition that shaped the understanding of the framers of the American Constitution was informed by the natural law,[213] with American constitutional law in debt to its natural law genesis.[214] Adopting a similar position to George's earlier outlined 'minimum standard of reasonableness,'[215] Corwin argues that the positive law of the constitution is still 'natural law under the skin.'[216] The question becomes whether this provides a minimum standard within adjudication?

[210] Ibid 2301.
[211] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174).
[212] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[213] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174) 2275.
[214] E Corwin, 'The Debt of American Constitutional Law to Natural Law Concepts' (1950) 25(2) Notre Dame Law, 258.
[215] See chapter 2.3.
[216] Corwin, 'The Debt of American Constitutional Law to Natural Law Concepts' (n 214) 258.

George's rebuttal of Corwin's argument is that 'common law judges [are] law making authorities'.[217] I suggest that this identifies with George's thought that if a rule is needed, then judges must exercise choice and judgement.[218] For George's approach to American constitutional law adjudication, however, this does not mean that the rule selected by an American judge enjoys a status as law 'simply by virtue of its reasonableness.'[219] Its status as law depends entirely on the judge's *authority* as an appointed member of the judiciary to make the choice among competing possible rules.[220] I claim that this reformulates George's method: a judge's will and choice are her or his own. This is crucial, even though the obligation is to choose, the legislator's (and the legislature's) obligation, no less than the judges', is 'precisely to make the choice as *reasonably* as possible.'[221] As such, the natural law due process provides discretion built upon human reasonableness. NNL reasoning is confined to adjudication, not validity.

George is clear that 'unjust choices are in principle unreasonable'.[222] Practical reason will guide the choices in order to promote flourishing. The constitutive power of humanly posited law to create moral obligations depends on the reasonableness of the law, as interpreted through the guide of practical reason in adjudication. This section has argued that this is not merely dependent on the jurisdictional authority of the person or institution with the authority to make law. For George, writing 'valid law is an act of both reason and will.'[223] This provides application within the American legal system for a synthesis between the natural law and practical reason; a broad synthesis between reasonableness and rationality.

George also applies Corwin's analysis to vindicate the 'natural law' jurisprudence that Justice Black opposed in *Griswold*.[224] It is arguable that he uses Corwin's reasoning to achieve a case law basis for NNL critique. In *The Authority of Law*,[225] George maintains that natural law does not settle the question of whether it falls

[217] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174) 2282.
[218] See the 'principles' objection - R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) chapter 2.
[219] George, 'Natural Law, The Constitution, and The Theory and Practice of Judicial Review' (n 174) 2282.
[220] Ibid.
[221] Ibid [Emphasis added].
[222] Ibid.
[223] Ibid 2283.
[224] *Griswold v Connecticut* (1965) 381 U.S 479.
[225] R P George, *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996).

ultimately to the legislature or the judiciary to ensure that the positive law conforms to natural law and respects natural rights.[226] It is suggested that natural law does not dictate an answer to its own enforcement.[227] As a result, George believes that authority to enforce the natural law 'may be vested primarily, or even exclusively, with the legislature'[228] as a check on law making power.

This mirrors the Grisez School's reliance on Aquinas: activities of the courts – such as judicial review – rely upon careful and subtle choice among morally acceptable options. For instance, in an enlarged array of goods, George relies upon Aquinas' process of '*determinatio*' and distinguishes this from matters that can be resolved by a process 'akin to deduction from the natural law itself.'[229] An example can be seen by George arguing that judicial review itself emerged in a US context as part of the strategy to ensure governmental conformity with natural law and to protect natural rights.[230] This is a synthesis between constitutional law and natural law. I suggest this provides a justiciable form of natural law adapted to a modern context. It is one that is applicable across jurisdictions. For instance, it can be applied towards equality law arising from the EqA 2010.

In summary, it has been shown that the earlier identified paradigm discourse is built upon judicial reasonableness. It has also been shown that natural law plays a large part in George's approach to the American Constitution, which allows a critique of the synthesis George draws between American constitutional law and natural law. This is important to draw a trans-jurisdictional critique that can analyse the right to religious freedom within the EqA 2010.

Conclusion

To summarise, through critiquing George's thought within his own legal jurisdiction, it has been shown that George views the status of the US Constitution as embodying the American founding fathers' belief in natural law and natural rights. It moves towards practical application because this is combined with authority to enforce the natural law and to preserve natural rights being protected by the legislature, not the courts, as a check on legislative power through

[226] Ibid 329.
[227] R P George, *The Clash of Orthodoxies: Law, Religion and Morality in Crisis* (Isi Books, 2001) 179.
[228] Ibid 179. George also accepts the role of the judiciary here.
[229] *Griswold v Connecticut* (1965) 381 U.S 479.
[230] George, *The Autonomy of Law: Essays on Legal Positivism* (n 225) 329.

processes such as judicial review. This provides a paradigm for a natural rights discourse. It will be considered in chapter 5, through the application of George's thought towards analysing the right to religion to the EqA 2010, whether analogously the UK government protects natural law and natural rights through equality law.

A conclusion can be drawn here: by giving effect to these principles George gives a limited role to constitutional government - a role that includes supporting religion.[231] As a result, natural lawyers derive fundamental rights for religious liberty.[232] With the American Constitution viewed as a paradigm for a natural rights discourse, this rights discourse is further guided by reason, which in itself is dependent upon the Grisez School's interpretation of Aquinas' preference of natural reason over divine revelation (as seen in chapter 2). The applied concept of 'reasonableness' provides direction for application to achieve 'legal liberty'. This will be a key concept used to critique equality law surrounding freedom of religion. The next section will consider this amalgamation between the common good and human rationality in the context of religious liberty.

4.4 The tensions within new natural law: a natural rights and common good approach to religious liberty case law

Introduction

Moving from the previous discussion, which conveyed the American Constitution as a paradigm for the NNL discourse of natural rights, section 4.4 will show how George addresses identified tensions within equality law[233] by further analysing George's thought. It will look to George's understanding of religion/religious liberty and critique what I suggest are the three constitutive aspects of George's methodology: a common/basic good approach, human rationality, and human flourishing.

A motif of fundamental rights to secure liberty has been repeated throughout chapters 2 and 3. This section will further argue and emphasise that George's jurisprudence presents fundamental rights for religious liberty. The arguments that George uses when defending religious liberties are importantly built upon

[231] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 91.
[232] Chapter 3 argued that the presentation of human rights being established from a natural rights basis helps provide a religious basis in rights related discourse.
[233] Sandberg, 'The right to discriminate' (n 81) 157.

these fundamental rights. To elaborate, for Finnis, the first amendment of the American Constitution and the ECHR both intrinsically associate religious liberty with freedom of conscience.[234] This rights basis, grounded in a basic good approach, allows religious judgements to be made.

Chapters 2 and 4.2 have already considered a basic NNL approach to religious liberty. To repeat, when new natural lawyers consider religious liberty, their consideration of religion depends partly upon the value given to the subject by society. It was earlier shown that Finnis rejects this. Indeed, for him, religion is a basic human good and thus does deserve dignity and value – it is more than 'just one among the deep passions and commitments that move people'.[235] It was shown above that George views the American Constitution as holding a high place for religion. On the other hand, another approach could be to deny religion and religious liberty any moral or constitutional status distinct from other 'deep commitments.'[236] This is similar to the multiple protected characteristics approach adopted within the EqA 2010. It will be argued that preference is not given to the characteristic of religion within English law. However, this will be distinguished from the elevated position given to religion within the basic goods. This section will attempt to analyse the reason why, and the process how, new natural lawyers have regard for this 'good' and why this requires more protection. This discussion is crucial in applying George's thought to analyse religion within the EqA 2010, to solve the problems facing freedom of religion.

In George's discussion about moral paternalism, liberty was held in chapter 2 to be close to elements of the basic goods, in so far as it served the good of what he terms 'choice'.[237] This element of 'choice' is essential to George's discussion of 'legal liberty', which was introduced in section 4.3.[238] For George, 'legal liberty' is 'the freedom to do as one pleases so far as the law is concerned, [and] can be understood as the absence of legal coercion.'[239] The good of 'choice' leads to

[234] J Finnis, 'Why Religious Liberty is a Special, Important and Limited Right' (2008) 09(1) Notre Dame Law School Legal Studies Research Papers 7.
[235] Ibid 5.
[236] Ibid 4.
[237] George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (n 26) 155. Section 4.2 also considered liberty to be vital to any discussion about morality.
[238] The concept of choice will be introduced and analysed later in this section. The concept of choice will further be considered in relation to the concept of conscience in chapter 5.
[239] Ibid 222.

legal liberty being considered 'an important human good.'[240] I suggest that this is a controversial position because the basic good of liberty does not appear within the ethical theory of Grisez or Finnis. The reason that George believes that it does not appear is because goodness of liberty is instrumental rather than intrinsic, and so neither Finnis nor Grisez classify it as a basic good.[241] The problem is that this depends on a strict understanding of liberty within law. This is an instance where George's development of NNL thought raises difficulties.

This section will consider the question as to whether positive legal restrictions on religion and the good of religion constitute a breach of 'legal liberty'. It is relevant because positive law, be it case law precedent or statutory legislation, that restricts religious freedom would restrict legal liberty as a factor which might impede action.[242] Positive law itself can provide an impediment towards religious liberty.[243] As such, George's conclusion is thus duty based. He imagines that '[t]hose in authority in the political community, therefore have the moral duty to respect the good of personal self-constitution in legal [*sic*] for the common good of those in their care.'[244] This is a moral duty of care towards the community not to infringe legal liberty. It is a moral duty because limitations of legal liberty that are unfair are, first, immoral[245] and, second, only legitimately limited by the legislator in certain circumstances.[246]

I argue that George's deliberation upon the restriction of religious liberty and legal liberty depends upon his views regarding the good of religion. In *Making Men Moral: Civil Liberties and Public Morality*,[247] he deliberates on the good of religion. Because George refers to his area of expertise as being normative jurisprudence and political theory,[248] this makes it easier to see the connections George makes with regard to political and legal theory when talking about religion.[249]

[240] Ibid 155.
[241] Ibid.
[242] George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (n 26) 219.
[243] Ibid.
[244] Ibid 195-196.
[245] Ibid 155, 195.
[246] Ibid 195-196.
[247] R P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press, 1994)
[248] Ibid viii.
[249] Ibid 222, 223.

It was briefly mentioned in section 4.3 that George understands that the health of any society rests on three pillars which combine both political and legal theory. These are: 1) individual respect for the human person and their dignity; 2) the institution of society/family; and 3) fair and effective system of law and government.[250] Importantly, George believes that religion underlies and supports each of these pillars, and so the third pillar enables the first pillar - respecting legal personhood (for human personhood and dignity). This is enabled through religious freedom, which has set down guidelines for the third pillar. The third pillar (a fair and effective system of law and government) in turn draws dependence from an inherent 'worth/value' in the person (pillar 1). This is a very unoriginal idea, for instance the idea of worth and value is identified by Wolterstorff as deriving from religion.[251]

The pillar structure is helpful in understanding George's tripartite approach towards religion: first, religion is a basic good; secondly, religion is dependent upon human rationality; and thirdly, religion is an irreducible aspect of human flourishing. There is a clear structure identified here to analyse George's approach to religion. The next section will consider each aspect of George's approach to religion separately in order to formulate a critique towards equality law impacting freedom of religion.

Common good application present in religious liberty case law

I will now analyse the application of religion as a basic good within George's approach. George relies upon Timothy Shaw's contribution, *The Anthropological Basis of Human Freedom*,[252] where religion is presented as a basic good, even for those that do not ascribe to a religion.[253] This gives a plural, expansive definition to religion, which is essential to the universal application of George's jurisprudence. This is how George deliberates upon restriction towards religious freedom. It is an inclusive method because overtly secular institutions can rule upon religion. Even atheists participate in the good of religion, under George's approach, by considering meaning, value and truth.[254] Rather than this condescending approach, it would be better to term the whole of humanity clearly

[250] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 4.
[251] Wolterstorff, *Justice: Rights and Wrongs* (n 121)
[252] Shah, 'The Anthropological Basis of Human Freedom' (n 141).
[253] Ibid.
[254] Ibid 221.

engaging with the good of religion, by all engaging with meaning, value and truth. A position such as this would be a far more inclusive position. The former approach regarding religion is still dependent upon George's interpretation of the basic good of religion. However, a question arises out of this: are problems encountered by this basic good approach when transferring this directly to religious liberty?

One key factor for a basic good approach to religious liberty lies in George's observation that state action which infringes individual moral rights can only damage the common good. Any negative action by the government in relation to religious liberty could only serve to damage the common good. This assumes a breach of human rights, such as a breach of Article 9 of the ECHR. For George, a breach of human rights overrides any gain and it is held that the 'incommensurability of goods means that the non-aggregative common good simply cannot be advanced by governmental action which infringes people's moral rights.'[255] This is because where 'there are undefeated reasons for government to act to support, and encourage religion, as there often will be, such action is for the common good'.[256] I argue that this suggests any governmental action in relation to religious liberty which would infringe religious rights could only serve to damage the common good by further infringing moral rights which are constitutive aspects of basic human goods. In effect this ties religion to the common good.

This leads us to the concept I have termed the 'goods-rights synthesis' which was mentioned above. According to George, 'the good is prior to the right and rights.'[257] He believes that to respect religious liberty is to respect rights. Religious liberty depends upon a certain form of good that both impacts rights discourse, and more precisely human rights application. George draws from the Aristotelian notion that thinking agents are rational individuals. For this reason, flourishing can take place by guarding individual health and wellbeing; for instance, through intellectual flourishing by receiving an education. I argue that the 'goods-rights synthesis' engages all three aspects constituting religious liberty (basic goods/rationality/flourishing). This follows from the analysis of George's thought

[255] Ibid 93.
[256] George, *Making Men Moral: Civil Liberties and Public Morality* (n 247) 226.
[257] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 117.

that if goods are regarded as intrinsically valuable, then practical reasoning will dictate that flourishing depends on our intellectual well-being, or our physical well-being.[258] Because the good is prior to the rights 'it gives shape, content to our rights.'[259] It matters to the identification and defence of rights what the basic good is that is being protected. An example given by George is the foundational right to life. This could easily be transferred to religious liberty. For George, it matters to the identification and defence of the right to religious freedom that religious liberty is no mere instrumentality but is an intrinsic aspect to the good of human persons, an integral dimension of overall flourishing:

> If we believe, as I believe, that right is violated … it is because we believe [religious liberty] has more than merely instrumental value, it has intrinsic or basic value, it is a constitutive dimension of our flourishing as human beings. And similarly it matters to the identification and defence of religious liberty that religion is yet another irreducible action of well-being and fulfilment: a basic human good.[260]

In criticism, George is clear in his identification of religion as a basic human good – the basic human good of religion. Although clarity may be lost through the 'goods-rights synthesis', as George identifies that rights enable religion; and religion, and religious liberty, enables flourishing. I argue this is a controversial projection of religion in that, as shown in earlier chapters, new natural lawyers differ on their understanding of the good and the subjective nature of the goods would be denied as being instrumental to intrinsic human flourishing.

For George, the 'goods-rights synthesis' is a rejection of Rawlsian public reason,[261] and also contemporary rights discourse. This gives a certain content and context to the 'goods-rights synthesis' model. It has been suggested that society is so obsessed with rights talk and contemporary rights discourse that we

[258] George grounds this conception of human flourishing on the Aristotelian notion of *eudaimonia*. This concept was outlined in chapter 1.
[259] Ibid.
[260] R P George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (Berkeley Centre for Religion, Peace and World Affairs; Georgetown University, 1 March 2012) <http://vimeo.com/38096383> accessed 8th May 2012.
[261] Given that the mainstream Christian denominations have failed to present convincing public reasons for their approach towards ethical viewpoints, this rejection is unsurprising - see McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (n 169) 38.

are no longer possible to talk about goods, well-being and human dignity.[262] George would not, however, agree with this. For him a plethora of people see the implications in public life. Have we gone too far in our language of rights? George would respond 'yes', for two reasons: 1) some issues simply are not addressed if the only language of discourse is rights; and 2) the focus on rights omits responsibilities, such as 'I want such and such – therefore, I have a right to such and such.' Here accountability is disregarded in favour of personal gain for the individual. It is arguable that this is a non sequitur movement from rights based on desires to responsibilities based on rights.

George wishes to suggest that human rights, including rights to religious liberty, are:

> … among the moral principles that demand respect from all of us, including governments and international authorities, which are morally bound not only bound because they possess authority, not only to respect human rights but also to respect them. To respect people and to respect their dignity is to honour these rights. This is what it means for governments to respect their citizens. Including the right to respect religious freedom.[263]

Here it is clearly identified that 'moral principles' – basic human goods, independent of human rights – deserve respect within George's thought. To achieve respect, governments must display dignity in terms of both citizens *and* their religious liberty. This is a difficult argument. Chapter 5 will display how in reality the government has argued to restrict religious liberty.[264] George sees a necessity for discussion of goods in public life as part of public mandate – a way to defend a right in human goods/human needs/aspects of human well-being and fulfilment that religious liberty is to protect.

I claim that George's observation that human rights (including rights to religious liberty) are being shaped and given content by 'the human goods they protect'[265] further justifies the 'goods-rights synthesis.' As introduced above, it is in this sense that the 'goods-right synthesis' holds that the *good* is *prior* to the *right*, and

[262] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260).
[263] Ibid.
[264] For instance: *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [59-63].
[265] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 117.

even to the *rights*. Rights are not mere abstractions, they are connected because they protect human goods. George believes that rights, like other moral principles, are intelligible as rational action guiding principles because they are specifications of practical reason that direct human choosing to 'what is humanly fulfilling or enriching … and away from what is contrary to our wellbeing as the kind of creatures we are i.e., human beings.'[266] This shows the prior application of George's NNL theory to any rights discourse establishing religious liberty, and to any human rights application engaging freedom of thought, conscience and religion within Article 9 of the ECHR. This is because both are dictated in content by the underlying goods-rights basis.

If religious liberty is dictated in content by the 'goods-rights synthesis', then does this present religion as a superior good? Chapter 2 considered the frequently offered suggestion that religion is subordinate to the other basic goods[267] or whether religion can be termed a 'superordinate good.'[268] George's NNL approach follows a practical requirement to form subjective prioritisation of the basic goods,[269] particularly when acting upon the good. George believes that religious freedom is central and has *priority* among the basic civil liberties.[270] As was established, this is why religion can be termed a 'public good'.[271]

NNL regard for the public good of religion

Following this approach to the good of religion, it was identified in chapter 2 that the legal idealist Mark Murphy rejected George's incommensurable approach to the good of religion, terming George's work a moral natural law thesis by suggesting that George has transformed his thesis from a claim belonging to analytical jurisprudence into a claim belonging to moral philosophy.[272] This is because Murphy doubted practical reason affirms that other basic goods for the sake of religious good.[273] He further criticised George's rejection of the basic

[266] Ibid.
[267] M C Murphy, *Natural Law and Practical Rationality* (Cambridge University Press, 2001) 191.
[268] Ibid 191. Kevin Staley, for instance, finds *Natural and Natural Rights* to present religion as a 'super-ordinate good' - K Staley, 'New natural law, old natural law, or the same natural law?' (1993) 38 Am. J. Juris 109, 126-127.
[269] Ibid 192.
[270] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 113.
[271] This public good builds upon the point made in chapter 2.5 that religion, in particular Christianity, has contributed to the abolition of slavery and efforts to reduce poverty - A Lister, *Public Reason and Political Community* (Bloomsbury, 2013) 6-7.
[272] M C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2009) 9.
[273] Murphy, *Natural Law and Practical Rationality* (n 267) 197.

goods hierarchy,[274] drawing into doubt where practical reason dictates that religion is a superior good. Murphy's approach was earlier rejected in this thesis because he suggested George may prioritise religion above the other basic goods, which George does not do and does not need to do. George does not view religion as a 'superordinate good'.[275] George's very clear anti-consequentialist presentation of religion as an incommensurable basic human good highlights this.[276] It was maintained in chapter 1 that basic human goods are taken to be irreducible and therefore incommensurable, and so the basic human goods provide ultimate reasons for actions.[277] This is precisely as far as they are intrinsic aspects of human flourishing in line with the common good. As such, this understanding surrounding incommensurability of the basic goods plays a key role in George's thought. The incommensurability of the basic goods clarifies George's thought surrounding religion (and the other goods).Therefore, despite Murphy's doubts concerning religion, George's view of religion as a public/superior good can still apply to the common good.

It was earlier shown that basic human goods deserve respect within George's NNL thought. This, in turn, ensures respect for both citizens *and* religious liberty by the state. The possibility for, first, religion as a basic human good and, second, religion as the subject of a primary reason for action, such as deducing norms from the intrinsic requirement of love of neighbour as self,[278] or for instance the Pauline 'Golden Rule',[279] flows from a 'premise that an intrinsic aspect of one's neighbour and one's own good is the basic good of life, and the premise that no more than in one's willing of ends may one choose means which are contrary to a basic human good.'[280] Applying this reason to religious liberty, the modificaition of George's thought would endorse a norm including a private person's choosing

[274] Ibid 192.
[275] Ibid 191, 197.
[276] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 119. For George, to reject incommensurability is to accept consequentialism which supposes 'that some goods have 'more' good in them than others.' George, *In Defense of Natural Law* (n 26) 50. A foundational point for religion in this chapter is that although religion is treated differently, this is not detrimental to the incommensurable understanding surrounding the basic goods and certainly does not give rise to a hierarchy.
[277] George, *In Defense of Natural Law* (n 26) 95.
[278] Matthew 22:39 - Holy Bible, English Standard Version (Collins, 2002).
[279] For Aquinas, and subsequently NNL, the golden rule is a principle of natural law or reason, independent of revelation. J Finnis, *Founders of Modern Political and Social Thought - Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998) 128.
[280] Ibid 140-141.

to engage with religion,[281] through the premise that an aspect of one's own good would be the basic good of religion, and the premise that none may be prohibited from engaging a choice in line with a basic human good, such as religion, which would establish human flourishing. This highlights the prominent role of scriptural interpretation, mixed with case law analysis, that can be critically analysed within George's thought when defending religious liberties. I argue it provides a reason to respect religious liberty based upon the high regard held for the good of religion as both the subject of a primary reason for action and a public good.

A different treatment for religious liberty

As a public good that merits respect, religion is treated differently. For instance, following *R (Begum) v Headteacher & Governors of Denbigh High School*,[282] Finnis has observed that the House of Lords here held that the right to be free from coercion in one's religious beliefs and acts is a right that is 'good not only against the state and its government and laws, but also against all other individuals and social groups.'[283] Within this decision it was considered that the right to religious freedom should be secured differently, having a wider remit.[284]

Finnis also interprets the ECtHR decision in *Sahin v Turkey*,[285] and gives particular attention to the assertion that state governments, laws and other public institutions are entitled to exclude and forbid the sartorial exercise of religious liberty. This is in order to preserve public order including the religious liberty of others. For Finnis, the Lords' decision implicitly 'accepts the premise that one religion may and should be treated – understood and dealt with – differently from others.'[286] Through Finnis' interpretation it follows that one religion may and should be treated differently from others, and this discloses an inbuilt bias. Throughout this thesis a recurring theme has been to suggest that this inbuilt bias is also present within George's work. The NNL disposition to Roman Catholicism

[281] Including religious acts and a person's ability to manifest their belief.
[282] *R (Begum) v Headteacher & Governors of Denbigh High School* [2006] UKHL 15.
[283] J Finnis, *The Collected Essays of John Finnis: Volume V – Religion and Public Reasons* (Oxford University Press, 2011) 98. This has fuelled Finnis' belief that the state's rulers are responsible for securing the public good. I argue this respect for the public good can be transferred to the public good of religion - J Finnis, 'Public Good: The specifically political common good in Aquinas' in R P George (ed), *Natural Law and Moral Inquiry: Ethics, Metaphysics and Politics in the Work of Germain Grisez* (Georgetown University Press, 1998) 187.
[284] *R (Begum) v Headteacher & Governors of Denbigh High School* [2006] UKHL 15.
[285] *Şahin v Turkey (2005) (Application No. 44774/98).*
[286] Finnis, *The Collected Essays of John Finnis: Volume V* (n 283) 99.

accords with Finnis' interpretation of the *Begum*[287] decision. Presumably from this basis, the one religion which should be treated differently would be Christianity, and narrowing even further this denomination would be Roman Catholic Christianity.[288] This case highlights the approach taken by NNL to treat religious liberty differently. However, this also reveals problems. For instance, do claims to public order override national laws, which are designed to protect liberty?[289] I suggest that Finnis' interpretation, however, is construed too narrowly in favour of his Roman Catholic bias, and it further re-emphasises that NNL is a conduit for the public communication of Roman Catholic ethics.

To secure this wider protection for religious liberty, George grounds respect for liberty, in all public manifestations, in the dignity and good of the individual. How does George reach this basis? In his keynote address, 'Religious Freedom: Why Not? Defending an Embattled Human Right',[290] George draws upon the example of Martin Luther King Jr.'s libertarian actions in the civil rights movement, namely his knowledge that such acts may lead to imprisonment.[291] How could King act in disobedience to the law when he advocated obedience to the law? For George, following Martin Luther King Jr's libertarian approach invokes a conception of equality similar to that submitted by Vickers, considered above.[292] Religious freedom removes disadvantage through a basis of individual human dignity, dependent upon autonomy rather than difference.[293] Religious liberty requires autonomy within a sphere defined as internal to the religion.[294] George's social inclusion grounds respect for legal liberty in human dignity (Vickers' third way) and good (basic good approach) towards the individual.

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[287] *R (on the application of Begum (by her Litigation Friend Sherwas Rahman)) v The Head Teacher and Governors of Denbigh High School* [2006] UKHL 15.

[288] Does this criticism regarding the treatment of religion extend to George? George uses NNL to maintain Conservative Roman Catholic ethical viewpoints. George, often more explicit on these acts than Finnis, talks of 'the basic good of marriage itself as a two-in-one flesh communion of persons' that is consummated and actualized by acts of the reproductive type - M D A Freeman (ed), *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet and Maxwell, 2008) 241. This highlights the Roman Catholic bias criticism levelled against George. This recurring theme was established in chapter 1.

[289] For instance: *Hirst v The United Kingdom (No 2)* [2005] ECHR 681; *Othman (Abu Qatada) v The United Kingdom* (Application no. 8139/09) [2012].

[290] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 259).

[291] See M L King, *Letter from Birmingham Jail* (HarperCollins, 1994) 117.

[292] Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 43.

[293] Ibid 51.

[294] Rivers, 'The Secularisation of the British Constitution' (n 40) 373.

This protection for religious freedom and dignity of the person is not limitless. George's approach concedes that there are limits to freedom that must be respected for the sake of the good of religion and the dignity of the human person. These limits extend to ordering one's life 'in line with one's best judgments as to where spiritual truth lies and what it requires. Gross evil, even injustice can be committed by sincere people for the sake of religion.'[295] The presumption in favour of respecting liberty, especially for the state, to preserve human good and the dignity of the human person as free and rational individuals, I argue is a broad one. Nevertheless, unjust or morally wrong acts should not be tolerated in the name of religious freedom.

George's limit to freedom is: morally wrong acts are not to be tolerated by public consensus in the name of religious freedom. George here is very clear – the recourse is through the courts, not through anarchy - through adjudication, rather than anarchy. This presents a problem. How do we go about resolving religious liberty conflicts while maintaining dignity? Here, George initially fails to provide a solution.

Therefore, it has been shown above that George's NNL approach is that religion should be protected. This is because for George religion is a human good unique in the shaping of one's pursuit of, and participation in, all the basic goods. In the words of George: 'One participates in this good the moment one enters the pursuit of ordering one's life in one's very best judgements in conscience, of the truth of religious matters … and relates this to the more than merely human sources of meaning and value.'[296]

As Vickers has observed, equality of religion ensures dignity of the individual.[297] Religious investigation was set out by George in *Making Men Moral*[298] as 'part of the human good of religion, as goods whose pursuit is an indispensable future of the integral flourishing of human kind.'[299] As a result, protecting the good of

[295] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260).
[296] Ibid.
[297] Vickers, 'The Expanded Public Sector Duty: Age, Religion and Sexual Orientation' (n 33) 51.
[298] George, *Making Men Moral: Civil Liberties and Public Morality* (n 247).
[299] Ibid 93.

religion protects flourishing for the individual.[300] This provides a potential resolution for religious liberty conflicts to preserve dignity for the individual.

The analysis of George's thought indicates that the good of religion leads to flourishing. Religious liberty requires specific protection within case law to protect the good that leads to human flourishing. This provides a basis for social inclusion as a form of justiciable equality that grounds respect for legal liberty in human dignity. Once again, this highlights the tripartite benefit of human goods, human rationality and human flourishing in religious engagement. My analysis suggesting that there are three constitutive aspects in George's approach to religious liberty is further substantiated. The aspect of flourishing within George's thought will now be considered.

Religious liberty leading to human flourishing

Within George's three constitutive aspects approach, in this section I now turn to the concept of human flourishing. The intention is to show why and how, for George, there are connections between religious liberty and human flourishing. A critique will be provided to further analyse George's NNL approach to religious liberty and prepare for the application towards religious equality law in chapter 5.

To respect a person's well-being, or more simply to respect a person, for George, demands respect for her or his flourishing as a religious person in line with their best judgment, to 'make judgements that link us with real opportunities of flourishing.'[301] For George, this requires respect for 'liberty in the religious quest; the quest to understand religious truth and order one's life in line with it.'[302] This presents flourishing as an extension of liberty – religious legal liberty. It has been established in this thesis that religious liberty is essential to human flourishing.[303] Therefore, I argue religious liberty is essential to George's NNL approach. It enables flourishing within George's NNL process. For George, it will now be shown that religion forms both a) a public good and b) a method of fulfilment. To respect religious liberty is to respect human flourishing.

To understand how, for George, flourishing and religion are linked it is helpful to look at how George responds to the Papal encyclical entitled the Declaration of

[300] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 119.
[301] Finnis, 'Why Religious Liberty is a Special, Important and Limited Right' (n 234) 9.
[302] Ibid.
[303] Ibid.

the Relation of the Church to Non-Christian Religions (*Nostra Aetate*),[304] which provides a religious centred approach: the further away one gets from the good of religion and 'the fullness of religious life, the less fulfilment is available.'[305] To put this positively: for George, in the central case viewpoint, freedom of religion represents the efforts to bring ourselves 'into a relationship of friendship with transcendent sources of meaning and value'.[306]

This provides a wide spectrum for protection and George posits from this a requirement that civil authority respect and nurture conditions and circumstances in which people can engage in religion.[307] Flourishing engages religion when one considers meaning, value and truth, 'living with honesty and integrity in line with … best judgements about ultimate reality.'[308] Coercing belief is a violation of human dignity and legal liberty. The violation of liberty is 'worse than futile'.[309] For George, 'it not only does no good, it does harm.'[310] I suggest this turns the principle of religious liberty defended by George, into a non-intrusive, libertarian form of freedom – an accommodating form of freedom. However, such libertarian freedom in flourishing relies upon the maximisation of choice based upon the pursuit of the basic goods. Choice founded upon human rationality, via practical reasoning, was shown in chapter 2. This will be shown to be important within George's approach when defending religious freedom.

I suggest that there is confusion is to be found in the concept of choice surrounding modern society's approach to liberty. Here we can define different uses attached to the concept of 'choice' in this thesis. As George has suggested, the good to now be found is the good of freedom (religious liberty). Choice in the Natural Law tradition, however, is part of practical reason.[311] Therefore the use

[304] Pope Paul VI, 'Declaration on the Relation of the Church to Non-Christian Religions, NOSTRA AETATE' (Holy See, 28 October 1965) <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html> accessed 8th May 2012.
[305] Ibid.
[306] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 113.
[307] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 113.
[308] Ibid.
[309] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260). See also George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (n 26) 350.
[310] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260).
[311] St. Thomas Aquinas, *Summa Theologica* (R J Henle ed, University of Notre Dame Press, 1993) <http://www.newadvent.org/summa/2011.htm> - ST I-II q. 13. a. 3; G Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae' (1965) 10 Natural Law Forum 168, 189; J Finnis, G Grisez and J Boyle, 'Practical Principles, Moral Truth, and Ultimate Ends,' (1987) 32 Am. J. Juris.

of choice here is not arbitrary. David Bentley Hart suggests that in contemporary society there is now no other absolute value to be found apart from choice.[312] This is essentially existentialism as choice and is hugely subjective. The cultural presupposition is that we are all now essentially consumers, shown through choice in rights. We now have the rights to exactly the same goods, rights and service from anyone who is providing them. This leads to an inevitable clash resulting in litigation between protected characteristics and is borne out by the proliferation of religious liberty case law.[313] For example in *Eweida*,[314] religious freedoms were categorised as choices by the employees.[315] This freedom was balanced against the deprivation of services.[316]

As we have identified that the concept of choice is not used arbitrarily in the Natural Law tradition, this can be contrasted with the way that the maximisation of this choice leads to confusion in the concept of religious liberty in contemporary society. The criticism given to 'choice' in this section is limited. It only relates to the meaning of choice, regarding the approach given to religious liberty in contemporary society. This is shown through value within religious freedom, which can be seen as the exercising of choice. Building on the point made above about clashes between protected characteristics in litigation, this understanding of choice was detrimental in *Eweida*[317] in the exercising of religious conscience by employees wishing to restrict service in line with conscience. Their choice here was prohibited. As such, this leads to tensions within religious liberty. By here considering the impact upon religious liberty, the difference between choice in contemporary society and that taken by George is apparent. The action of 'choice'

99, 101; R P George, *In Defense of Natural Law* (n 26) 59, 118. See substantive discussion on the exercise of practical reason in chapter 1.

[312] D Bentley Hart, *Atheist Delusions: The Christian Revolution and Its Fashionable Enemies* (Yale University Press, 2009). See earlier in this chapter for discussion upon 'choice'.

[313] See *Azmi v Kirklees MBC* [2007] ICR 1154; *Harris v NKL Automotive Ltd* [2007] UKEAT 0134/07; *McClintock v Department of Constitutional Affairs* [2008] IRLR 29; *Chondol v Liverpool City Council* [2009] UKEAT 0298/08; *Cherfi v G4S Security Services Ltd* [2011] UKEAT 0379/10.

[314] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). In chapter 5 we will see that the 'choice' for individuals to seek another job was only narrowly rejected by the ECtHR.

[315] See further R McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom'* (2014) 77(2) MLR 277, 279.

[316] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [6] (Partly dissenting judgment). See also *Bull v Hall* [2013] UKSC 73.

[317] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [3].

impacting religious liberty is arbitrary in society, whereas rationality (in order to make any decisions) as part of practical reasoning is more defined in the Natural Law tradition. Rationality, seen as choice, will be the subject of discussion in the next subsection. Here in further analysing George's approach to religious liberty it will be shown that George fails in his understanding of human rationality to give a satisfactory basis for religious freedom.

The role of common human reason in the good of religion

The last subsection identified the tension caused by an incorrect focus upon human reason within human flourishing. This subsection will look to the third aspect of religious liberty, which is human rationality/reason. Religious reasoning plays a central part in George's approach to religion. Human reason also has an expansive role in the distinctive good of religion within George's theory. Human reason has a central part to play in any applied NNL conclusion in which religion provides a reason for political action. It will be argued in this section that English law requires a new higher standard to protect the good of religion.

George's NNL conception of religious reasoning has a higher regard for the individual as a rational choosing agent than the current equality law. This is because, for George, reason's role is not exclusive to individual reasoning but very prominent in both individual and governmental judgments. I argue this expands George's analysis because, as was shown in chapter 2, his concept provides not only capacity for case law analysis, but also capacities for practical reason and moral judgment.

Practical reasoning is also used by George to distinguish religious freedom as a fundamental right. This is an approach to religion in line with the definition provided by Lord Toulson in *R (Hodkin) v Registrar General of Births, Deaths and Marriages:*[318]

> … a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives

[318] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

> in conformity with the spiritual understanding associated with the belief system.[319]

I argue that George here follows the 'belief'[320] aspect within the definition.[321] Freedom of belief entails respect for the human person, which derives from a rational approach to human dignity. Thus under George's NNL account, religious freedom is a fundamental right. George defends a conception of religious liberty as a basic human good.[322] Choice concerning religion is seen as part of the practical reasoning process. Reason holds that respect for the person requires respect for this fundamental right. This, for George, allows people to make decisions about religion in line with their conscience. When people lose their religious freedom, George suggests they lose more than their freedom to be religious – he suggests that they lose their rights to act in line with conscience and so lose their 'freedom to be human.'[323] They lose the ability to pursue the basic human goods – integral human fulfilment is prevented. The problem with this approach is that human rationality is aligned to choice. It arguably does not reflect the other arbitrary use of choice shown in a consumerist approach to religion in contemporary society. As such, it does not address, once more, Bentley Hart's criticism posed for religious liberty that was outlined in the previous subsection. Namely that what is now considered to be the ultimate good is the good of freedom (including religious liberty); yet there is now no other absolute value to be found apart from choice.[324] This subjective existentialism as choice leads to the pursuit and maximisation of materialist goods. The result is that the materialist provision of services would extend far wider, beyond any religious liberty exception identified in *Eweida.*[325] George's method to reach religious freedom may, therefore, produce a tension because it does not meet or provide a solution to the contemporary understanding about the way religious equality

[319] Ibid [57] (Lord Toulson).
[320] Ibid [57] (Lord Toulson).
[321] The meaning of religion in *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 will be considered at length in chapter 5. The definition is limited to the Places of Worship Registration Act 1855 - A Hudson, *Equity and Trusts* (9th edn, Routledge, 2016) 999.
[322] George, *In Defense of Natural Law* (n 26) 5.
[323] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260).
[324] Bentley Hart, *Atheist Delusions: The Christian Revolution and Its Fashionable Enemies* (n 312).
[325] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This was introduced in chapter 1 and will be further developed in chapter 5.

law interacts with a consumerist approach to religion (in particular the tensions arising from service provision).

This provides an opportunity to further analyse George's approach to religion because to support this contested position for religion, George relies upon the Roman Catholic teachings *Dignitatis Humanae* (Declaration on Religious Freedom, 1965)[326] and, as earlier noted, *Nostra Aetate*.[327] Is George simply, and predictably, following the teaching of his Church? Is this another example of the Roman Catholic bias established in chapter 1? Is George revising historical Thomism in a way that would accommodate the Second Vatican Council and so preserve traditional Catholic and Thomist moral teaching?[328] I suggest these criticisms are valid because George notes that, in *Dignitatis Humanae*, the Roman Catholic Church provides a natural law argument for religious liberty and has 'a commitment to such reasoning.'[329] This is distinguished from Rawls's 'common human reason.'[330] George's preferred, modified approach which was first identified in chapter 2.5 will be discussed at length later in this section. At the outset, however, George argues that his NNL approach may be able to defend religious freedom, although this is rather in a rational affirmation of the human value of religion as embodied and made available to people through many traditions of faith via practical reasoning, in line with the teaching of the Roman Catholic Church. The benefit is that this moral reasoning method enables many traditions of faith to participate in the good of religion. This is an inclusive approach, even if it is one prescribed initially by an exclusive, institutionalised religion. Later in this section it will be shown that this dual commitment provides the necessary critique to engage case law that recognises the plurality of faiths,

[326] Pope Paul VI, 'Declaration on Religious Freedom, DIGNITATIS HUMANAE, On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious' (Holy See, 7 December 1965) <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html> accessed 8th May 2012.
[327] Pope Paul VI, 'Declaration on the Relation of the Church to Non-Christian Religions, NOSTRA AETATE' (n 305).
[328] N Bamforth and D Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge University Press, 2008) 167.
[329] Ibid. A process, outlined in chapter 2, that involves both practical reasoning and Scriptural reference - Pope Paul VI, 'Declaration on Religious Freedom, DIGNITATIS HUMANAE, On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious' (n 327).
[330] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 121.

and a wide spectrum of morality, as defined in *R (Hodkin) v Registrar General of Births, Deaths and Marriages*.[331]

George's understanding of political morality protects the flourishing of the rational agent

For George, what is true of personal morality is true of political morality.[332] This is important because it highlights that George's understanding of political morality encompasses a wide spectrum of positions and allows his NNL thought to engage with such positions. It is helpful for the wider thesis because it may allow George's thought to engage with equality law regarding religious liberty. For instance, both forms of morality (personal and political) can be in line with flourishing. This also connects two pillars[333] present in George's idealised society: the individual person (pillar one – private) is connected with a system of law and government (pillar three – public). The problem here is that religious freedom is held to be part of political morality rather than public morality. George writes that governmental respect for individual freedom and the autonomy of governmental spheres of authority is a requirement of political morality.[334] This is because law and government fundamentally exist to protect human persons and their well-being. I claim that George here fails to acknowledge a liberal sense of autonomy (transferring responsibility to the people) and also confers a high expectation upon government. George attempts to rebut this criticism, through his belief that 'human conviction to limited government is the fruit of moral conviction.'[335] Nevertheless, this critique has utility. Government's role should be subsidiary. Yet the role of equality law is anything but subsidiary; instead, the government through legislation is arguably prescribing conceptions of morality.[336]

This can be seen in the remedy available under the public sector equality duty. For instance, the implementation of the earlier introduced public sector equality duty by the EqA 2010 has set down statutory duties. Since there is no private

[331] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 [Lord Wilson].
[332] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 115-116.
[333] Ibid 4.
[334] Ibid 91-92.
[335] Ibid 93.
[336] Hepple, *Equality: The New Legal Framework* (n 1) vii. See earlier criticism of equality law in section 4.2.

sector duty to advance equality within the EqA 2010,[337] Hepple has identified that the public sector equality duty does not give rise to any enforceable private law rights; rather, it is only enforceable by way of judicial review within the UK.[338] This limits the equality duty to a duty that is only enforceable against public bodies as a public law action. As such, Hepple observes that the majority of proceedings so far have been brought by non-governmental organisations or individuals.[339] Because there is no cause of action in private law, it is not possible for an individual to claim damages for breach of statutory duty. Instead, the only legal remedy available is an application for judicial review on the basis that an authority had failed to perform its duty.[340] Notably, public bodies have a larger general impact upon society at large (when compared with private bodies). As a consequence, in critique, applying George's thought to the public sector equality duty would lead to the conclusion that equality is being enforced by government against public bodies in an effort to impact a wider consensus – a conception of political morality directed to society at large.

This political morality should, George contends, result in the governmental enforcement of common welfare – one that promotes human flourishing. This position further puts a high level of expectation upon the government because it ought to take account of the religious life of citizens, since the function of government should be to make provision for the common welfare.[341] Arguably the common welfare should provide opportunities of flourishing, one of which, according to George, can be achieved through the good of religion.[342] I argue that this is an idealised notion that fails to take account of necessary and appropriate limits imposed upon the right to religious freedom. For instance, by the Supreme Court limiting protection to recognised forms of religion,[343] and regulating religious education.[344] As such, George's approach does not successfully impose limits upon the right to religious freedom.

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[337] Ibid 179.
[338] Ibid 140.
[339] Ibid 142.
[340] Ibid.
[341] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 16.
[342] Ibid 14.
[343] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 [54-55] (Lord Toulson).
[344] See *R (on the application of Begum (by her Litigation Friend Sherwas Rahman)) v The Head teacher and Governors of Denbigh High School* [2006] UKHL 15.

As a result of this flaw and because of the problems inherent within equality regarding religion, this chapter argues that English law needs a higher standard in law. Such a standard will include a respect for the good (and basic goods) to prevent religious institutions from being forced to act against their will. At the outset this standard will be one of a 'very heavy burden'[345] upon legal authority to disregard a broad presumption in favour of religious liberty and impose the least intrusive/restrictive means in limiting principles for religious institutions not to be compelled to act against their will.[346]

George's approach is analogous to the second condition for a free society suggested by Laws LJ in *McFarlane v Relate Avon Limited*.[347] He considers, although hastily rejects, that the law may protect a particular moral position taken by Christianity not because of its 'religious *imprimatur,* but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty.'[348] In a free society, Christian morals should be protected because human rationality and practical reasoning supports their logical consistency.

George terms this a rational philosophical argument because George's limiting principles for religious institutions not to be compelled to act against their will *is* the standard in the Religious Freedom Restoration Act 1993. It is apparent that George is here merely attaching his view to a statute in which the view finds support. By doing so, this reduces the persuasive impact of George's argument. Yet, whether this standard should be applied by the courts or by the legislature, the standard relied on by George should be a high one:

> … the highest interest/standard known to our law and the least intrusive/least restrictive means, so if this government regards this as important, they better be able to show it is supremely important and there is another important way of doing it that doesn't impinge negatively on the liberty of the person they are imposing on.[349]

[345] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260).
[346] This latter part is the legal test found in the Religious Freedom Restoration Act 1993.
[347] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880.
[348] Ibid [21] (Laws LJ).
[349] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 13.

George here proposes a potential solution for state restriction in an American context. Can this also apply to UK case law or does the UK already demonstrate a high standard? Do legal restrictions on religious liberty constitute a breach of 'legal liberty'? For George, a justified, political authority must meet a 'very heavy burden,' to restrict liberty.[350] Is this standard really robust enough to prevent political authority from disregarding a broad presumption in favour of religious liberty? This concept is one that needs elaboration. Although George's broad, sweeping principle may be idyllic in content, in practice imposing an arbitrary standard may not prove to be this simple.

George's approach has again provoked criticism. McIlroy has argued that, with religious liberty being seen as 'optional' by the courts, the maximisation of this choice in the form of equality leads to methodological confusion in the good of religious liberty.[351] Once again, this consumerist approach to religion in contemporary society does not reflect George's approach to religion, which as we have seen, is linked to the exercise of practical reason in the Natural Law tradition.

Moving from dignity: responsibility, common human reasonableness or human rationality?

As I continue to critique George's approach to religious liberty, the challenges presented above require deeper exploration. As discussed earlier, value within religious freedom in contemporary society can be seen as exercising choice, and this is to the detriment of restricting services on matters of religious conscience.[352] It was also outlined above that religious equality law is causing religious liberty to be an optional consideration. In his defence of religious liberty, Rivers has presented a different approach to George.[353] Following from the Kantian enlightenment (here postmodernism value/dignity is the capacity to be one's own creator), Rivers has identified human dignity once again to be most clearly

[350] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260).
[351] D McIlroy, *A Biblical View of Law and Justice* (Paternoster, 2004).
[352] Bentley Hart, *Atheist Delusions*: *The Christian Revolution and Its Fashionable Enemies* (n 313).
Chapter 5 will detail the approach of the courts against this position: for instance *Bull v Hall* [2013] UKSC 73.
[353] J Rivers, 'Human Rights and Human Dignity: Unmasking the Trojan Horse' (Faith in the Future: biblical thinking for public life conference, 13 September 2013)
<https://www.youtube.com/watch?v=yVLGl6FCNI4> accessed 1st December 2014.

expressed in *Justice For Hedgehogs*,[354] where Dworkin identified two principles securing ethical responsibility: 1) a principle of self-respect; and 2) human dignity.[355] The ethical concept of human dignity is constructed from these two principles taken together. A clear example is given but the example given is purposefully not a very robust concept of human dignity. This is because, for example, Rivers attempts to defend religious liberty by suggesting this ethical constructivism is dangerous for religious belief because if dignity requires self-respect and authenticity, then what makes an act *morally wrongful* is if it attacks or insults the dignity of *others*.[356] From this basis any rights discourse, such as that relating to human rights, entails the 'relatively discrete components on which the dignity of human beings can be attacked'.[357] This concept of human dignity is fragile because it is dictated by ethical constructivism based upon human choice in a contemporary society.

To summarise, a concept of human dignity is becoming a Trojan horse, appearing like the universal foundation of freedom, justice and peace in the world, when its actual function is for the insinuation of a postmodern worldview.[358] It provides no set currency for nature or flourishing because truth is juxtaposed with relativism, to provide authenticity dependent upon individual choice in situations presented by modern life. For instance, through analysing the right to religious freedom one consequence is that in a human rights conflict, the choice in freedom of sexual orientation is arguably given greater rights than choice in freedom of religion in contemporary society.[359]

Rivers has built on this by presenting a 'Christian conception of human dignity.'[360] This requires the expression of religious conscience in human dignity via a theistic understanding. The problem, identified by Rivers, is that this would seem to relegate the non-religious to 'second class citizens'.[361]

The flaw in Rivers' argument is the failure to observe that an independent theistic conception would invoke rights, notwithstanding any (lack of) belief. For example,

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[354] Dworkin, *Justice For Hedgehogs* (n 113).
[355] Ibid.
[356] Rivers, 'Human Rights and Human Dignity: Unmasking the Trojan Horse' (n 353).
[357] Ibid.
[358] Ibid.
[359] See *Bull v Hall* [2013] UKSC 73.
[360] Rivers, 'Human Rights and Human Dignity: Unmasking the Trojan Horse' (n 353).
[361] Ibid.

Christmas traditions are observed within Western Society by the majority of people. Large parts of this majority have little regard for the underlying Christian/Pagan influence. However, s.1(1) of the Banking and Financial Dealings Act 1971 provides a *prima facie* option to take bank holidays for the majority of the population,[362] not relegating any to 'second-class' citizens. The bank holiday is not excluded from those who choose not to participate in the annual Christmas celebrations. As such, a better way to ground religion and the good of religion against conflicting rights discourse, may be through looking to the responsibilities discourse.[363]

This 'responsibilities approach' is an understanding built not on rules, nor rights, but upon responsibilities.[364] A responsibilities discourse draws links with the discussion about rights that is present throughout this section. For instance, a 'responsibilities approach' to religious liberty would meet the test that is set down for legal restriction. As briefly mentioned earlier in this section, to overcome the powerful and broad presumption in favour of religious liberty, political authority must meet a 'very heavy burden.'[365] The applied critique in chapter 5 will outline the ways this limit has been breached in equality law areas.

I argue that a responsibility approach is shown to be better. However, George does not adopt such. Rather, he lays down a test that can be transferred to English case law. George relies upon the courts or to the legislature to 'decide when exceptions to general neutral laws should be granted for the sake of religious freedom, or to determine in other words when presumption in favour of religious freedom has been overcome by the substantive matter of what religious freedom demands'.[366] I earlier suggested that this proposes a high standard in exercising the levers of governmental power, whether in the US or elsewhere, which standard, according to George: 'reasonable people of good will across the

[362] This provision is subject to individual employment contracts.
[363] This would provide obligation, with responsibility being a key aspect of any obligation.
[364] 1 Corinthians 10: 32-33 - *Holy Bible, English Standard Version* (Collins, 2002).
[365] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 260). George here relies upon, once again, the US Religious Freedom Restoration Act 1993 as an example to illustrate a ban that impacts upon religious liberty.
[366] Ibid.

religions and political spectrum should agree, precisely because it is a matter capable of being settled by our common human reason.'[367]

This sets down a 'reasonableness test' guided by common human reason to balance religious exceptions and so provide protection for religious freedom.

George's Roman Catholic 'reasonableness test' approach to the natural law argument for religious liberty[368] was earlier distinguished from Rawls's 'common human reason'.[369] It was earlier distinguished on the basis that a pluralist approach to moral reasoning enables many traditions of faith to participate in the good of religion.

This is important because, following Rawlsian political liberalism, would reasonable people of good will across the religious and political spectrum agree with current English religious liberty case law? From the unsettled case law and media commentary already generated, we can answer this negatively. There is also a problem here with the NNL concept of reasoning – practical reason contains elements of public reasoning.[370] For George, publically communicating ethics appeals to a facet of Rawlsian public reason, that of common human reason, as a part of public reason that appeals to the lowest common denominator. George has written that 'choice and action here enables [NNL] to overcome to [*sic*] inadequacies of Kantianism, while retaining the fundamental (and plausible) Kantian commitment to the inviolable dignity of the human person.'[371] George here presents a further weakness in his theory by forwarding a post-Rawlsian form of NNL reasoning based upon choice and human dignity.[372]

It has been shown in chapter 2 that Rawlsian public reason silences natural law. Rawls allows beliefs to influence policy only if they belong to the overlapping consensus, or beliefs that would be accepted in the original position behind the veil of ignorance.[373] An unintended consequence of this reasoning may lead to

[367] Ibid. See also George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 125.
[368] See also George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 15) 125.
[369] Ibid 121. See chapter 2.5 for the relevant discussion.
[370] See chapter 2.5.
[371] George, 'Law, Liberty and Morality in some Recent Natural Law Theories' (n 26) 41.
[372] Ibid. The problems with 'choice' were seen earlier in this section.
[373] Rawls, *Political Liberalism* (n 135) xviii. Lim has recently identified that Rawls viewed Finnis' thesis as compatible with his understanding of public reason (J Rawls, 'The Idea of Public Reason Revisited' (1997)

those with religious convictions being prevented from fully expressing their opinion or standing for their rights. This would be contrary to public reason's judicial application: Dworkin has observed that, in a hard case, judges may appeal to religious convictions or philosophical writings.[374] Dworkin has noted that a number of American judges have in fact appealed to the philosophical writings of John Rawls.[375] Rawls' public reason requires judges searching for a justification of the law's structure to avoid controversial religious, moral or philosophical doctrines. As such, this demonstrates the undesirability of Rawlsian public reasoning to achieve a fair and open critique of equality law. The same result would not apply to George's reasoning. George's 'reasonableness test' engages the good of religion in public debate. This is why it may provide a better approach to solve tensions within the EqA 2010.

Conclusion

It has been shown above that George has other foundations to his religious liberty law critique, rather than just presenting religion as a basic good. Preference is not given to the characteristic of religion within English law and this could be better protected. My analysis indicates that George's juxtaposition between the three constitutive aspects of religion – the elevated position given to religion within the basic goods; human flourishing; and rationality – taken together produce a 'reasonableness test'.[376] This is similar to many other tests for the 'reasonable person' in both private and public law, and so overcomes legal restrictions that breach 'legal liberty' and provides more protection. However, the reliance upon Rawlsian reason and conception of human dignity within a rights discourse leads ultimately to a responsibilities approach being preferred.

4.5 Chapter Conclusion

This chapter has provided original analysis by considering Robert George's approach to equality law, and his understanding of, and contribution to, the basic

64 Univ Chicago L Rev 765); however, Lim here fails to identify that practical and public reasonableness focus on different, irreconcilable ends - E Lim, 'Religious Exemptions in England' (n 108) 449.

[374] R Dworkin, 'Rawls and the Law' (2004) 72 Fordham L. Rev. 1387, 1396.

[375] For example: *Uhl v Thoroughbred Teach. and Telecomms., Inc.,* 309 F .3d 978, 985 (7th Cir. 2002) (referring to Rawls's 'veil of ignorance' from *A Theory Of Justice); Goetz v Crosson*, 967 F.2d 29, 39 (2d Cir. 1992) (quoting *A Theory of Justice*).

[376] This is most connected to the 'Wednesbury Unreasonableness' Judicial Review Test - *Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6* [140] (Lord Diplock).

good of religion and religious liberty discrimination case law, and has shown that, for him, law is the medium in which we can talk about the good. This chapter has also shown that the modification of George's thought engages the public good of religion in order to advocate a more effective approach towards equality law.

Section 4.2 argued that any discussion of NNL is now dictated under the banner of equality and enforced by a 'due regard' public sector duty. Section 4.3 further that George holds the American Constitution as a paradigm for natural rights discourse. This provides authority to enforce the natural law and to protect the natural rights held by the legislature or judiciary.

Section 4.4 analysed George's approach to religious equality law by considering the juxtaposition in his work between the three constitutive aspects of religious liberty. The role of common human reason was shown here to produce a 'reasonableness test'. Through combining this test with the 'responsibilities discourse', chapter 4 has demonstrated George's unique approach to religious liberty adjudication. This unique approach will be further reconstructed and applied in the fifth chapter in an attempt to resolve the problems facing freedom of religion within equality law.

Chapter 5 – Possible Application of Robert George's Approach to Religious Equality Law

Table of Contents

5.1 Introduction

My central argument is that the analysis of George's thought provides a viable justification for the greater protection of religious freedom in English law. Chapter

4 analysed the core components of George's approach to discrimination and religious equality law. In this chapter I review English case law and legislation to show how the modification of George's thought can relieve some of the difficulties found within current religious equality law.

In 5.1 more discussion will be given to religion to lay groundwork for the later application of George's thought, with both a focus upon the meaning of religion in English law and also with a brief overview of the key legislation. This will lead to the substantive work in the remainder of the chapter. The steps taken in this chapter are then as follows. First, in 5.2, I will engage with George's understanding of the concept of human flourishing and proportionality analysis. I will use this to view natural rights as protection forcing the state to engage in a more serious examination of Article 9 of the European Convention on Human Rights 1950 (ECHR). Building on the protection offered to the right to manifest religion in the workplace in *Eweida and Others v The United Kingdom*,[1] I will argue that this protection is necessary to protect the good of religion that leads to human flourishing. Second, in 5.3 I will argue that George's conception of 'legal liberty' secures freedom from equality laws which restrict religious liberty and shows how the freedom to change jobs is insufficient to secure freedom of religion. Third, in 5.4, I will argue that applying George's thought enables us to develop a different understanding of reasonable accommodation that protects religion as a public good. Finally, in 5.5, I develop the concept of public good further and draw on George's discussion of religious conscience to argue for enhanced protection for freedom of religious conscience.

The analysis in this thesis so far has shown that George's views surrounding equality and conscience have centred upon religion, in particular the promotion of religious liberty. This chapter will show that in an area where religious liberty often loses out in a balancing of rights, interests and protected characteristics, a superior way to view religion will be via my critique of George's thought in which religion is presented as a public good. This development was started in chapter 4 and so in this chapter a modification of George's thought will be drawn from the analysis and application of his work. The claim is that this will have implications

[1] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

for the protection of religious freedom – it will strengthen the protection accorded to religion and belief.

This chapter will contribute to the overall argument by explaining that the English courts have regularly undervalued religion and generated an inappropriately narrow understanding of liberty. This is why more protection for religious freedom is necessary. This point will be developed by reference to the Supreme Court's recent definition of religion for the purposes of the Places of Worship Registration Act 1855, the extent of protection offered to religious persons in the workplace under the Equality Act 2010, the scope of lawful conscientious objection under section 4 of the Abortion Act 1967, and the debate concerning the introduction of reasonable accommodation.

To do this, it is first necessary in this section to consider the meaning of religion within English law and to provide a brief overview of key legislation and case law.

The right to manifest religion - the meaning of religion

Legislation and case law surrounding religious freedom may be seen to be difficult because of the way that the meaning of religion is conveyed in law. Edge criticises the way that the law provides for religious freedom by doubting the legal system's approach to defining religion.[2] This is because he believes statements about metaphysical reality impacting on manifestation (and so religious freedom) are not adequately analysed. As such, this indicates that there are problems with manifestation of belief and freedom of religion. As quoted in the previous chapter, Lord Toulson's most recent definition of religion given in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* is:

> … a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.[3]

[2] P Edge, *Religion and Law: An Introduction* (Ashgate, 2006) 32.
[3] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 [57] (Lord Toulson).

Lord Toulson accepted in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* that, '[t]here has never been a universal legal definition of religion in English law'.[4] The courts have struggled providing a definition and a specific meaning for religion. For our purposes Lord Toulson took a very bold and controversial step by offering the understanding of religion given above. This understanding limited religion to, first, 'a spiritual or non-secular belief system' and second, 'explain[ing] mankind's place in the universe and relationship with the infinite' for the purposes of registering Scientology premises as a place of worship under the Places of Worship Registration Act 1855.[5]

There are two benefits with this approach. First, it rejects the narrow ruling in *R v Registrar-General ex Parte Segerdal*.[6] Religion no longer requires belief in some sort of supreme being.[7] The theistic test set down in *R v Registrar-General ex Parte Segerdal*[8] was always too narrow. The danger is that the requirement for belief in a supreme being can exclude certain religions. For instance, Buddhism is, and should be, considered a religion regardless of that test.[9] This approach broadens the scope, and continues the pattern found in both the Charities Act 2006 and Charities Act 2011, which states that religion includes those which involve belief in more than one god or none.[10] Second, this meaning given for religion does not judge the relative worth of one religion as compared to another.[11] It does not prescribe the merits of one particular religion**.** For instance, the reference to a 'group of adherents' does not discriminate against a large

[4] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and* Marriages [2013] UKSC 77 [34] (Lord Toulson).
[5] This would then allow an application for the premises to the licensed for marriage under the Marriage Act 1949.
[6] *R v Registrar-General ex Parte Segerdal* [1970] 2 QB 697.
[7] J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 162.
[8] *R v Registrar-General ex Parte Segerdal* [1970] 2 QB 697, 707 per Lord Denning MR: 'it must be reverence to a deity…Religious worship means reverence or veneration of God or of a Supreme Being'. The theistic test was followed by Dillon J in *Re South Place Ethical Society* [1980] 1 WLR 1565.
[9] Rivers, *The Law of Organized Religions* (n 7) 162. For discussion surrounding the inclusion of Jainism, Taoism, and Theosophy in the definition of religion, see *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and* Marriages [2013] UKSC 77 [51].
[10] Charities Act 2006 s.2(3)(a). See now s.3(2)(a) of the Charities Act 2011.
[11] K O'Halloran, *Religion, Charity and Human Rights* (Cambridge University Press, 2014) 59-60; S Panesar, *Exploring Equity and Trusts* (Pearson, 2010) 687. See *Thornton v Howe* (1862) 31 Beav. 14; *Nelan v Downes* (1917) 23 CLR 546; *Neville Estates Ltd v Madden* [1962] Ch. 832; *Varsani v Jesani* [1999] Ch. 219, 235.

number or a small number of adherents to the religion.[12] In a multi-faith, contemporary society this is welcome.[13]

The definition provided by Lord Toulson upon first impression complies with my analysis of George's position. In this thesis I have detailed George's definition for religion, as part of the wider application of George's views to analyse the right to religious freedom in equality law. Lord Toulson's understanding of religion accords with George's, for instance, because as was noted in chapter 4.4, concerning the 'belief' aspect within the definition, George acknowledges that freedom of religious belief allows people to make decisions about religion in line with their conscience.[14] One is able to live their life in tandem with what their belief system encourages them to follow.

On the other hand, I suggest that there are problems with this definition. Lord Toulson recognises the limits provided by his own definition and suggests that his comments in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* are, 'intended to be a description and not a definitive formula'.[15] The qualification offered by the Supreme Court shows the uncertainty present in this approach. This is mirrored in the legislative provisions surrounding the definition for a religion, which provides little guidance as to whether a system of belief constitutes a religion.[16]

Perhaps this lack of guidance is, however, by intention. Lord Toulson did consider the challenges facing the courts and commission over analysing particular "fine theological or liturgical niceties as to how precisely [adherents] see and express their relationship with the infinite",[17] which may lead to these issues not being

[12] J Chevalier-Watts 'Charity Law, The Advancement of Religion and Public Benefit – Will the United Kingdom be the answer to New Zealand's Prayers' (2016) 47 Victoria U. Wellington L. Rev. 385, 398; J Glister and J Lee, *Hanbury and Martin: Modern Equity* (20th edn, Sweet & Maxwell, 2015) 388.
[13] This development is a logical progression following the older rule that no distinction was to be drawn between Christian denominations - *Dunne v Byrne* [1912] AC 407.
[14] R P George, *In Defense of Natural Law* (Oxford University Press, 1999) 5. Analysis in chapter 4 identified George's tripartite definition for religion: religion as a basic good; religion dependent upon human rationality; and religion as an irreducible aspect of human flourishing.
[15] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 [57] (Lord Toulson). The definition is limited to the Places of Worship Registration Act 1855 and therefore is not authority for the law of charities - A Hudson, *Equity and Trusts* (9th edn, Routledge, 2016) 999.
[16] Glister and Lee (n 12) 369. For instance, section 3 of the Charities Act 2011.
[17] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 [63] (Lord Toulson).

justiciable.[18] This matches concerns that have been raised surrounding control being placed over religion by the law.[19] That being said, it is arguable that the Supreme Court is exactly the right sort of arena for these issues to be discussed. The justices of the Supreme Court provide independent legal judgment[20] and are frequently to be found engaging with matters of law and religion.[21]

This definition also conflicts with the analysis concerning George's tripartite approach to religion that was introduced in chapter 4.4; a definition that was provided to analyse the right to religious freedom. This is because religion is not seen as an irreducible aspect of human flourishing. The connection between religious liberty and human flourishing was a key observation made in analysing George's approach to religious liberty law. The protection required for religious liberty will be shown later in this chapter to be necessary to support the good of religion that leads to human flourishing.

I depart from the Supreme Court's approach because there is nothing explicit, however, in Lord Toulson's definition that specifically highlights or acknowledges the protection required by religious liberty, in order to protect the good that leads to human flourishing. By recognising a plurality of faiths and a wide spectrum of morality in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* reference is made to a 'group of adherents'. There is no explanation given here surrounding religious freedom, rather, the focus is more instructive in 'teach[ing] its adherents how to live their lives'. It is suggested that this lack of focus upon religious liberty in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* leads to greater attention being paid to the ethical definition given by Dillon J in the earlier *Re South Place Ethical Society*: 'ethics are concerned with man's relations with man'.[22] The focus is switched from worship of a deity as an aspect of religious liberty to a solely human focus. This approach conflicts with Dillon J's favoured approach in which religion was clearly concerned with man's

[18] O'Halloran (n 11) 181.
[19] See R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 98; J Rivers, 'The Secularisation of the British Constitution' (2012) 14(3) Ecc. L.J. 371, 398.
[20] *R (on the application of Miller) v Secretary of State for Exiting the European* Union [2017] UKSC 5.
[21] *Bull and another v Hall and another* [2013] UKSC 73 [45]; *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and* Marriages [2013] UKSC 77; *Shergill v Khaira* [2014] UKSC 33; *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.
[22] *Re South Place Ethical Society* [1980] 1 WLR 1565, 1571. For more discussion see P W Edge, 'Determining Religion in English Courts' (2012) 1(2) Ox. J Law Religion 402.

relationship with God.[23] By moving from a clear focus providing religious liberty being connected to a deity, this different focus may lead to a reduced, unclear role for religious freedom and so conflict with the account provided by George.

A further problem for the meaning of religion is that Lord Toulson's comments may be considered vague and amorphous. References are made to 'man's place in the universe' and 'the infinite' and both have broad theological leanings. We have also seen that teaching a 'group of adherents' how to live has ethical teaching connotations. The lack of specificity given in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* may prove problematic for different religions. Prior to the Charities Act 2006, charities law had 'separated religion off from other forms of belief by reference to the existence of belief in a god or gods.'[24] If there is, as above, no need for there to be reference to a god/gods, how is a religion to be distinguished from other competing belief systems?[25] It is identified that a code of living in accordance with belief in a group context is one possible factor.[26] This has merit because it accords with the finding that Scientology is a religion[27] and further may accommodate other recognised belief systems such as paganism.[28] As such, although the understanding of religion in *R (Hodkin) v Registrar General of Births, Deaths and Marriages*[29] is to be considered vague and without explicit reference to religious freedom, there may be one specific benefit: by recognising Scientology under the Places of Worship Registration Act 1855, there is an implicit tendency towards religious freedom by allowing a wider consideration. An implicit outworking is that greater religious freedom may be achieved by promoting groups that are generally considered to be religions outside outdated meanings given for religion. It is arguable that Paganism and Scientology should find favour in the understanding of religion, or at least the meaning should be open to such bodies for consideration. Through the modification of George's thought required to analyse religious freedom,

[23] *Re South Place Ethical Society* [1980] 1 WLR 1565, 1571.
[24] Hudson, *Equity and Trusts* (n 15) 996.
[25] Ibid.
[26] Ibid 997-998.
[27] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and* Marriages [2013] UKSC 77.
[28] For an argument that Paganism should fall within the meaning of religion see - A Iwobi, 'Out with the old, in with the new: religion, charitable status and the Charities Act' (2009) 29(4) Legal Studies 620, 629.
[29] *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

religious liberty was identified in chapter 4 as a public good.[30] So by finding Scientology to be a religion the law therefore has followed suit by promoting religious liberty for Scientology in this manner.

The reference to 'infinite' in *R (Hodkin) v Registrar General of Births, Deaths and Marriages* also displays the problems that the courts experience in evaluating an inherently spiritual, transcendent order. George takes a more pro-active stand for religion – George adopts a protective position for religion. It will be argued later in this chapter that George adopts a legal test[31] to provide protection for religious individuals from the state. Further, it was identified in chapter 3 that George has drawn influence from Hobbes by insisting on natural rights held against the state, in particular providing protection against 'overreaching governments.'[32]

This protective position for religion is reflected in the view proffered by the European Court of Human Rights (ECtHR), whereby a person's views 'attain a certain level of cogency, seriousness, cohesion and importance';[33] this actively prevents the State assessing the expression or legitimacy of these religious beliefs and the question of what is required by a religious or other belief is now to be tested subjectively.[34] I argue that when analysing George's thought this protective position for religion instead provides a readily enforceable position for religious freedom under equality law and the exercise of religious liberty in the workplace as a natural right,[35] as courts and tribunals must engage in a more serious examination of Article 9 in interpreting employment legislation.[36] Arguably this is a move which can only benefit the exercise of religious liberty. This is because it accords more with NNL by fulfilling requests for a return to 'freedom of religion or belief for all'.[37] This is to be welcomed because in effect a breach of

[30] R P George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (Berkeley Centre for Religion, Peace and World Affairs; Georgetown University, 1 March 2012) <http://vimeo.com/38096383> accessed 8th May 2012.
[31] Religious Freedom Restoration Act 1993.
[32] R P George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Isi Books, 2013) 114.
[33] Pitt, 'Taking Religion Seriously' (2013) 42 ILJ 4, 403. This reflects the earlier judgment in *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.
[34] Pitt, 'Taking Religion Seriously' (n 33) 403. The test set down in *Eweida* is now: a 'sufficiently close and direct nexus between the act and the underlying belief' – *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [82].
[35] This would here be the natural right to freedom identified in: H L A Hart, 'Are there any natural rights?' (1955) 64 *Philosophical Review* 175-91, 175.
[36] Pitt, 'Taking Religion Seriously' (n 33) 403.
[37] M Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change' (2012) 1(1) Ox J. Law Religion 5, 13.

Article 9 rights is a form of religious discrimination. It is a form of discrimination which can also been seen acting as a form of cultural discrimination.[38] The importance of this is shown in the protection set out within Article 9: in the structure of Article 9 only the manifestation of religion or belief may be subject to the limitations set out in Art 9(2), general freedom of religions are absolute rights not subject to any limitations.[39]

The Equality Act 2010 – religion or belief

I now begin to look at the legislation impacting religion, legislation which will be important when applying George's thought to analyse the protection for religious freedom. It has been argued that the Equality Act 2010 (EqA 2010) is 'not the end of the struggle for equality, but it is a new beginning.'[40] This Act provides an important opportunity to stop discrimination that demeans individuals. It will be argued in this section that, although the intentions behind the EqA 2010[41] in relation to religion and belief were admirable,[42] the enforcements of these intentions in case law, such as *Eweida*,[43] are less so. This will be shown to be the case especially in a 'democratic society',[44] which has forced a significant shift from 'non-discrimination to anti-discrimination'[45] in the legislation and case law focus outlined above. For instance, the English appellate courts have encountered great difficulty in addressing questions of religious discrimination particularly in the context of equality law. The implementation of the Employment Equality (Religion or Belief) Regulations 2003, since replaced by the Equality Act 2010, has made it impossible for courts to avoid this issue,[46] because religion or belief is listed as a 'protected characteristic' under s.4 of the EqA 2010.

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[38] Fredman, *Discrimination Law* (2nd edn, Oxford University Press, 2011) 73.
[39] J Dingemans, 'The need for a principled approach to religious freedoms' (2012) 12(3) Ecc. L.J. 2012 371, 371-372.
[40] B Hepple, *Equality: The New Legal Framework* (Hart, 2011) 186.
[41] Lord Bingham identified the idea of equality before the law as a 'cornerstone of our society' - T Bingham, *The Rule of Law* (Allen Lane, 2010) 55.
[42] For instance, removing disadvantage and increasing ethnic minority participation in public life.
[43] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This is not to say many of the provisions within the Equality Act 2010 are not valuable. The majority are very beneficial and welcome. This chapter critiques solely the provisions with the EqA 2010 concerning religion or belief.
[44] *Bayatyan v Armenia* (2011) 54 EHRR 467 [494] – here the ECtHR stressed the importance of Article 9 rights in a democratic society.
[45] R Sandberg, 'The Right to Discriminate' (2011) 13(2) Ecc. L.J. 157, 159.
[46] Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (n 14) 384.

In chapter 4.2 it was noted that equality legislation has led to excessive integration of equality law in the area of religion and belief.[47] Chapter 4 highlighted problems with the way that, for instance, the public sector equality duty interacts with religion. As such, the EqA 2010 has caused concerns about the way equality law has been connected to religion and belief. Religious equality law now dominates matters involving religion and belief.[48]

As a consequence there is now a 'growing tension' between Article 9 rights and the anti-discrimination provisions of the EqA 2010,[49] with equality law now starting to take over from the Human Rights Act 1998 (HRA) as the greater cause of increased litigation – such disputes are more frequently being framed in terms of anti-discrimination and not in liberty claims.[50] If equality law is increasingly being used, with an impact that is driving religion out of public discourse, then this may prevent employees with religious convictions from litigating to protect their rights. This difficulty for religious equality law is a difficulty found in the workplace. The protection offered to the right to manifest religion in the workplace will now be considered in light of George's thought.

5.2 Human flourishing and the right to manifest religion in the workplace

This section will display how a modified version of George's thought supports the right to religious freedom. In particular it will focus upon the right to manifest religion in the workplace. The first step here is to consider the reasons why manifestation of religion in the workplace is problematic. Second, it will be considered whether the right to manifest religion shown in *Eweida*[51] is necessary to protect human flourishing. This will require engagement with concepts drawn from George's work, in particular human flourishing. Thirdly, the right to manifest religion in the workplace will be considered in line with a legal process that can both protect and limit manifestations of religious belief: proportionality analysis. As such, this section will particularly consider the (lack of) proportionality analysis

[47] Hepple, *Equality: The New Legal Framework* (n 40) 177.
[48] For instance, it was suggested in chapter 4.2 that religious equality law prevents claimants being able to effectively rely upon Articles 9 and 14 of the European Convention on Human Rights 1950 (ECHR).
[49] M Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (2013) 15(2) Ecc. L.J. 191, 2013.
[50] Rivers, 'The Secularisation of the British Constitution' (n 19) 382.
[51] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

in *Greater Glasgow Health Board v Doogan*.[52] Finally, this section will turn back to the proportionality tensions identified in *Eweida*[53] to apply George's thought and assess the right surrounding manifestation of belief. By taking these steps this section will show that the right to manifest religion in the workplace is necessary to protect the good of religion that leads to human flourishing. This will argue that the analysis of George's thought is helpful in analysing the right to religious freedom.

The manifestation of religion in the workplace has proven to be very problematic. Does case law recognise that employees have a right to manifest religion in their workplace? In *Eweida*[54] the ECtHR found that Ms Eweida, as an employee, had a right to manifest her religion in the workplace: domestic law[55] did not strike the right balance between the protection of Ms Eweida's right to manifest her religion and the rights of others.[56] Further Ms Ladele's and Mr McFarlane's (conjoined applicants) religious beliefs were the direct motivation for their objection to carry out certain duties; this was held to be sufficient to engage Article 9 of the ECHR

[52] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

[53] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

[54] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This case was explored (and introduced) in detail in chapter 1 because of its centrality to the thesis. A short re-introduction is that Ms Eweida, a British Airways employee, was successful in her claim of discrimination against her employer who breached her right to manifest religion in the workplace by wearing a cross. This was held to be contrary to Article 9 of the ECHR. The ECtHR held that by denying Ms Eweida her right to wear a cross, domestic law did not strike the right balance between the protection of Ms Eweida's right to manifest her religious and the rights of others - *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79]. The ECtHR determined that the domestic courts had given too much weight to BA's wish to protect its corporate image - *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [112]-[114]. It was decided that domestic law did not therefore protect Ms Eweida's right to freedom of religion and so this case promotes the protection for religion offered by Article 9 - *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [66].

[55] In contrast, the Court of Appeal's judgment in the same case held that Article 9 of the ECHR was inapplicable since the restriction on wearing a cross visibly at work did not constitute an interference with the manifestation of belief - *Eweida v British Airways PLC* [2010] EWCA Civ 80 [22] (Sedley LJ). Here Sedley LJ believed he was following the ECtHR decision in *Kalac v Turkey* (1997) 27 EHRR 522, s.27, which stated: 'Article 9 does not protect every act motivated or inspired by a religion or a belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account'. Sedley LJ's interpretation was deemed by the ECtHR in *Eweida* to place too little weight on the legitimacy of Ms Eweida's manifested religious belief - *Eweida v British Airways PLC* [2010] EWCA Civ 80 [94].

[56] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79]. The courts here held Ms Eweida's desire to manifest her religious belief was of *value* to an individual – ibid [94] [Partly dissenting judgment]. This highlights the affirmation of Article 9 and the place of religion.

in *Eweida*.[57] Donald considers this an important step as overall Article 9 is becoming 'insufficiently and erratically protected in the courts'.[58] Ms Eweida's manifestation of religious belief being protected under Article 9 is considered to be important by Donald. This is to the extent that 'almost every case brought with reference to the religion clauses of the European Convention has failed in the British domestic courts'.[59] It will be argued in this section that the intentions of Parliament implementing the religious liberty protections in the EqA 2010 were admirable. These were intentions such as removing disadvantage and increasing participation in public life; however, it will be shown that the enforcement of these intentions in case law and under the application of George's thought are less so in a democratic society. As such, following these admirable intentions it has been argued that it is easy to accept that equality is a 'good thing' without stopping to question what supports such a belief and what factors drive intentions to implement religious equality law.[60]

The right to manifest religion is necessary to protect human flourishing

Before it can be shown that employees have any rights to engage equality law under our critical application of George's thought, it is necessary to establish a connection between the critique of George's NNL and equality law. Hepple has defined an 'equal society' as one which 'protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish.'[61] For Hepple, much like within NNL, equality within society is connected to flourishing.

It will now be established by engaging George's thought, whether the right to manifest religion secured in *Eweida*[62] is necessary to protect human flourishing. This requires engagement with the concept of flourishing. Flourishing, and in

[57] Ibid [103, 108] (Fourth Section).
[58] A Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (2013) 2(1) OJLR 50, 51.
[59] Rivers, 'The Secularisation of the British Constitution' (n 11) 380; Rivers, *The Law of Organized Religions* (n 7) 320.
[60] Trigg, *Equality, Freedom and Religion* (Oxford University Press, 2012) 2.
[61] Hepple, *Equality: The New Legal Framework* (n 40) 12 – here citing The Equalities Review Panel, 'Fairness and Freedom: the Final Report on the Equalities Review' (Equal Rights Trust, 27 February 2007) <http://www.equalrightstrust.org/content/fairness-and-freedom-final-report-equalities-review> accessed 25th August 2015.
[62] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79].

particular human flourishing is very important for George.[63] In chapter 4.4, analysis highlighted the definition for human flourishing.[64] I will elaborate upon this concept here. Human flourishing was earlier considered to be important because it is linked to the attainment of religious freedom.[65] The good of religion requires religious freedom[66] and in establishing the connection between religious freedom and human flourishing, George writes that '[r]eligion is a basic human good, an intrinsic and irreducible aspect of the well-being and flourishing of human persons'.[67] For George, it is clear that to attain and secure religious freedom requires the protection of the right to religious liberty, in order to achieve human flourishing.[68]

It has been shown above that the protection required by religious liberty (highlighted by manifestation of belief being protected) is necessary in order to protect the good that leads to human flourishing. This is an important observation for religious freedom. As this thesis argues that religious liberty currently conflicts with religious equality law, this connection between religious liberty and human flourishing allows the possible application of the analysis of George's thought to equality legislation and associated case law.

Turning to the relevant case law, Hill believes that the judgment in *Eweida*[69] formed an 'uncompromising reaffirmation of the importance of the Art. 9 right to freedom of religion and belief'.[70] Indeed, there is consensus in the literature that *Eweida* establishes a right under Article 9 for employees to manifest their religion in the workplace.[71] Does this manifestation of religion in the workplace also

[63] Chapter 1 outlined that George grounds his conception of human flourishing on the Aristotelian notion of *eudaimonia*.
[64] Human flourishing was argued to be a constitutive aspect for George's definition of religion.
[65] In chapter 4.4 I analysed George's approach to the Declaration of the Relation of the Church to Non-Christian Religions (*Nostra Aetate)* which directly links religious liberty to human fulfilment - Pope Paul VI, 'Declaration on the Relation of the Church to Non-Christian Religions, NOSTRA AETATE' (Holy See, 28 October 1965) <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html> accessed 8th May 2012.
[66] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 119.
[67] R P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press, 1994) 221.
[68] R P George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (Berkeley Centre for Religion, Peace and World Affairs; Georgetown University, 1 March 2012) <http://vimeo.com/38096383> accessed 8th May 2012. See also George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 75.
[69] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This case was introduced at length in chapter 1.
[70] M Hill, 'Religion at Work' (2013) 163 NLJ 89, 90.
[71] For example: McIlroy, 'A Marginal Victory for Freedom of Religion' (n 13) 211; M Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (2013) HRLR 1, 22; Hill, 'Religious Symbolism and

include views upon ethical and moral questions? For instance, does this include George's view that the natural law is inherent in making moral conclusions?[72] The fourth section of the ECtHR has stated that because religious beliefs prescribe views upon moral questions, this leads to these views generated being termed a 'manifestation of ... religion and belief'.[73] This further supports the manifestation of religion because it prescribes the contentious duty for the state to protect and secure these rights under Article 9.[74] It also arguably provides guidance for member states when applying the limitations for indirect discrimination provided for in Article 9(2), as 'manifestations of religious belief' will only be limited subject to the proportionality balancing exercise undertaken by the courts under Article 9(2).

Manifestation and proportionality analysis

The right to manifest religion in the workplace will now be considered in line with a legal process that can both protect and limit manifestation of religion and belief: proportionality analysis. Given that the concept of proportionality has a long history[75] and can mean different things in different contexts, it is important to identify the proportionality analysis being criticised in this thesis. Proportionality provides a method for justifying interference with a Convention right that is permitted by the courts.[76] Neil Addison puts it well: '[i]n essence, proportionality means a balance between what is the alleged discriminatory effect and the importance of the aim pursued.'[77] This is a balancing act which requires analysis

Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (n 10) 193.

[72] See George, *Making Men Moral: Civil Liberties and Public Morality* (n 67). For instance, a moral position within law: a philosophical belief in the BBC was held to gain protection under equality law within *Maistry v BBC* [2011] ET 1313142/2010.

[73] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [108] (Fourth Section majority judgment).

[74] Sir James Munby has considered that Article 9 of the ECHR requires the courts to 'pay every respect to the individual's….religious principles.' J Munby, 'Law, Morality and Religion in the Family Courts' (2014) Ecc. L.J. 131, 137. For this reason Article 9 protects both 'religion' and 'belief'.

[75] For instance in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, Lord Reed fascinatingly traces proportionality reasoning to German constitutional law, Thomas Aquinas and Aristotle - *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 [68] (Lord Reed).

[76] This concept of proportionality was most clearly set out by Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 [165]; see also *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 [20] (Lord Sumption).

[77] N Addison, *Religious Discrimination and Hatred Law* (Routledge-Cavendish, 2007) 71.

by the court.[78] It is a balancing act that seeks to avoid unnecessary limitations of rights by taking, for instance, religious interests into consideration.[79]

Proportionality has been shown throughout this thesis to be at the centre of religious freedom tensions. Indeed, proportionality is held to be inherent within the whole of the Convention.[80] The scope of proportionality is therefore broad and powerful. Evidently this scope would include Article 9 and 14 rights. Hence this is why manifestation of religion is subject to proportionality analysis. This can be seen in *Eweida* because, as introduced in chapter 1, the ECtHR weighed 'the proportionality of the measures taken by a company in respect of its employee.'[81] They considered whether the imposition of a dress code (prohibiting manifestation of religion) was a proportionate means of achieving a legitimate aim (a company brand and image). As was detailed in chapter 1, it was by this process that the ECtHR decided that Ms Eweida's Article 9 rights had been infringed.[82] It was by this process that the protection offered to the right to manifest religion in the workplace was secured for Ms Eweida.

This protection for the manifestation of religion and belief secured by proportionality analysis would be a move endorsed by Robert George. The protection given to manifestation of religion and belief in the workplace is necessary to support and guard the good that leads to human flourishing. This is an important observation that I have taken from George's thought in order to critique religious freedom and show protection for the good of religion. Chapter 4.4 analysed George's tripartite approach to religion, and George is very clear that everyone should enjoy the right to manifest their religious belief and should not suffer discrimination when doing so.[83] The protection for the manifestation of religion is important because it prevents the English courts from 'assum[ing] that they know enough about Christianity to be able to determine what does and does

[78] See further: E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999); Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in Jurisprudence* (Intersentia, 2002) 14-16, 190-205; T Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff, 2015) 63-99; F Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) 4-12.
[79] L Vickers, 'Twin approaches to secularism: organized religion and society' (2012) 32(1) OJLS 197, 209.
[80] *Sporrong and Lonroth v Sweden* (1983) 5 EHRR 35 [69].
[81] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [94].
[82] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79].
[83] R P George, *The Clash of Orthodoxies: Law, Religion and Morality in Crisis* (ISI Books, 2001) 6.

not count as a necessary manifestation of such a belief.'[84] The courts have seemingly come close to this position, for instance in *McFarlane v Relate Avon Ltd*[85] Underhill J was prepared to accept that an objection to a manifestation of religious belief might effectively be an objection to the belief itself, if the context showed no other reason for the employer's action.[86]

As we have now seen that the right to manifest religion in the workplace was secured by proportionality analysis in *Eweida*, this section will now turn to consider the lack of proportionality analysis in the important later decision in *Greater Glasgow Health Board v Doogan* before I then identify the preferred proportionality test.[87] A further restriction and interpretation imposed upon manifestation of religious belief (in particular religious conscience) can be seen in *Greater Glasgow Health Board v Doogan*.[88]

***Greater Glasgow Health Board v Doogan* – manifestation of religion and proportionality analysis**

The Supreme Court considered freedom of religious conscience in *Greater Glasgow Health Board v Doogan*.[89] It is an example of a missed opportunity to consider the right to manifest religion in the workplace. This case highlights an instance where equality law interacts with freedom of conscience. Miss Doogan and Mrs Wood were both practising Roman Catholics. Both worked at South General Hospital in Glasgow as Labour Ward Co-ordinators, and they objected to having any involvement in the process of abortion. Although this case originated in Scotland, the relevant legislation is the same in Scotland as in England and Wales.[90] This makes the judgment important as an indication of the scope of the Abortion Act 1967 and the Equality Act 2010 in England as well. Section 4 of the Abortion Act 1967 was in issue in this case because the Supreme Court considered the right to conscientious objection to abortion. Section 4(1) of the Abortion Act 1967 states:

[84] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 212. See *R (Williamson and Others) v Secretary of State for Education and Employment* [2005] UKHL 15 [23].
[85] *McFarlane v Relate Avon Ltd [2010]* IRLR 196 [18]-[19] (Underhill J).
[86] Ibid.
[87] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.
[88] Ibid.
[89] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.
[90] Section 217 of the Equality Act 2010.

‘(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection: Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.’

The “conscience clause” in s.4(1) of the Abortion Act 1967 was identified as the key in determining the scope of the right of conscientious objection,[91] and in particular the phrase ‘to participate in’, which protects an individual from participating in an abortion. As such, the key question was one of pure statutory construction.[92]

Lady Hale’s analysis followed Lord Diplock’s judgment in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*[93] in deciding that the Abortion Act 1967 authorised the whole course of treatment bringing about the abortion.[94] Lady Hale agreed with Lord Diplock that the clear policy brought about by the wording in the Abortion Act 1967 was to, ‘broaden the grounds upon which an abortion might lawfully be obtained and to ensure that abortion was carried out with all proper skill and in hygienic conditions.’[95] The key point for impact on freedom of religious conscience and religious equality law is that Lady Hale’s statutory construction then built upon this by adopting a narrow meaning in relation to what is meant by to participate in the course of treatment, for the purposes of the conscience clause under section 4 of the Abortion Act 1967.[96] This was because in drafting the conscience clause it was unlikely that, ‘Parliament had in mind the host of ancillary, administrative and managerial tasks’.[97] Here Lady Hale ascribed a narrow meaning for the purposes of conscientious objection. For instance, it was held that participation ‘means taking part in a “hands-on” capacity.’[98] Lady Hale interpreted the intention of Parliament

[91] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [10]-[11] (Lady Hale).
[92] Ibid [11] (Lady Hale).
[93] *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800.
[94] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [33] (Lady Hale). See *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 [828A] (Lord Diplock).
[95] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [27] (Lady Hale). See *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 [827D] (Lord Diplock).
[96] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [37-38] (Lady Hale).
[97] Ibid [38] (Lady Hale).
[97] Ibid.
[98] Ibid.

in a way that excluded ancillary, administrative and supervisory tasks in the course of treatment in question.

By holding this narrow meaning, these arguments then led to the statutory interpretation being applied to a number of hypothetical scenarios. Here Lady Hale practically applied the Abortion Act 1967 to the context of particular roles and situations faced in the workplace by midwives.[99] For instance, Lady Hale applied the conscience clause to the job description of the Labour Ward Co-ordinator,[100] in order to decide whether the particular examples satisfied her Ladyship's interpretation of the statutory wording. This found the conscience clause to be narrower in scope than that put forward by the midwives. The whole course of treatment included work activity not included in the narrow conscience clause.[101] As such, the nurses' complete job description was not covered by the conscience clause; the nurses were required to perform services that infringed their religious conscience but which were not covered by the statutory conscience clause.

Religious freedom in relation to equality law was raised in the judgment.[102] In deciding that the case concerned solely statutory construction, Lady Hale considered (and dismissed) important arguments that involve religious freedom and equality law. These were labelled by Lady Hale as '*Two distractions*'.[103] Lady Hale considered that any argument made under the Equality Act 2010 should be made under a different forum. *Doogan* was held to resolve issues involving statutory interpretation; *Doogan* was not the correct setting to resolve matters of indirect discrimination under the Equality Act 2010. Lady Hale came to this conclusion for two reasons: first, Lady Hale considered whether the employer should adopt 'reasonable adjustments' in the job in order to cater for the nurses' religious beliefs.[104] Reasonable accommodation to cater for the religious beliefs of the employees was held to depend upon 'issues of practicability which are

[99] Ibid [39] (Lady Hale).
[100] A Henderson, 'Conscientious objection to abortion: Catholic Midwives lose in the Supreme Court' (UK Human Rights Blog, 28 December 2014) <https://ukhumanrightsblog.com/2014/12/28/conscientious-objection-to-abortion-catholic-midwives-lose-in-supreme-court/> accessed 18th September 2017.
[101] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [39]-[40] (Lady Hale). See further B Hale, 'Secular Judges and Christian Law' (2015) 17(2) Ecc. L.J. 170, 177.
[102] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [24] (Lady Hale).
[103] Ibid [22] (Lady Hale).
[104] Ibid [24] (Lady Hale).

much better suited to resolution in the employment tribunal proceedings'.[105] Therefore the issue of reasonable accommodation was considered to be better suited to resolution in the proceedings that the respondent had also brought in the employment tribunal. In writing extra-judicially Baroness Hale has identified that the issue whether employers could reasonably be expected to make reasonable adjustments to accommodate the midwives' belief is considered a separate question.[106] The concept of reasonable accommodation will be analysed at length in chapter 5.4.

The second argument alluded to by the Supreme Court questioned whether there was a need to apply a proportionality test to decide about limiting manifestation of belief following *Eweida and Others v United Kingdom*.[107] This is key because although we have seen above that the case was not explicitly analysed in these terms, the fact that Lady Hale cites *Eweida* and suggests '[r]efusing for religious reasons to perform some of the duties of the job is likely…to be held to be a manifestation of a religious belief'[108] this frames the rest of the debate. The manifestation of belief was here considered to be the nurses' conscious objection to performing services directly connected to abortions,[109] and this invoked mention about indirect discrimination under the Equality Act 2010.[110] A judgment surrounding the issue of discrimination under equality law was not given. Lady Hale considered this to involve 'difficult questions'[111] because such questions would involve proportionality analysis under Article 9(2) of the ECHR, and so question whether restrictions placed upon the manifestation by the employers was a proportionate means of achieving a legitimate aim.[112] This was held not to be helpful because the answers would not assist in the preferred approach (statutory analysis) adopted by Lady Hale in this case.[113] The answers would not necessarily point to 'either a wide or a narrow reading of section 4 of the 1967

[105] Ibid [24] (Lady Hale).
[106] Hale, 'Secular Judges and Christian Law' (n 101) 177.
[107] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[108] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [23] (Lady Hale).
[109] Ibid [23] (Lady Hale). See further, J Kentridge, 'Case Comment: *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68' (UK Supreme Court Blog, 20 January 2015) <http://ukscblog.com/case-comment-greater-glasgow-health-board-v-doogan-anor-2014-uksc-68/> accessed 15th September 2017.
[110] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [23]-[24] (Lady Hale).
[111] Ibid [23] (Lady Hale).
[112] Ibid.
[113] Kentridge, 'Case Comment: Greater Glasgow Health Board v Doogan & Anor [2014] UKSC 68' (n 109).

Act.'[114] For this reason the answers were deemed 'context specific'.[115] Instead, Lady Hale found it helpful to set a clear limit set down from the employer to the employee and instead, as we have seen, clearly adopted the 'ordinary principles of statutory construction.'[116] This was because this would 'set a limit to what an employer may lawfully require of his employees.'[117] I suggest that in this respect the judgment was admirable because taking this approach helpfully provides clear guidance involving conscience exemptions to both hospitals and midwives. As a result of the case there are clearer guidelines given for the scope of conscientious objection under the Abortion Act 1967.

By considering manifestation of religion in *Doogan*, we can see that Baroness Hale rejected balancing the need to provide abortion services with midwives' religious conscience. It is nevertheless clear throughout this thesis that balancing the interests of society with those of religious individuals, involves weighing (and potentially restricting) religious rights.

For instance in *Doogan*, the Supreme Court considered that refusal to perform abortion services for religious reasons was likely to be held to be a manifestation of religious belief,[118] and for the reasons given above rejected the need to employ the proportionality analysis to question whether the restriction of a religious right was a proportionate means of achieving the legitimate aim to provide hospital services in accordance with Article 9(2).[119] The need for a clear limit providing guidance for conscientious objection, in the provision of abortion services, was met.

On the other hand, I suggest that the statutory construction approach by the Supreme Court (providing guidance) potentially decides the question in an illogical manner. Just because arguably a valid legal test does not help the preferred mode of legal analysis, this does not mean that this test should be abandoned. The proportionality analysis was a perfectly valid option open to the Supreme Court here. A preferable approach is that when the Supreme Court is invited to interpret a rule affecting a fundamental right, they should do so against

[114] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [23] (Lady Hale).
[115] Ibid.
[116] Ibid [24] (Lady Hale).
[117] Ibid.
[118] Ibid [23] (Lady Hale).
[119] Kentridge, 'Case Comment: *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68' (n 109).

the background of the underlying balance of principles. In other words, to interpret s.4(1) of the Abortion Act 1967 properly requires the court to consider what limitations of freedom of conscience are justified. The underlying balance of principles was the same and equally relevant both in the statutory interpretation rule and any other question of indirect discrimination. As such, following the use of the proportionality analysis in *Eweida*,[120] proportionality under Article 9(2) of the ECHR was highly relevant and would have addressed the issue of manifestation of belief surrounding individual conscience here. Richard Ekins, for instance, has termed it 'extraordinary' that the Supreme Court did not reflect on Article 9 of the ECHR.[121]

The Supreme Court should not dispense with a valid legal option merely because an easier option (in the form of statutory interpretation/construction) presents itself. It is arguable that if the Supreme Court had considered what limitations of freedom of conscience are justified, then the decision may have been more favourable to the nurses' religious rights. There was a missed opportunity to invoke the proportionality analysis under Article 9(2) of the ECHR and so a corresponding opportunity to (potentially) allow for more protection to be given to the protection of manifestation of religious belief in the workplace. Here this was freedom of religious conscience.

Alastair Henderson argues that the ruling in *Doogan* makes clear that the law requires employers to respect the conscience of their employees, to the extent that they do not need to directly participate in abortion.[122] He identifies that this is a narrow victory for religious freedom – it is one that recognises a limited respect for freedom of religious conscience. Such a level of respect is welcome in hospitals. As Henderson points out this is also for the sake of women undergoing an abortion procedure, because presumably they would rather not be treated by someone who strongly disagrees with what is happening.[123] The problem with the decision in Doogan, however, is that in this case there were two opportunities for protecting religious belief and both were missed: neither the manifestation of the

[120] *Eweida and Others v The United Kingdom* [2013] (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [83]-[84], [100]-[101], [104]-[106].
[121] R Ekins, 'Abortion, Conscience and Interpretation - Case Comment: *Greater Glasgow Health Board v Doogan* [2014] UKSC 68' (2016) 132 LQR 6, 11.
[122] Henderson, 'Conscientious objection to abortion: Catholic Midwives lose in the Supreme Court' (n 100).
[123] Ibid.

midwives' religious beliefs, nor the reasonable accommodation of these beliefs were secured. This suggests that rather than respecting conscience, Doogan was a missed opportunity and therefore continues to limit conscience. The Supreme Court instead 'undercut the provision that Parliament made to protect conscience.'[124] This will require the modification of George's thought to provide an express position for freedom of religious conscience later in this thesis.

The failure here to protect manifestation of religious conscience highlights a limitation placed upon religious liberty. Legal liberty is not guaranteed for those willing to defend their right to freedom of thought, conscience and religion following *Doogan*. This is surprising because following Eweida it may have been reasonable to assume that domestic courts would be more willing to protect religious conscience. This has not been the case. Miss Doogan and Miss Wood did not see their manifestation of their religious belief being protected. As such, this shows a limitation upon the public good of religion when exercised by the individual. The promotion of religion as a public good is needed to extend protection for matters of individual freedom of religious conscience.

It has now been shown that there was a lack of proportionality analysis when deciding about limiting manifestation of religion and belief in *Doogan*. As such, now that proportionality analysis impacting the manifestation of religious belief has been highlighted, it is now appropriate to identify the proportionality test that is preferred.

Religious Freedom Restoration Act 1993

To assess the issue surrounding manifestation of religion and belief we need to turn back to the original proportionality tensions[125] identified within *Eweida*.[126] Here the restrictions imposed upon Mr McFarlane, Ms Ladele and Ms Chaplin arose out of the fact that their employers were attempting to justify workplace duties and obligations (McFarlane and Ladele) and workplace attire (Chaplin and Eweida) as requirements to pursue a legitimate aim. This raises the question whether a religious believer can be required to do something contrary to their

[124] R Ekins, 'Abortion, Conscience and Interpretation - Case Comment: *Greater Glasgow Health Board v Doogan* [2014] UKSC 68' (n 121).
[125] Sandberg, 'The right to discriminate' (n 45) 157.
[126] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This was explored in chapter 1.3: 'The applicants within *Eweida and Others v The United Kingdom*.'

faith. If so does this limit their right to actively manifest their religion? It was identified in chapter 4 that to overcome the powerful and broad presumption in favour of religious liberty, political authority must meet a 'very heavy burden'[127] when providing a justification. Here a practical, broad limit is imposed. George notes that a legal test, for example in the United States under the Religious Freedom Restoration Act 1993,[128] is one way of capturing the presumption and the burden to justify a prohibition that bears negatively on religious freedom: 'a neutral law of general applicability must be supported by a *compelling state interest* and represent the *least restrictive or intrusive means* of protecting or serving that interest.'[129] This is a proportionality test highlighted by George and as part of the application of George's thought to analyse religious freedom it can helpfully be transferred to English case law.

This differs from existing conceptions of proportionality. The 'least restrictive or intrusive means of protecting or serving that interest' wording in the Religious Freedom Restoration Act 1993, is a very high legal standard of review to impose.[130] Next the 'compelling state interest' requirement of the Religious Freedom Restoration Act 1993 can also be considered harder for political authority to meet than the equivalent standard in English law.[131] The proposed proportionality test is a stricter one. It is arguable that this proposed proportionality test may provide more protection for religion. For instance, this preferred approach could be used to impose a heavy burden upon restriction of religious liberty – such as the restrictions to religious liberty taken by the state in *Eweida*. It is a proportionality test that focuses upon causing minimal disruption,[132] this is because it does not give wide discretion through the

[127] R P George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (Berkeley Centre for Religion, Peace and World Affairs; Georgetown University, 1 March 2012) <http://vimeo.com/38096383> accessed 8th May 2012.

[128] The Religious Freedom Restoration Act 1993 is a United States federal law aimed at preventing laws that substantially burden a person's free exercise of their religion. By requiring that government will not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, and holding federal government to be responsible for accepting additional obligations to protect religious exercise then religious liberty is *prima facie* provided with protection.

[129] George, 'Keynote Address: Religious Freedom: Why Not? Defending an Embattled Human Right' (n 30) [Emphasis added].

[130] It is higher than 'whether a less intrusive measure could have been used' - *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 [20] (Lord Sumption).

[131] See: '(i) whether its objective is sufficiently important to justify the limitation of a fundamental right' - *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 [20] (Lord Sumption).

[132] For instance, the Religious Freedom Restoration Act 1993 includes the prohibitive terms: 'the least restrictive or intrusive means'.

'justification' and 'legitimate aims' given to the courts, for instance, under Article 9(2) of the ECHR.

A proportionality test is necessary in order to secure religious freedom under English law. George's proportionality test reflects the difficulty that law encounters when dealing with religious belief. English law has already perceived religious beliefs restrictively, that is as *prima facie* 'chosen' beliefs.[133] Lucy Vickers has observed it also to be important that 'courts do not overstep their competence in ruling on matters of faith and doctrine'.[134] This is because it seems that courts are more ready to restrictively determine both what is and what is not core with regard to Christianity than with other faiths, while also giving a 'cautious and formalistic approach to the task of interpreting and applying anti-discrimination law'.[135] For instance, this was the case in *Williams v Secretary of State for Education and Employment*[136] where 'some of the judges were prepared to determine what was and what was not required of Christianity, rather than considering the religious views of the particular claimants before them.'[137]

This contrasts with Lord Hope who famously began his dissenting judgment in *R (E) v Governing Body of JFS* by stating 'it has long been understood that it is not the business of the courts to intervene in matters of religion'.[138] Evidently through the imposition of the EqA 2010 there is a certain level of intervention, one which has led Vickers to comment that the courts are 'stepping beyond their usual boundaries in determining religious issues, with particular reference to comments by the courts on issues such whether [*sic*] particular beliefs are 'core beliefs''.[139] This intervention can also be seen through 'belief' being interpreted broadly[140] and expansively[141] as a positive legal right for the purposes of the EqA 2010 – a process that has led to the courts moving from 'non-discrimination' towards an

[133] E Lim, 'Religious Exemptions in England' (2014) 3(3) Ox J. Law Religion 440, 446. See, for instance, *Eweida v British Airways PLC* [2010] EWCA Civ 80 [40] (Sedley LJ).
[134] L Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc. L.J. 280, 295.
[135] C O'Cinneide & K Liu, 'Defining the limits of Discrimination Law in the United Kingdom: Principle and Pragmatism in Tension' (2015) 15(1-2) IJDL 80, 89.
[136] *Williams v Secretary of State for Education and Employment* [2002] EWCA Civ 1926 [76] (Buxton LJ).
[137] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 295.
[138] *R (E) v Governing Body of JFS* [2010] IRLR 136 (SC).
[139] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 280.
[140] M Pearson, 'Offensive Expression and the Workplace' (2014) 43(4) ILJ 429, 440. See: *Grainger Plc v Nicholson* [2010] 2 All ER 253 (EAT); *Maistry v BBC* (2011) ET/1313142/2010.
[141] Sandberg, *Law and Religion* (n 19) 83.

'anti-discrimination' approach.[142] This intervention has been argued to be from passive toleration to the active promotion of religious freedom as positive legal rights.[143]

A proportionality test is necessary to secure religious freedom because *Eweida*[144] has shown that for manifestation of belief, adjudication surrounding manifestation of belief in the workplace has been difficult. To resolve any fears that the courts are restrictively determining core beliefs differently for Christians as compared to other groups of religious believers, Ernest Lim has argued that the courts could adopt a different approach in the context of indirect discrimination claims.[145] For instance, instead of analysing the source and content of belief that should be accorded (a qualitative approach) he suggests that the court could instead analyse whether the belief is subscribed to by many believers (a quantitative approach).[146] There are however problems with this suggestion. This is because although this approach would be helpful if the number of persons holding a particular belief was viewed as a proportion within any religious group - i.e. examining what proportion of Christians hold a particular belief may be helpful in identifying whether it is a core belief - sincerity of belief is conceptually distinguishable from the number of people who subscribe to a belief. Therefore adjudication surrounding core beliefs shows that there are further difficulties to be found with manifestation of belief and that the preferred proportionality test identified above is necessary to secure religious freedom.

This section has shown that following *Eweida*[147] employees do have the right to manifest religion in the workplace. This manifestation was seen to be contingent upon the connection I have drawn from religious liberty and the concept of human flourishing in George's work. The protection given to manifest religion in the workplace was shown to be necessary to support and guard the good that leads to human flourishing. From engagement with the concept of human flourishing and a preferred quasi-proportionality test following the Religious Freedom

[142] Sandberg, 'The Right to Discriminate' (n 45) 157.
[143] Ibid 159; R Sandberg, *Law and Religion* (n 19) 81, 192. It is submitted a similar process has followed for the other protected characteristics.
[144] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[145] Lim, 'Religious Exemptions in England' (n 133) 452.
[146] Ibid 453. See *Mba v Mayor* [2013] EWCA Civ 1562 [39] (Vos LJ).
[147] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

Restoration Act 1993, the analysis conducted here into George's thought provides a response to any attempt by the state to restrict religious liberty. Anti-discrimination law, however, has further proven problematic for equality in relation to religion and belief – the evaluation of Article 9 presents problems surrounding justiciability. This was shown by suggestions that courts have been terming certain manifestations as fundamental beliefs. This has infringed religious freedom and resulted in the law moving from 'non-discrimination' to 'anti-discrimination'. The next section will consider whether equality law and George's 'legal liberty' concept protects employees manifesting their belief against pressure to seek employment elsewhere.

5.3 Legal liberty and the insufficiency of changing jobs to protectfreedom of religion

Chapters 3 and 4 detailed Robert George's understanding of liberty as a basic reason for action within his theory. This section will consider this basis and use the modification of George's thought to address the issue whether freedom to change jobs is enough to guarantee religious liberty and so continue the critique surrounding the right to religious freedom in equality law. To do so this section will engage with the concept of choice. George's thought will be shown to be helpful when analysing this concept. This section will continue to analyse the right to freedom of religion by, first, my analysis of an opposition provided towards laws restricting religious liberty, via 'legal liberty'. This section will also, secondly, engage with the concept of conscience when considering religious liberty restrictions, in particular freedom of religious conscience. By engaging with George's conception of 'legal liberty' I will arrive at a position showing how freedom to change jobs is insufficient to secure freedom of religion. This issue surrounding the freedom to change jobs has arisen from case law because liberty, in the form of religious liberty, has encountered difficulty in litigation involving Article 9 of the ECHR. For instance, in *R (Begum) v Headteacher and Governors of Denbigh High School*,[148] Lord Bingham dealing with the question of interference with the claimant's rights under Article 9, stated:

> The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or

[148] *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

> observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.[149]

This gives rise to the inference that faced with a conflict between religious freedom and another protected characteristic, if the possibility of changing jobs is available, this guarantees freedom of religion – a 'specific situation rule'.[150] By changing jobs, this prevents conflict by allowing the religious believer to carry on in their practice/belief without interfering with another's rights.[151] Gwyneth Pitt has argued against this 'highly restrictive approach' on the basis that in reality employees are rarely in the position to be 'choosy' about which jobs they will accept and on which terms.[152] This highlights the imbalance of power this position has enforced.

This position (the option for the employee to gain employment elsewhere) was argued by the UK Government in *Eweida.*[153] The government sought to define religion here by the ability of the employees to seek employment elsewhere – a 'get another job'[154] approach – an approach argued not to impose requirements upon individuals incompatible with their religious beliefs. Freedom of religion is one of the central tenets of liberalism and as this chapter considers the implications of George's work for religious liberty, was this a restraint upon an employee's religious liberty? The courts have acknowledged the 'moral imperative' for employers not to discriminate[155] but should employers be analogously prevented from requiring their employees to find alternative work?

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[149] Ibid [23]–[24] (Lord Bingham).
[150] Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (n 71) 10. Adhar terms this a 'take-it-or-leave-it stance' - R Adhar, 'Solemnisation of Same-sex Marriage and Religious Freedom' (2014) 16 Ecc. L.J. 283, 295.
[151] *Ahmad v United Kingdom* 4 EHRR 126.
[152] Pitt, 'Taking Religion Seriously' (n 33) 401. Pearson has found that for most employment is an 'economic necessity' - M Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (n 30) 11.
[153] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79] (Majority judgment).
[154] R McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom'* (2014) 77(2) MLR 277, 279.
[155] *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59 1.

This has provoked much opinion and criticism. David McIlroy has termed this position on alternative employment 'unjustified and dangerous'.[156] The 'specific situation rule' is held to be dangerous because, as Sandberg believes, this approach has confined religion to the 'private sphere'.[157] Religious freedom is removed from the public sphere and this practical outcome is a negative one for religious freedom.[158] A further problem is that enforcing resignation to prevent interference with rights would make employment a 'rights-free zone'.[159] As individuals are prevented from manifesting their Article 9 rights, instead they are faced with finding other employment and so as I continue to analyse the right to religious freedom this can be identified as a restriction upon religious liberty.

In the discussion of liberty in chapter 3 it was shown that George has applied John Locke's natural rights conclusions by appealing to the self-evidency of right reason and sociability to reach religious liberty conclusions, through embracing the Lockean property right of liberty. Chapter 4 argued the American Constitution acts as a paradigm for the discourse of natural rights. In the continued analysis applying George's thought towards religious equality law, this section and also the wider chapter argues George's NNL can impact upon contemporary adjudication through the natural law acting as a guiding limit upon authority – a check on legislative power.[160]

To remind ourselves of how this follows in my analysis of George's NNL theory: chapter 3 argued George's modification of the Hobbesian 'state of nature' arises from embracing Locke's natural property right to liberty. It was argued that this enlarges the good to encompass the right/rights. Good effectively precedes right and rights.[161] This led in chapter 4 to the 'goods-rights synthesis'. This transforms liberty, and respect for religious liberty, into a basic reason for action. Liberty is reduced to a 'distinct' basic human good of religion.[162] This is to be held as a superior good because it is a good 'that is uniquely architectonic in shaping one's

[156] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 212.
[157] Sandberg, *Law and Religion* (n 19) 98.
[158] See T J Gunn, 'Adjudicating Rights of Conscience Under the European Convention on Human Rights', in V D Vyver and J Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff, 1996); Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (n 49) 197.
[159] Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (n 71) 11.
[160] George, *In Defense of Natural Law* (n 14) 109.
[161] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 117.
[162] Ibid 119.

pursuit of and participation in all the basic human goods.'[163] As seen in chapter 3, I argued that Locke's escape from the 'state of nature' has led to George's good-based opposition towards enforcement of laws restricting liberty by the government. For George, it follows that liberty is essentially a human good; a human good which would oppose a restriction on religious freedom and present a basic good based opposition to the enforcement of law restricting religious liberty.[164]

Legal liberty enables freedom from religious equality laws that restrict religious liberty

This good of liberty ('legal liberty') that was introduced in chapter 4.3, is established through the reasoning process employed by George. For George, it is argued that human reason highlights that religious freedom should be treated as a fundamental human right to liberty. This fundamental human right is supported by the state in rejection of the Hobbesian 'state of nature.' This is not mere reason revealed by religion, as identified in chapter 2, nor practical reasoning as has been modified by George to present NNL. Instead, through opting for a pluralistic approach to religious liberty, George provides discernment on the good through Rawlsian 'common human reason.'[165] From this position, identified in chapter 4, George believes that religious pluralism can incorporate, into the basic understanding of the human right to religious liberty, principles and arguments available to all men and women by virtue of Rawlsian 'common human reason.'[166] For George, democratic reason dictates laws on religious freedom. This is because religious freedom demands 'something on which reasonable people of goodwill across the religious and political spectrums should agree on'[167] by those who exercise state power. Logically then, this must be a matter capable of being settled by our 'common human reason.' Hence 'common human reason' requires agreement to decide whether courts or legislators should decide whether exemptions to general, natural laws should be granted for the sake of religious freedom. 'Legal liberty' offers a balance to dictate laws concerning religion

[163] Ibid.
[164] This is a conclusion supported by Trigg, who further connects any restriction of the good to a restriction of human nature - Trigg, *Equality, Freedom and Religion* (n 60) 25.
[165] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 121. See J Rawls, *Political Liberalism* (Columbia University Press, 1993) 137.
[166] Ibid 137.
[167] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 125.

through ‘common human reason’. This is one of the ways in which George’s thought, with his view of religion as a basic human good, can be used to critique religious liberty cases taken under the provisions of the Equality Act 2010. George does not specify a solution here; rather, George presents a method. I argue that George’s conception of ‘legal liberty’ here enables freedom from religious equality laws that restrict religious liberty.

George’s approach to ‘legal liberty’ can also help us here to analyse the concept of choice. The concept of choice was introduced in chapter 4.4. Here choice was considered in relation to religion. It was argued that there is arbitrary use of the concept of choice, which is shown in a consumerist approach to religion in contemporary society. This was held to be different from the use of choice in the exercise of practical reason. The concept of choice can be further defined here. For instance, an individual expresses freedom when making a choice. It is in this sense (freedom) that choice can mirror the arbitrary meaning given in contemporary society: as a way of expressing freedom. The concept of choice may, however, be considered problematic, particularly as the concept of choice relates to religious freedom. This is because often when one makes a choice, this choice is often taken from a list. For instance, all actions motivated by religion beliefs may be seen as matters of choice, however, in reality a religion typically makes demands of its adherents and so obligations imposed upon them limit the choices that can be made.[168] As such, this limits whether choice can really be seen as a way of expressing freedom.[169] The combination between the concept of choice and the concept of conscience (freedom of religious conscience) is also important here. The way that the concept of choice interacts with the concept of conscience will be considered a little later in this chapter.

Applying the analysis of George’s thought to current case law within English law, the majority judgment in *Eweida*[170] identified that any approach to restrict religious liberty via the ‘get another job approach’ was unjustified because ‘no equivalent principle exists in relation to any of the other fundamental freedoms’[171] set out in the ECHR. This ‘belated recognition’[172] is the correct reading as the

[168] Trigg, *Equality, Freedom and Religion* (n 60) 106.
[169] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 112.
[170] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79] (Majority judgment).
[171] McIlroy, ‘A Marginal Victory for Freedom of Religion’ (n 71) 212.
[172] Pitt, ‘Taking Religion Seriously’ (2013) (n 33) 401.

logical conclusion of such a restrictive measure would be to create no-go areas in the jobs market for those who have particular religious beliefs,[173] ignoring the basic right to religious freedom.[174] It is also the correct reading because it rejects the assumption that underlies the specific situation rule that individuals have chosen their religion and must therefore take responsibility for it.[175] The Fourth Section imposed a proportionality assessment:

> Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction of freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was appropriate.[176]

This is to be welcomed as a significant development in the freedom of thought, conscience and religion;[177] a progression towards asserting once more the court's role to safeguard the religious rights of citizens of member states;[178] and it undermines the reasoning in *R (Begum) v Headteacher and Governors of Denbigh High School*[179] by providing an avenue to find interference with manifestations of religion and belief rather than showing the 'specific situation rule' to apply. I argue that this removes a restriction upon 'legal liberty'. The rejection of the 'specific situation rule' can be seen to follow a good-based opposition against rules (such as the 'specific situation rule') that restrict religious liberty. As such, the rejection of the 'specific situation rule' is endorsed by my modification of George's thought because it allows religion freedom (and freedom of religious conscience) to be dictated by 'common human reason', rather than allowing a restrictive position to continue – one that restricted religious liberty. By

[173] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 212.
[174] Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (n 71) 12.
[175] Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (2011) 31 LS 135, 138.
[176] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79] (Majority judgment).
[177] *European Court Judgment: Big Steps Forward but Further To Go* (*Christian Concern*, 18th January 2013) <http://www.christianconcern.com/our-concerns/religious-freedom/european-court-judgment-big-steps-forward-but-further-to-go> accessed 9th October 2014.
[178] I Leigh and R Ahdar, 'Post-Secularism and the European Court of Human Rights: or How God Never Really Went Away' (2012) 75(6) MLR 1064, 1080.
[179] *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

rejecting the 'specific situation rule' the decision in *Eweida*[180] clearly supports religious freedom.

The concept of conscience brought about by the 'specific situation rule'

I have argued that the rejection of the 'specific situation rule' is an important development for freedom of conscience. The second part of this section will engage with the concept of conscience in the context of analysing the right to religious liberty against restrictions such as the 'specific situation rule'. The meaning and definition given to conscience in this thesis will now be considered.

Conscience is an elusive and intangible concept. Indeed, discussion of the concept of conscience in philosophy has become quite rare.[181] Perhaps this is why when George talks about conscience in *Conscience and its Enemies*, George specifically refers to freedom of religious conscience.[182] Despite there being many different theories about what conscience is,[183] I identify that the concept of conscience is here explicitly connected with religion. A religious conception of conscience is frequently engaged in contemporary human rights discourse. For instance, George's reference matches with the combined understanding of conscience and religion set down in Article 9 of the ECHR: 'Freedom of Thought, Conscience and Religion.' This right is shown to be important throughout this thesis because acting against religious conscience is *prima facie* discriminatory, falling within the ambit of Articles 9 and 14 of the ECHR.

This consideration is helpful for us when modifying George's thought in order to analyse the right to religious liberty against restrictions such as the 'specific situation rule'. George creates a problem by only considering conscience in relation to religion. This approach creates problems for here assessing a full, developed understanding surrounding the concept of conscience. George's position on conscience can be criticised for two reasons. First, George's approach can be criticised because it portrays a 'limiting individualistic

[180] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79] (Majority judgment).
[181] W Lyons, 'Conscience – An Essay in Moral Psychology' (2009) 84 Philosophy 477.
[182] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 110.
[183] For instance, see R Sorabji, *Moral Conscience Through the Ages: Fifth Century BCE to the Present* (OUP, 2014) 215.

tendency'.[184] The 'limiting individualistic tendency' in this complaint comes about by regarding freedom of conscience as primarily a matter of religious liberty and *vice versa*.[185] The concept of conscience is here limited to the individual exercising religion in the state and so does not consider the role of the wider religious body. It does not consider collective religious freedom. The role played by collective religious conscience is ignored in favour of the individual. Second, George's position does not further explicitly accept the fact that, of course, non-religious people have developed consciences.[186] George's reference to freedom of religious conscience ignores the fact that conscience is not only a religious concept.[187] Although the 'specific situation rule' only applied to religious conscience it was earlier noted that conscience is an elusive concept – conscience is not only confined to religion. The two problems that are detailed here further develop George's understanding of conscience and help to justify the modification of George's thought that is applied in this chapter.

George's understanding of conscience is also not very different from an objective sense of conscience. An 'objectively constituted conscience'[188] was recognised by the Roman Catholic priest Cardinal Newman as acknowledging that Roman Catholics receive religious teaching which is placed upon their brains, which then impacts their attitudes and holds them to account throughout life.[189] George relies upon Cardinal Newman's work to present an account of freedom, in particular freedom of religious conscience. George reads the foundation for freedom of conscience in a concern for human flourishing: 'he [Cardinal Newman] locates the foundation of honourable freedoms in a concern for human excellence and human flourishing.'[190] It is clear that when talking about conscience George draws upon this place for conscience given by Cardinal Newman to provide that

[184] R McCrea, 'Book review: J Rivers, The Law of Organized Religions: Between Establishment and Secularism (Oxford University Press, 2010)' (2011) 74(4) MLR 631, 665.
[185] Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (n 7) 30.
[186] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79]-[80].
[187] See Sorabji, *Moral Conscience Through the Ages: Fifth Century BCE to the Present* (n 183) 201.
[188] A Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2(1) CJCCL 261, 279.
[189] A Hudson, *Principles of Equity and Trusts* (Routledge, 2016) 11-12. See generally - J H Newman, *Certain Difficulties Felt By Anglicans Considered…A Letter to the Duke of Norfolk* (Longmans, 1897).
[190] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 110.

'conscience is…a stern monitor.'[191] Therefore, conscience is a guiding force,[192] like a pair of braces straightening an individual's teeth. This is contrasted with a subjective autonomous notion of conscience which is termed 'conscience as "self-will" [which] is a matter of feeling or emotion'.[193]

George expressly recognises that outside, external influences can impact on the conscience. Religious obligation can therefore particularly impact on the conscience, such as the earlier identified Roman Catholic influence. This is because conscience is 'a right to do what one judges oneself to be under an obligation to do, whether one welcomes the obligation or must overcome strong aversion to fulfil it.'[194] It is why individuals compelled by their religious teaching may be forced to carry out duties or follow mandated teachings even if they do not want to follow them.[195] Religious liberty can involve demands put upon followers that may require them to abstain from or follow certain action, sometimes even against their own will. This allows for outside, wider influence.

George's position here can be compared with the psychoanalyst Sigmund Freud. By analysing conscience Hudson suggests that there is an objective psychological sense of conscience.[196] This flows from a mixture of objective ideas implanted into the mind.[197] Such an understanding of conscience as an objectively formed phenomenon derives from Freud's work in psychoanalysis. Freud sets out the relationship between the super-ego and conscience in *The Question of Lay Analysis*: '[y]ou will already have guessed that that the super-ego is the vehicle of the phenomenon that we call conscience.'[198] Building upon the interrelation between the id/ego/super-ego,[199] his psychoanalysis of the mind led to Freud coming to detail the creation of conscience as a psychological

[191] Ibid 112. Here George expressly draws upon Cardinal Newman - J H Newman, *Certain Difficulties Felt By Anglicans Considered…A Letter to the Duke of Norfolk* (Longmans, 1897) 250.
[192] George elaborates upon this: 'It [conscience] speaks of what one must do and what one must not do.' - George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 112.
[193] Ibid.
[194] Ibid 112-113.
[195] Ibid 112.
[196] Hudson, 'Conscience as the Organising Concept of Equity' (n 188) 276.
[197] Ibid.
[198] S Freud, *The Question of Lay Analysis* (Internationaler Psychoanalytischer Verlag, 1926) 17. See further, E Jones, *The Life and Work of Sigmund Freud* (Pelican, 1964) 596; P Kline, *Psychology and Freudian Theory: An Introduction* (Routledge, 1984) 18; I Dilman, *Freud, Insight and Change* (Basil Blackwell Ltd**Correct?**, 1988) 199.
[199] S Freud, *The Ego and the Id* (Internationaler Psychoanalytischer Verlag, 1923) 30, 477.

phenomenon.[200] This draws comparisons with the understanding surrounding freedom of religious conscience provided by George.

This is because it has been shown that for both, the conscience is a guiding force that provides a controlling influence upon the individual. For both, outside messages control the conscious mind. It does not depend upon whether this direction is subjectively welcomed by the individual. George's account of conscience therefore measures up to the account of conscience provided by Freud.[201] This will be considered important for analysing the right to religious freedom in equality law. This section has shown that the 'specific situation rule' placed a restriction upon religious conscience. This chapter will show that religious freedom requires freedom of conscience in order to protect matters of conscience from invasion by the state.

The approach given for conscience, which leads to the rejection of the 'specific situation rule', also helps us to criticise the concept of choice used in this thesis. It was earlier established that choice may be used as an arbitrary way of expressing freedom (freedom in choice). This was criticised because, often in religion, choice is made from a list – a list of choices attached to the religion that bind the believer.[202] In contrast the objective account[203] provided above for the concept of conscience, 'is something which comes to you unbidden and which nags at you. You have no conscious control over the things which do or do not bother your conscience.'[204] This distinctly differs from understanding choice as a concept which constrains freedom. It is because within the limits of the messages that have been inserted into an individual's psyche,[205] then conscience strikes in a more open field. There is not such a constraining limit upon individual freedom. With no conscious control over the conscience for the individual,[206] then conscience as an objectively formed phenomenon can be seen to be helpful for

[200] A Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2(1) CJCCL 261, 277. See S Freud, *The Question of Lay Analysis* (Internationaler Psychoanalytischer Verlag, 1926) 41; S Freud, *Civilisation and its Discontents* (Penguin, 1930) 77; S Freud, *New Introductory Lectures on Psychoanalysis* (first published 1933, J Strachey tr, Penguin 1962) 91-94.
[201] For argument that Christian accounts (such as George's) and Freudian accounts of conscience both provide externalist accounts with influences outside the mind, see Lyons (n 181).
[202] Trigg, *Equality, Freedom and Religion* (n 60) 106.
[203] Hudson, 'Conscience as the Organising Concept of Equity' (n 188) 276-279.
[204] Hudson, *Equity and Trusts* (n 15) 11.
[205] Hudson, 'Conscience as the Organising Concept of Equity' (n 188) 278.
[206] A Hudson, *Understanding Equity and Trusts* (6th edn, Routledge, 2017) 5.

later in this chapter when assessing limits that have been placed upon freedom of religious conscience.

Therefore this section has argued that a) the majority judgment in *Eweida*[207] reached the correct decision by identifying that any approach to restrict religious liberty via the 'get another job approach' was unjustified - instead applying a proportionality assessment[208] and b) by engaging with the concepts of choice and freedom of religious conscience to analyse George's thought, then my analysis indicates 'legal liberty' offers a balance to conflicting rights discourse. This balance dictates laws on religious freedom through 'common human reason' and shows that freedom to change jobs is never enough to guarantee religious liberty. The next section will consider a solution to restricting religious liberty in the form of the concept of reasonable accommodation.

5.4 The concept of reasonable accommodation

This section will engage with the important concept of reasonable accommodation. To enable engagement with the concept of reasonable accommodation it will also be necessary to consider the concept of autonomy. For this section, it was identified in chapter 1 that one of the key issues for direct and indirect discrimination in relation to religion or belief is the particular protection this characteristic receives. The issue is whether law confers less protection upon religion or belief compared with other protected characteristics, or alternatively, does protection ensure one belief is favoured over another?[209] This had divided opinion. Pitt has previously argued that the effect of the Court of Appeal decision in *Eweida v British Airways*[210] is 'effectively to introduce a hierarchy of protection in relation to different beliefs.'[211] As such, it has been suggested that the law offers 'very little, if any, accommodation' for the views of religious individuals.[212] Others have disagreed, for instance Lady Hale has

[207] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[208] Ibid [79] (Majority judgment).
[209] Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (n 46) 395. A good example of this claim being made is the witness statement of Lord Carey in *McFarlane v Relate Avon Ltd* [2010] IRLR 872.
[210] *Eweida v British Airways* [2010] IRLR 322 (CA).
[211] Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (n 46) 398. Pitt has recently written this hierarchy is direct over indirect discrimination, not sexual orientation over religious discrimination - Pitt, 'Taking Religion Seriously' (n 33) 407-408.
[212] Sandberg, 'The right to discriminate' (n 45) 173.

previously incorrectly identified that a concept of reasonable accommodation can be found in English discrimination law.[213] There are also calls for recognising that a concept of reasonable accommodation for religion and belief can be simply integrated into religious liberty law.[214] The ECtHR decision in *Eweida*,[215] which was explored in detail in chapter 1, has provided space once more for discussion upon the concept of reasonable accommodation. This section will argue that the concept of reasonable accommodation can be used to engage the 'goods-rights synthesis' within George's work. I will then go on to argue that my analysis of George's thought debates using reasonable accommodation to present and protect religion as a public good.

This concept of reasonable accommodation is already a live issue within English law for two reasons: first, the duty to make 'reasonable adjustments' already exists in relation to disability under s.20 of the EqA 2010 and so it is argued why an analogous right is not available for religion or belief?[216] Disability is a protected characteristic alongside religion or belief under s.149(7) of the EqA 2010 and so why do they not both receive the same treatment? Secondly, a duty of reasonable accommodation already connects with the framework of anti-discrimination law – reasonable accommodation is used in this thesis as a species of anti-discrimination law.[217] The concept of reasonable accommodation is therefore identified as a further method to prevent discrimination.

[213] *Bull and another v Hall and another* [2013] UKSC 73 [45] (Lady Hale). Lady Hale is here relying on the incorrect position asserted by Erica Howard, see E Howard, 'Reasonable Accommodation of Religion and other discrimination grounds in EU Law' (2013) 38 EL Rev 360. In *Bull*, Hale posits the legitimate aim in the incorrect order: she enquires whether 'the limitation on the right of Mr and Mrs Bull to manifest their religion was a proportionate means of achieving a limited aim. The legitimate aim was the protection of the rights and freedoms of Mr Preddy and Mr Hall.' Rather, the correct aim was the protection of the religious rights Mr and Mrs Bull held *and* whether this could be done at less cost towards protecting rights conferred by sexual orientation to Mr Preddy and Mr Hall. Trigg has helpfully identified this to be a clash between a right to equal treatment and not to be discriminated against, and a right to religious freedom - Trigg, *Equality, Freedom and Religion* (n 18) 94.

[214] See *Islington v Ladele* [2008] UKEAT 0453_08_1912 [116-117] (Elias J); Hepple, *Equality: The New Legal Framework* (n 40) 39.

[215] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

[216] It should be noted that, by this same token, disability remains the *only* protected characteristic in respect of which reasonable accommodation currently operates - A Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities seized, lost and generated' (2011) 40 ILJ 4 359, 369.

[217] M Gibson, 'The God 'Dilution'? Religion, Discrimination and the case for Reasonable Accommodation' (2013) 72(3) CLJ 578, 591.

Following *Eweida*[218] some commentators were disappointed by the lack of discussion surrounding the issue of reasonable accommodation in the majority judgment,[219] other commentators were more favourable towards the dissenting judgment's approach,[220] and still more were more negative towards this dissent.[221] Through engaging with the work of Hepple,[222] McIlroy[223] and Pitt[224] (and most frequently George), it will be shown that reasonable accommodation may not ensure freedom of religion as a public good (or religion as a public good) to ensure flourishing of believers. This section will show that in the context of religious equality law, despite different understandings of reasonable accommodation, the modified NNL conception that is drawn from the analysis of George's thought is to be favoured. This is one founded upon the public good of religion.

Although it has been noted that reasonable accommodation was not mentioned in the majority judgment, the dissenting judgment in *Eweida,*[225] in favour of Ms Ladele, argued that the right not to be forced to act against one's conscience was not subject to the limitations that cover manifestation of belief in Article 9.[226] Judges Vučinić and de Gaetano suggested that once a case of conscientious objection is established, the state has an affirmative duty to require it to be accommodated.[227] The state has a duty to accommodate conscience.[228] McCrea

[218] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[219] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 213.
[220] Hill, 'Religion at Work' (n 70) 89, 90.
[221] McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom'* (n 154) 277.
[222] For instance: Hepple, *Equality: The New Legal Framework* (n 40); B Hepple, 'Enforcing Equality Law: two steps forward and two steps backwards for reflective regulation' (2011) 40 (4) ILJ 315.
[223] For instance, see McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 210; D McIlroy, *A Biblical View of Law and Justice* (Paternoster, 2004).
[224] For instance: Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (n 46) 384; Pitt, 'Taking Religion Seriously' (n 33) 398.
[225] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) Partly dissenting judgment.
[226] Ibid.
[227] Ibid [2] (Partly dissenting judgment).
[228] This already occurs within other jurisdictions. The court within *Eweida* noted that in the United States, when a statutory claim is made, the employer must have either offered 'reasonable accommodation' for the religious practice or prove that allowing those religious practices would have imposed 'undue hardship on the employer' - *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [48]. See *Ansonia Board of Education v Philbrook* 47 US 60 (1986); *United States v Board of Education for School District of Philadelphia* 911 F.2d 882, 886 (2rd Cir. 1990); *Webb v City of Philadelphia* 562 F.2d 256 (3rd Cir. 2009). Canadian employers are also expected to 'adjust workplace regulations that have a disproportionate impact on certain religious minorities' to achieve reasonable accommodation - *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [49]. In *Multani v Commission*

has opposed this approach on the basis that 'people can change'.[229] Here McCrea's observation depends upon, for instance, Ms Ladele becoming a Christian only after she took her job (presumably the inference being here that the employer could not accommodate an employee's changing conscience). This fails because reasonable accommodation depends upon change – a mutual accommodation by employer and employee. Further any mandatory requirement in assessing manifestations to religious belief cannot, as was suggested in *Eweida*,[230] be an objective approach. Rather the third parties/interveners within *Eweida*[231] argued that any 'mandatory requirement' was too high and overly simplistic. If this mandatory requirement was compared with my modification of George's thought, it would not allow a basic good approach to take into account the subjective convictions of the individual when measuring conscience.[232]

In contrast, within the majority opinion, despite the matter being raised by a number of interveners, calling for both 'reasonable accommodation/mutuality of respect'[233] and evidence provided to the court of a 'substantial corpus of foreign jurisprudence' favouring reasonable accommodation of conscientious objection,[234] there was no evaluation of the concept in the judgment. McIlroy has reflected on this judgment and termed this approach the 'most unsatisfactory part of the decision.'[235] This is because he has observed that reasonable accommodation ensures that one of the major justifications for laws against discrimination is upheld: employers are able to draw from the widest pool of talent available because no one who has the relevant experience/skills/qualification is

Scolaire Marguerite-Gourgeoys (2006) 1 SCR 256, the Supreme Court of Canada upheld a Sikh student's right to wear a kirpan to school. The court did not undertake a theological analysis of the centrality of kirpans to the Sikh faith. Instead, the court considered that the claimant 'need[ed] only show that his person and subjective belief in the religious significance of the kirpan [was] sincere.' In *Eweida* and *Chaplin*, by contrast, the court did effectively engage in a theological analysis to determine the centrality of the cross to Christian faith rather than attempting to accommodate individual religious conscience.

[229] McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom'* (n 154) 286.

[230] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [76].

[231] Ibid.

[232] Ibid.

[233] The interveners argued a proportionality and justification interference with Article 9 should incorporate some 'compromise between competing rights…in a democratic and pluralistic society' within the context for a significant margin of appreciation, which would hold 'so long as an individual's religious practices did not detrimentally affect service provision or unduly affect an employer; those religious practices should be permitted and protected at work.' Ibid [78].

[234] Hill, 'Religion at Work' (n 70) 89, 90.

[235] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 213.

excluded.[236] Reasonable accommodation ensures employers consider the duties of the employee and give consideration to any conscientious objection based upon part of the job role. As a result, this prevents the marginalisation of minorities.

Reasonable Accommodation: does this concept provide or deprive choice?

The concept of autonomy will also be considered in this section. George's definition for autonomy will be given in order to further analyse and critique his thought. George's definition is the 'capacity to be author of one's own life'.[237] This places individual autonomy in relation to individuality and freedom. For example, it is arguable that religious freedom requires autonomy.[238] Therefore restrictions upon individual autonomy, via discrimination in the workplace,[239] may clearly hinder religious liberty. The concept of autonomy can, however, be distinguished from the earlier identified concept of conscience. The concept of autonomy is not here a guiding force that requires an individual to act in a certain way in, for example, an employment context.

In an employment context, discrimination in employment also deprives individuals of choice. Julian Rivers has noted that it is becoming clear that employers who fail even to consider whether they could accommodate a religious employee commit a wrong.[240] This connects the concept of reasonable accommodation with the concept of choice that was considered in section 5.3. Reasonable accommodation is here offered as a consideration for employers in relation to their employees. Accommodation is part of this concept because it forms part of the consideration to be taken by employers. Yet, I suggest that mere consideration noted by Rivers does not go far enough – this does not confer religious liberty on employees – it may only add another procedural requirement for employers. Jeremy Waldron has written that the right to religious freedom logically requires the protection of the right to religious liberty, via

[236] Ibid.
[237] George, *Making Men Moral: Civil Liberties and Public Morality* (n 67) 147.
[238] Rivers, 'The Secularisation of the British Constitution' (n 19) 373.
[239] Such as the earlier considered 'specific situation rule'.
[240] Rivers, 'The Secularisation of the British Constitution' (n 19) 383.

accommodation, to produce flourishing.[241] This is the process within NNL and in chapter 4.4 analysis indicated that George's thought follows this process.

Some theorists have argued that reasonable accommodation should involve equality. Robert Wintemute, for instance, has argued an understanding of equality law involving 'accommodation'[242] requires an aspect of equal treatment. Moreover, accommodating religious beliefs in a diverse society is better viewed as a matter of 'equality'.[243] Wintemute here sees that equal treatment accommodates religious beliefs and so allows such belief to flourish. This approach, however, goes further than is necessary. Equal treatment may require a higher level of protection than that sought by the recent calls for reasonable accommodation. This is because although reasonable accommodation requires a level of protection, it is a lower level of protection built upon permitting religious expression in the workplace.[244]

Hatzis may further assist in the application of George's thought to religious equality law. This is because he has identified values underlying the principle of equal treatment to be: human dignity and autonomy.[245] Hatzis here takes a different position when integrating reasonable accommodation with equality. For Hatzis, autonomy requires people to be allowed to shape their lives by making choices among a range of valuable options - a series of choices by the individual.[246] The concept of autonomy therefore requires reasonable accommodation - one cannot live an autonomous life if one is denied the options to choose between.[247] This draws connections with the earlier definition given for autonomy – an individual is given the freedom to separately make decisions.[248] A religious believer is allowed to follow their religious convictions. While an individual has the capacity to be the author of their own life, under this approach

[241] J Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, 1987) 157.
[242] Wintemute proposes his own form of accommodation, and this can be seen to be close to reasonable accommodation because it seeks a 'right to accommodation of a particular manifestation of an individual's religious beliefs' - R Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (2014) 77(2) MLR 223, 224.
[243] Ibid 226.
[244] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [78].
[245] N Hatzis, 'Personal Religious Beliefs in the Workplace: How not to define Indirect Discrimination' (2011) 74(2) MLR 287, 293.
[246] Ibid.
[247] J Raz, *The Morality of Freedom* (Oxford University Press, 1985) Ch. 14.
[248] George, *Making Men Moral: Civil Liberties and Public* Morality (n 67) 191.

reasonable accommodation secures the autonomy for religious believers in the workplace. As such, an employee is neither separated from their religion/religious community or their employment. I suggest that reasonable accommodation would therefore acknowledge employee's individual religious choices and so reduce risk of alienation by the law.[249]

Individual choice within equality law also highlights a problem with reasonable accommodation applied to religion. We have seen that reasonable accommodation already exists in relation to disability under s.20 of the EqA 2010. Vickers has suggested a legislative model based upon the 'reasonable adjustments' duty under disability discrimination law should also apply to religion and belief.[250] The difference in terminology here between reasonable adjustments and reasonable accommodation within disability instead highlights problems in transferring reasonable accommodation to the protected characteristic of religion or belief. The issue is the concept of choice: it is hard to imagine one would choose a disability. However, freedom of religion should expressly allow a person to choose their religion. This leads to a further problem arising from the concept of choice in that it was earlier established that the concept of choice can follow the arbitrary meaning given in contemporary society: as a way of expressing freedom.[251] This exposes a tension because the concept of choice suggests an ordered range of 'free' choices, whereas belief suggests an open-texture free from prescriptive guidelines. When engaging religious freedom this therefore causes a tension in transferring reasonable accommodation to the protected characteristic of religion or belief. For these reasons it is here argued that no direct comparison or transfer of legislation between these areas (disability and religion) can be made.

Discrimination clearly also deprives employees of choice, by depriving individuals of valuable options which relate to a fundamental aspect of one's life – this is because work is 'not merely a way of earning one's living but also an important aspect of self-fulfilment.'[252] Hatzis has identified that in religious discrimination this means the discriminator undermines the discriminatee's ability to exercise

[249] Gibson (n 217) 616.
[250] L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart, 2008) 129, 130.
[251] In the last section the way the concept of choice relates to religious freedom was considered problematic because of the limits imposed upon adherents by their religion.
[252] Hatzis, 'Personal Religious Beliefs in the Workplace: How not to define Indirect Discrimination' (n 245) 293.

their autonomy by making choices which relate to the freedom of religion overly burdensome to pursue.[253] This relates back to the earlier definition given for the concept of choice in section 5.3 – as a potential way of expressing freedom. If this freedom is not secured under autonomy then self-fulfilment is denied Once again the concept of choice is problematic in discussion involving religious freedom. This provides another argument against reasonable accommodation. If through any discrimination autonomy is prevented, legal liberty cannot be pursued; reasonable accommodation cannot arise. This is, therefore, an argument against religious discrimination – discrimination in and of itself would prevent any form of autonomous accommodation arising in the first place.

Does reasonable accommodation secure flourishing within NNL?

Does accommodating equality fit with George's goods based approach and secure flourishing? Equality in Britain is based upon lifestyle and habits. One person's lifestyle and habits may differ from another's. For instance, I may like to swim every morning, you may prefer to swim every evening. Reasonable accommodation can solve the problem of difference in discrimination law based upon equality. Chapter 4.2 highlighted that differentiation is wrong when it demeans (Hellman).[254] Chapter 4 argued that people's lifestyles and habits are not the same on the face of it. However, they share a 'common good' and I have argued that George's 'legal liberty' offers a balance to conflicting rights claimed by individuals.

Further, although people may differ regarding lifestyle and habits, Biblical teaching about 'common origin' in Acts 17,[255] indicates that though people are not all the same, all share a 'common origin' not restricted to faith, ethnicity or ideology.[256] This helps to explain current understandings of equality that underpin the concept of religious equality law. In chapter 4 it was noted that equality is a very welcome concept (in particular gender and racial equality). It was stated in chapter 4 that the critique in this thesis only applies to equality law impacting religion or belief under section 4 of the EqA 2010. This focus distinguishes the

[253] Ibid.
[254] See D Hellman, *When is Discrimination Wrong* (Harvard University Press, 2008).
[255] 'And he made from one man every nation of mankind to live on all the face of the earth, having determined allotted periods and the boundaries' - Acts 17:26 - *Holy Bible, English Standard Version* (Collins, 2002).
[256] M Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islam and Multiculturalism* (Bloomsbury, 2012) 10. See also ibid 140.

use of equality in a non-abstract way in this thesis. This sense of equality is why this thesis focuses upon the lead case in religious equality law that was introduced at the beginning of this thesis: *Eweida v United Kingdom*.[257] This case has been shown to provide freedom from discrimination under Article 9 of the ECHR, and so it has resolved problems facing religious equality law. As such, engaging with this case suggests that religious equality law involves freedoms rather than equality, when in dialogue with (in particular Christian) religious discrimination. Religious equality law is concerned with freedom from religious discrimination.

Given this understanding for equality, although 'common origin' provides a basis for human equality, this basis has subsequently mutated in religious equality law. Religious equality law can now be seen to encompass two different versions of equality:[258] 1) equality of persons;[259] and 2) equality of lifestyle and behaviour.[260] These two visions are caught in tension which helps to explain current conflicts in both case law and competing conceptions for religious equality law. The modified concept of reasonable accommodation may here provide a solution for accommodation of the person in religious equality law. Such an approach to reasonable accommodation is based upon inherent characteristics (work ethic, religion, conscience). This advocates a Biblical approach based upon the good of the person, while providing a broad-brushed approach to encompass all preferences and differences. This may overcome a post-modern focus upon habits and lifestyle in line with the NNL human flourishing focus.

The development of reasonable accommodation

A further reason for reform is that reasonable accommodation, it has been argued, is the culmination of religious equality law. As such, it can be a helpful concept in analysing the right to religious freedom. The concept of reasonable accommodation is one that can be defined to 'expect an employer to

[257] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[258] Ibid 162-163.
[259] Shown by the 'common origin' ideal - Acts 17:26 - *Holy Bible, English Standard Version* (Collins, 2002). Nazir-Ali argues that the value of equality comes from the Biblical teaching of 'common origin' which is related primarily to equality of persons and not equality of behaviours or relationships - Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islam and Multiculturalism* (n 256) 162-163.
[260] This has found expression in the litigation surrounding protected characteristics, such as sexual orientation and religion or belief within religious equality law: *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880.

accommodate an employee's religious practices'.[261] An employer undertakes action to permit and protect religion in the workplace.[262] In both the US and Canada[263] there is a duty of reasonable accommodation for religious purposes. By the start of the twentieth century, English law had developed to accommodate the full range of Christian practice and belief.[264] Once more, Pitt has observed that guidance provided by the Equality and Human Rights Commission[265] in the wake of *Eweida*,[266] suggests that the UK, like the US and Canada, may be moving towards a situation where 'effectively employers will have a duty of reasonable accommodation in relation to religion or belief'.[267] Pitt argues this on the basis that following from Ms Eweida's claim, indirect discrimination in the form of individual disadvantage (prohibition on wearing a cross in the workplace) requires justification.[268] A failure to accommodate a request by a religious employee may be a form of discrimination, if not justified. The positive duty for reasonable accommodation suggested by the EHRC guidance is found by Pitt not to be necessary to comply with the negative injunction 'not to interfere without justification'.[269] This form of protection suggested by Pitt is dependent upon the legitimate aim defence to indirect discrimination and has found judicial support in *Bull and another v Hall and another.*[270] Here it was considered whether reasonable accommodation may 'constitute a less restrictive means of achieving the aim pursued.'[271] This arguably shows a development in equality law impacting

[261] B Hale, 'Are we a Christian Country? Religious Freedom and the Law' (Oxford High Sheriff's Lecture, 14 October 2014) <https://www.supremecourt.uk/docs/speech-141014.pdf> accessed 25th September 2017.
[262] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [78].
[263] *Ontario Human Rights Commission v Simpson-Sears Ltd* [1985] 2 SCR 53.
[264] Rivers, 'The Secularisation of the British Constitution' (n 19) 377.
[265] Equality and Human Rights Commission, *Religion or belief in the workplace: An explanation of recent European Court of Human Rights judgments* (Equality and Human Rights Commission, February 2013) <http://www.equalityhumanrights.com/sites/default/files/documents/RoB/religion_or_belief_in_the_workplace_an_explanation_of_recent_judgments_final.pdf> accessed 1st September 2015.
[266] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[267] Pitt, 'Taking Religion Seriously' (n 33) 404.
[268] Supporters of religion are likely to welcome this development as previously the Court of Appeal judgment in *Eweida* held indirect discrimination did not apply to a practice that discriminates against one individual, rather as confirmed by s.19(1)(b) of the EqA 2010, the practice would need to put *persons* at a disadvantage – *Eweida v British Airways* [2010] I.C.R 890 [15]–[19]. This has now been overturned by the ECtHR in the same case.
[269] Pitt, 'Taking Religion Seriously' (n 33) 404.
[270] *Bull and another v Hall and another* [2013] UKSC 73.
[271] Ibid [46] (Lady Hale).

religious freedom, with reasonable accommodation replacing the old position taken by indirect discrimination.

Pitt's 'conceptually important' distinction here is important to a degree. However, it fails to heed McIlroy's criticism that this was a feature of the minority, as opposed to the majority judgment. Moreover, Pitt's criticism relates to the finding of indirect discrimination in Ms Eweida's case. This case was not held to be an instance of reasonable accommodation at all.[272] Even despite submissions made to the ECtHR surrounding reasonable accommodation, yet again, no assessment surrounding the concept was found in the Fourth Section's judgments,[273] despite the later EHRC guidance.[274]

Further Pitt's approach contrasts with the logic of Sandra Fredman. Fredman contends that a finding of indirect discrimination should trigger a duty to make reasonable adjustments (accommodation), rather than a justification for any indirect discrimination which would maintain the 'status quo'.[275] These criticisms distinguish Pitt's approach from the broader calls for reasonable accommodation made by the interveners in *Eweida and Others v The United Kingdom*.[276] This causes doubt about whether the calls made for reasonable accommodation are really suitable in order to solve the tensions facing religious equality law.

Reasonable accommodation and indirect discrimination

The justification defence for indirect discrimination has received further attention. Michael Connolly has noted that in litigation regarding religious discrimination, the justification defence for indirect discrimination often amounts to a form of reasonable accommodation.[277] *JH Walker Ltd v Hussain*[278] involved a claim of indirect discrimination brought by Muslim workers who were disciplined for taking a day off work to celebrate a Muslim holiday. The tribunal held the rule was not

[272] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 213.
[273] Ibid 213.
[274] Equality and Human Rights Commission, *Religion or Belief in the Workplace: A Guide for Employers Following Recent European Court of Human Rights Judgments* (n 159).
[275] Fredman, *Discrimination Law* (n 38) 270.
[276] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [78]. Pitt further incorrectly analyses the case to suggest that both McFarlane and Ladele were seeking permission to discriminate directly on the grounds of sexual orientation see - Pitt, 'Taking Religion Seriously' (n 33) 404. This expressly fails to engage the Court's own recognition in the case that involved the balancing of rights.
[277] M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell, 2011) 199, 200.
[278] *JH Walker Ltd v Hussain* [1996] I.C.R. 291 EAT.

justified because the employers could have made appropriate arrangements in advance and exploited willingness by the workers to work extra hours.[279] Here the tribunal effectively used reasonable accommodation to rebut the justification defence, this shows that a justification defence has so far not amounted to reasonable accommodation.

Vickers has argued that a similar accommodating position may arise following the Court of Appeal decision in *Ladele*.[280] Within Ms Ladele's situation,[281] Vickers has observed that under the Civil Partnership Act 2004, Islington may have retained Ladele's services as a registrar without registering her for civil partnerships. This is because as an existing registrar Ms Ladele was not automatically designated to carry out civil partnerships.[282] Does the government need to accommodate civil servants' consciences?[283] Should local government not require the same service to be performed by all employees? The decision therefore confirms that just because alternative accommodation was identified by the claimant, the employer may still justify indirect discrimination.[284] This is further substantiated by Vickers questioning whether it was necessary for the employer to designate Ms Ladele as a civil partnership registrar in the first place.[285] This was not considered in the judgment. Elias J in the EAT hearing gave credit to the pragmatism shown: 'we would be sorry if pragmatic ways of seeking to accommodate beliefs were impermissible … it may be that choosing not to designate those with strong religious objections would be a way of reconciling conflicts'.[286] Following this, Vickers' conclusion is that it was not necessary to designate all registrars as civil partnership registrars, particularly given that '[p]arliament has not automatically designated all registrars under the Civil Partnership Act, and others councils clearly did not feel it was necessary to do

[279] Ibid 295, 296.
[280] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.
[281] As a registrar working for Islington Borough Council, Ms Ladele declined to perform registration services for couples seeking a civil partnership, which may have occurred after the implementation of the Civil Partnership Act 2004. See chapter 1 and *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 [4]-[15].
[282] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 291.
[283] Adhar, 'Solemnisation of Same-sex Marriage and Religious Freedom' (n 150) 295.
[284] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 293.
[285] Ibid 294.
[286] *Islington v Ladele* [2008] UKEAT 0453_08_1912 [116–117].

so'.[287] From this, Vickers proposes a new method to analyse accommodation within the context of indirect discrimination.

Does this provide a suitable approach to reasonable accommodation in order to help analyse religious freedom in this thesis? Matthew Gibson has argued that this approach would lead to a conflict in practice between reasonable accommodation and indirect discrimination.[288] This is because of the burdens of proof required in each claim. In reasonable accommodation, Gibson had identified the burden to be on the defendant to establish that accommodation would create undue hardship, whereas, in indirect discrimination, the initial burden is on the claimant.[289] Gibson suggests a clearer stance would be 'to create a separate duty for reasonable accommodation so to keep the duty distinct.'[290] This does not consider that if reasonable accommodation were implemented, religious liberty claimants would likely no longer need to bring claims brought under indirect discrimination. A new legal cause of action would be present.

In the context of the Court of Appeal decision in *Eweida*,[291] Vickers continues to analyse the concept of reasonable accommodation within the framework of indirect discrimination by further suggesting that failure to accommodate one employee's religious request may be more easily regarded as more proportionate rather than 'insisting on a uniform rule which disadvantages a large proportion of the workforce.'[292] This is a contentious approach. It is unhelpful because it disadvantages the religious minority who are discriminated against by, for instance, a controversial workplace rule such as in *Eweida*.[293] An approach that disadvantages the minority is not one that can be reconciled with reasonable accommodation. On the other hand, this may be helpful as Vickers calls for equality law to function upon an act utilitarian notion - with the greater good being provided by not disadvantaging the numerically higher number of individuals who do not hold a protected characteristic upon the basis of religion or belief. This

[287] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 289.
[288] Gibson (n 217) 615.
[289] Ibid.
[290] Ibid.
[291] *Eweida v British Airways* [2010] EWCA Civ 80.
[292] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 289.
[293] *Eweida v British Airways* [2010] EWCA Civ [5] (Sales LJ).

benefits social goals, which can be identified as helping employers that are facing discrimination claims[294] and that public sector organisations should be secular.[295]

The problem is that Vickers here, however, conceives of a system that does not appreciate the good of religion:

> … the debate about the extent to which the manifestation of religion should be accommodated at work should take place in the context of proportionality, rather than by an *a priori* decision that indirect discrimination cannot occur for single adherents of a belief system.[296]

Unhelpfully this contradicts the finding of the Court of Appeal in *Eweida*,[297] and further fails to engage the priority of the good, by presenting a utilitarian understanding of the good and so does not accord with my analysis of George's common good approach or the 'common origin' approach outlined earlier. As this would not enable flourishing, it is not a suitable basis for reasonable accommodation. The analysis of reasonable accommodation within the context of indirect discrimination by Vickers is rejected.

On the other hand, George's NNL basis for reasonable accommodation has itself not been welcomed because of, *inter alia*, the discriminatory impact it may have. Robert Wintemute has argued that, although accommodation causes no direct harm, it causes indirect harm. Reasonable accommodation causes indirect harm because it 'exclu[des] from part of the service offered by the employer, which amounts to a form of segregation.'[298] For instance, in the cases of *McFarlane*[299] and *Ladele*,[300] it was shown in chapter 1 that the customers were deprived a hypothetical service on the basis of their sexual orientation. This demonstrates harm being caused to individuals because they are deprived from receiving a service.

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[294] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 289.
[295] Ibid 292.
[296] Ibid 289.
[297] *Eweida v British Airways PLC* [2010] EWCA Civ 80.
[298] Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (n 242) 252.
[299] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880.
[300] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357. Both of these cases were introduced in chapter 1.

Lim has further formulated the question well: why should courts grant special privileges to religious practices or organisations by exempting them from laws of general applicability or anti-discrimination law?[301] Lim qualifies this question by adding the exception that unless (religious organisations) can show that they exhibit 'positive and unique features and benefits qua religion?'[302] It has so far been argued in this thesis that equality has to yield to religious liberty. Yet, conversely, what does religion have to yield to equality within Wintemute's understanding? In other words, what actions and considerations do religious individuals need to take in order to make sure that individuals do not suffer from lack of service provision? The principles of this demand are outside the scope of this thesis; however, Wintemute makes an astute suggestion:

> Consistent, principled protection of the right of employees or students to wear religious clothing or symbols could in turn make it easier for religious individuals to accept that a necessary limit to accommodation is the harm that conscience exemptions from anti-discrimination law would cause to others … they could display diversity while serving diversity.[303]

Religious liberty would thereby promote equality through limiting accommodation. Religious individuals may accept a limit to accommodation in order to promote diversity in the name of equality. In this respect the Court of Appeal in *Ladele*[304] went further than the ECtHR's judgment in *Eweida*.[305] This was by holding the 2007 regulations prohibiting sexual orientation discrimination in access to services[306] obliged Islington Borough Council to require all registrars to officiate at civil partnership ceremonies.[307] However, Wintemute's criticism fails to engage the ECtHR's own later ruling and recognition in *Eweida*,[308] one which involved the balancing of rights and hence the level of proportionality crucial to this area

[301] Lim, 'Religious Exemptions in England' (n 49) 445.
[302] Ibid.
[303] Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' (n 242) 253.
[304] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.
[305] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[306] Equality Act (Sexual Orientation) Regulations 2007.
[307] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880 [69]–[72].
[308] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

of law.[309] In addition to not recognising the later ruling, Wintemute's criticism also does not accept the position for religious freedom developed from George's work which we have seen provides for religion as a public good. This position would contrastingly ensure that there is reasonable accommodation for religious belief, and we will see later in this chapter the way that religion's presentation as a public good can be beneficial for reasonable accommodation.

Reasonable Accommodation: proportionality solving a clash of rights (or preventing legal liberty)?

This level of proportionality has been considered by Vickers, who draws into question the commensurability of human rights in the context of religion such as in *Eweida* and suggests significant weight is 'put on the role of proportionality in determining the outcomes of cases yet the use of proportionality can itself be contested, as it involves measuring incommensurable interests, and can lead to legal uncertainty.'[310] Proportionality has been shown to require the balancing of human rights in a religious context. Common human reason was earlier identified, however, to engage the right to freedom of religion in equality law. Common human reason ought here to play a role: this assists in considering whether the deprivation of services arguably trumps the right to accommodate freedom of conscience. This is helpful because it enables us to use the modification applied to George's work in this thesis - the attainment of flourishing through 'legal liberty'.[311]

Balanced debate has been provided by Sandberg suggesting that reasonable, passive accommodation has been replaced by 'prescriptive regulation'[312] typified by the concept of proportionality. He considers this to be initially a positive, providing diversity and toleration. However, the 'pace of change and the complicat[ed] overregulation presents a multi-faceted picture',[313] and Sandberg comes to the logical conclusion that the growth of the law on sexual orientation is faster than the growth of the law protecting religious discrimination.[314]

[309] Ibid [104]-[106]. For an argument that employment disputes with a religious element are better seen as a clash between competing rights see I Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 Ox. J Law Religion 109, 123-124.
[310] Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134) 289.
[311] Trigg, *Equality, Freedom and Religion* (n 60) 8.
[312] Sandberg, 'The right to discriminate' (n 45) 181.
[313] Ibid.
[314] Ibid.

Sandberg believes this growth in law has led to sexual orientation rights trumping freedom of religion rights[315] which has been termed 'crude and unhelpful'.[316]

Does this growth signify a move from passive tolerance to the active promotion of religious freedom and sexual orientation discrimination, as positive legal rights? To put this in context, it has been argued that the courts should not enter into the question of whether a particular practice is an indispensable element of a religion or system of belief in any analysis.[317] This transition surrounding growth has been observed by Sandberg as producing a "new' law on religion and a 'new' law on sexual orientation.'[318] The growth of the law is not the problem here; instead, the problem lies in the way the law is consistently applied in a proportionality analysis by the courts, in turn dependent upon the jurisprudential trends underlying the analysis. In other words, the growth of the law argument is a pretext. It moves the reason for the problem from one that can be addressed to one that is seemingly inevitable. There exists an 'increasing discomfort' in the way the state exercises authority to decide upon a 'plurality of religious beliefs, practices, communities and organisations'[319] and conducts an analysis that provides more than toleration. Lord Hoffmann explained in *R (Carson) v Secretary of State for Work and Pensions* that 'it is therefore necessary … to distinguish between those grounds of discrimination which *prima facie* appear to offend our notions of the respect due to the individual and those which merely require some rational justification.'[320] This invites criticism upon the way the state distinguishes these grounds. A critique of the state will be seen in the next section. There, I will argue that George uses the concept of religious freedom to protect matters of conscience being invaded by the state.

[315] Sandberg, *Law and Religion* (n 19) 111. Trigg has noted that: '[r]ights, in this instance those of homosexuals, often seem to trump any claim to a right of religion.' Trigg, *Equality, Freedom and Religion* (n 60) 8.
[316] Ibid 127.
[317] N Bratza, 'The 'Precious Assset': Freedom of Religion under the European Convention on Human Rights' (2012) 14 Ecc. L.J. 256, 260. See *Leyla Şahin v Turkey* (Application no. 44774/98) ECHR 2005-XI, Grand Chamber (2007) 44 EHRR 5.
[318] Sandberg, 'The right to discriminate' (n 45) 170. Sandberg has argued that there does not seem to be recognition that equality law protects discrimination on grounds of religion as well as on grounds of sexual orientation - Sandberg, *Law and Religion* (n 19) 111.
[319] Edge, *Religion and Law: An Introduction* (n 2) 133.
[320] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 [14].

Accommodating conscience in the workplace: a public good approach

As the next section will consider the concept of freedom of conscience raised by religious equality law, this part will turn to the combination of the concept of reasonable accommodation and matters of conscience in the workplace and critically apply the analysis drawn from George's thought. It will do so in order to continue analysing the place of religious liberty in equality law and show that religion can be protected as a public good. Hill has supported the dissenting opinion in *Eweida*[321] on the basis that it distinguishes Ms Ladele from Mr McFarlane: a changing job role in the former as opposed to a willing acceptance of the job description in the latter.[322] Ms Ladele was employed in 2002 before officiating same-sex ceremonies became part of her job role. Mr McFarlane willingly applied for a job as a counsellor upon the expectation of counselling people with differing sexual orientations. In this position Hill argues that Ms Ladele should have been accommodated by 'creative rostering'[323] - she had consistently invited her employer (Islington) to accommodate her belief.[324] It has been argued Ms Ladele should not have been compelled to officiate at civil partnerships.[325]

McIlroy's criticism for this basis of reasonable accommodation is twofold: first, he takes Hill to task for giving no reason why Mr McFarlane's employers ought not to have been asked to consider whether rosters could be re-arranged to accommodate his convictions, because '[a]ssessing such differences is what the doctrine of reasonable accommodation is all about.'[326] This is a fair point if one sees reasonable accommodation as merely an employer shifting the boundaries of a job role. It fails to see reasonable accommodation under the modified

[321] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).
[322] Hill, 'Religion at Work' (n 29) 89.
[323] Ibid 90.
[324] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 [10] (Lord Neuberger).
[325] Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (n 58) 61.
[326] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 7) 214. Within *When is Discrimination Wrong,* Hellman provides a helpful insight into how this would work. Reasonable accommodation depends upon respecting difference. Chapter 4 showed difference is a problematic basis to adopt; however, the problem is the social significance the difference comes to have. To ensure the equal moral worth of persons, Hellmann has argued that a moral problem arises when differences give rise to domination or subjugation. Difference is not here the problem. I argue that reasonable accommodation provides an adjustable conception which is adaptable to changing social attitudes and relativistic to the situation - see Hellman, *When is Discrimination Wrong* (n 254) 171.

approach that I have proposed from George's thought – as founded upon a conception of the good that ensures the promotion of religion as a public good – not merely protective of religion, but key to an individual's religious beliefs as part of 'legal liberty' rejecting narrow interpretations of religious liberty and as an aspect of flourishing.[327] It does not see the need to secure human flourishing for the individual. It is submitted that Elias J reached a better understanding. This is one that termed Miss Ladele's complaint not that she was treated differently from others; rather, it was that 'she was not treated differently when she ought to have been' and her complaint was 'about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference.'[328]

Secondly, McIlroy identifies - correctly, in my view - that Hill's solution of reasonable accommodation provides 'only an ever-decreasing area of protection for religious believers in the workplace.'[329] This is the problem identified earlier, in that reasonable accommodation is inherently malleable and adaptive: the old guard in post prior to the legislation will eventually retire and new/younger employees will be faced with taking jobs requiring them to act against their conscience/remain jobless/take less suitable work.[330] This is not a form of accommodation. Rather, it is a temporary compromise that as time passes will ultimately favour an employer.

In contrast, my analysis of George's thought adopts the concept of reasonable accommodation and provides a more expansive approach to equality applied to religion and belief. Through embracing the value thesis outlined in chapter 4, Rivers views 'promoting equality' in *Ladele*[331] to require employees to sign up to a definition of equality adopted by the authority, a conception which 'preferred protecting same-sex partners from the presence of others who disapproved of their lifestyle over finding ways to accommodate practically the religiously motivated convictions of those others.'[332] Here a net effect is to require individuals

[327] Religion as a public good was developed/introduced in chapter 4.
[328] *Islington v Ladele* [2008] UKEAT 0453_08_1912 [53] (Elias J).
[329] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 32) 213.
[330] Ibid 213-214.
[331] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.
[332] J Rivers, 'Promoting Religious Equality' (2012) 1 Ox J. Law Religion 2, 16.

to value what they do not value.[333] This is opposite to the effect brought about by NNL reasoning. This has led to some commentators suggesting that equality law impacting religious freedom is a vehicle (and bias) by which Christianity is being marginalised and penalised.[334] Admittedly, this is an imposition of a majority consensus upon a minority, an imposition that does not value difference in equality. Rather, it allows the majority to impose contestable conceptions of equality.

Equality law has been criticised by Alice Donald here for ensuring an 'undue insistence on the assertion of competing identities'.[335] Rivers has criticised this bias confliction within equality on grounds of religion and belief that necessitates reasonable accommodation: starting with the understanding that a liberal democracy subjects all beliefs and behaviours to challenge and public contestation.[336] This basis still requires a commitment to equality, in that the 'human person is still valuable, and their identity secure, even when their beliefs are mistaken and their behaviour objectionable.'[337] Rivers has suggested that an aspect of toleration involves willingness to be satisfied with toleration to 'live alongside others who, one knows, disapprove of some beliefs one holds or behaviour one adopts.'[338] Logically this must be correct; otherwise all beliefs must be ignored equally, since they cannot all be equally accepted.[339] This would, in effect, enable reasonable accommodation within a tolerant, liberal democracy.[340] Democracy would make room for views and practices of which the majority may disapprove.[341]

The approach taken here by Rivers is problematic. This position does not expressly pose any limits. It also is an idealised notion because it does not provide any guidelines. A more pressing problem is that is still allows a 'rich social

[333] Ibid.
[334] Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (n 58) 52. Trigg has suggested that 'equality' and 'non-discrimination' overrides religious freedom in every case - Trigg, *Equality, Freedom and Religion* (n 18) 133.
[335] Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (n 9) 70. See also Trigg, *Equality, Freedom and Religion* (n 18) 83.
[336] Rivers, 'Promoting Religious Equality' (n 223) 13.
[337] Ibid.
[338] Ibid.
[339] Trigg, *Equality, Freedom and Religion* (n 60) 67.
[340] For further discussion on protecting the right to disagree with others see: Trigg, *Equality, Freedom and Religion* (n 60).
[341] Ibid 157.

space for the expression of identities in 'private'.[342] This once again provides a high level of respect for religious belief but may not provide any guaranteed protection for religion.

We have seen throughout this chapter that the EqA 2010 does not give religion or belief any special protection – for instance, by only listing it as one of the eight protected characteristics.[343] A liberal democracy could still offer protection from discrimination without providing a high mantle for religion or belief, and perhaps reasonable accommodation (without formal legislation such as protected characteristics) is one way to achieve this. That being said, by discrimination from religion and belief being prohibited under Article 9 of the ECHR,[344] this ensures that there is definite protection in place and there will still remain a focus upon religion and belief.

This position for reasonable accommodation is further dependent upon an expansive understanding of the good within George's NNL – a public good within NNL. I argue that 'legal liberty' allows beliefs to be contested, and it sets guidelines by drawing upon the 'reasonableness test' that was identified in chapter 4 in order to engage the public good. Yet this public good still needs to be seen in relation to reasonable accommodation arising from *Eweida*.

Reasonable accommodation and the public good

Religion as a public good can be read into *Eweida.* This judgment of the ECtHR did not declare a concept of reasonable accommodation to be incompatible with the ECHR. McIlroy views the decision to introduce such a doctrine now to lie with Parliament, with scope to vary precisely how that freedom is implemented in particular contexts.[345] The decision, therefore, will benefit from considered, applied suggestions in order to move on from a position that holds that religious believers, in non-religious contexts,[346] are now expected to bear the cost of their lack of conformity to conventional standards of behaviour themselves.[347]

[342] Rivers, 'Promoting Religious Equality' (n 332) 14.
[343] Section 4 of the EqA 2010.
[344] Chapter 5.2 analysed the current protection for religion set out in the structure of Article 9.
[345] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 216.
[346] Rivers, *The Law of Organized Religions* (n 7) 31.
[347] Rivers, 'Promoting Religious Equality' (n 332) 13.

So the modified conception of reasonable accommodation may be favoured here, I argue that this is one that is founded on a conception of the good that ensures the promotion of religion as a public good. This is dependent upon George's 'goods-rights synthesis' (good is prior to the rights and rights)[348] introduced in chapter 4. The prominence of the good prevails over individualistic rights. George has argued in favour of this priority of the good[349] and so really this is only a conceptual, definitional, priority given by George. As such, this prominence of the good is helpful because it enables a right to religious liberty legitimised by the basic human good of religion[350] - a natural rights basis. In my view this would not merely seek to protect religious believers in public manifestation of their belief [*Eweida*], nor would it seek to accommodate belief in the face of health and safety guidelines [*Chaplin*], but instead it would actively promote an individual's religious beliefs as an aspect of human flourishing. Such an active promotion of an individual's religious beliefs is a normative conclusion built upon practical reason, which would ensure Article 9 rights conferred would not be relegated as a 'matter of choice' [Sedley LJ] but instead as a hierarchical right, a public good built upon the intrinsic value and worth of the human person. This is a public good which is an 'indispensable feature of the comprehensive flourishing of a human being.'[351] This would secure individual protection in the form of reasonable accommodation, particularly in cases of indirect discrimination for Christian employees.[352] The promotion of an individual's religious belief here is an example of the modification of George's thought, which I argue here provides a justification for the greater protection of religious freedom in the workplace and so strengthens the protection accorded to religion and belief.

A public good is now evident in the form of support from the judiciary, governmental commissions and drafters of the EqA 2010 seriously debating the issue of reasonable accommodation. First, in a highly unusual move, Lady Hale rejected a costs in the case order and cast doubt on her own previous judgment in *Bull v Hall*,[353] to suggest that by ignoring claims for reasonable accommodation

[348] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 117.
[349] Ibid.
[350] Ibid 119.
[351] Ibid.
[352] For instance, see Pearson, 'Offensive Expression and the Workplace' (n 140) 441.
[353] *Bull v Hall* [2013] UKSC 73 – by a 3:2 majority direct discrimination on the ground of sexual orientation was found in the refusal to offer a homosexual couple a double room in a hotel. The

the law has done too little to protect the beliefs of Christians.[354] This call for a 'more nuanced' approach would seek to develop 'an explicit requirement upon providers of employment, goods and services to make reasonable accommodation for the manifestation of religious…beliefs.'[355] This further suggests that the law should be developing an explicit requirement upon providers of employment, goods and services to make reasonable accommodation for the manifestation of religious beliefs. It is telling that Lady Hale has now reached this conclusion post-hearing. In 2014 Lady Hale gave three different speeches on this area.[356] It was clearly a troubling issue that Lady Hale considered important. However, this further adds to the reasoning that the Supreme Court, as the final appellate court, should have given more consideration to the calls for Christian conscience when deciding *Bull v Hall*.[357] Arguably this is too little, too late.

Lady Hale has further built on this conclusion. In *Greater Glasgow Health Board v Doogan,*[358] she invoked discussion about 'reasonable adjustments'[359] in the context of discussion about indirect discrimination. This case was introduced earlier in the chapter and focused upon statutory construction of the right to conscientious objection in section 4(1) of the Abortion Act 1967 and also considered indirect discrimination against employees on grounds of religion or belief within the EqA 2010. It was earlier noted that in this case the practicalities of reasonable accommodation was better suited to resolution in the employment

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Appellants had argued there was no direct discrimination and that even if their treatment of guests amounted to indirect discrimination, this was justified on the basis of their religion. It was held that if direct discrimination was not found then all the justices agreed that the refusal to provide services was indirectly discriminatory and unjustified. It is interesting to note that Lady Hale rejected the usual measure of requiring the unsuccessful party (Mr and Mrs Bull) to pay the Respondent's costs.

[354] B Hale, 'Freedom of Religion and Belief' (Annual Human Rights Lecture for the Law Society of Ireland, 13 June 2014) <https://www.supremecourt.uk/docs/speech-140613.pdf> accessed 25th September 2017; see S Doughty, 'I may have been wrong to condemn Christian B&B owners for banning gay couple because people with religious beliefs have rights too, says top judge' (*Daily Mail*, 19th June 2014) <http://www.dailymail.co.uk/news/article-2585769/British-courts-not-respect-Christians-says-judge.html> accessed 23rd June 2014.

[355] B Hale, 'Freedom of Religion and Belief' (n 354).

[356] B Hale, 'Religion and Sexual Orientation: the Clash of Equality Rights' (Comparative and Administrative Law Conference, 7 March 2014) <https://www.supremecourt.uk/docs/speech-140307.pdf> accessed 25th September 2017; B Hale, 'Freedom of Religion and Belief' (n 354); Hale, 'Are we a Christian Country? Religious Freedom and the Law' (n 261).

[357] *Bull v Hall* [2013] UKSC 73.

[358] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

[359] Ibid [24]-[27] (Lady Hale).

tribunal proceedings.[360] Lady Hale's discussion surrounding reasonable accommodation can be seen in line with the decision in *Bull v Hall*,[361] in which no finding for reasonable accommodation was made. In *Bull v Hall*[362] there was clear direct discrimination found and, even if such was not found, the court held that there was indirect discrimination that was unjustified.[363] This supports the inference that discrimination law is moving to engage with reasonable accommodation.

Secondly, the Equality and Human Rights Commission advised employers to adopt where practical 'mutual accommodation'.[364] As it was earlier noted, this goes further than *Eweida* and may lead to employers having a practical duty of reasonable accommodation in relation to religion or belief.[365] This is an interesting development for two reasons: first, it goes further than the leading case law - there was no evaluation of reasonable accommodation in the judgments of the Fourth Section in *Eweida*.[366] Secondly, I suggest that the guidance provided by the Equality and Human Rights Commission is itself evolving to potentially ever more promote and develop the concept of reasonable accommodation as a public good for employers. For instance, while the 2013 guidance suggested 'where practical' accommodation was to be 'in the interests of all parties',[367] a more prescriptive 2013 guidance 'Religion or Belief in the Workplace: A Guide for Employers Following Recent European Court of Human Rights Judgments'[368] requires employers to treat all requests relation to religion or belief seriously, taking a 'starting point' in considering accommodating the request unless there are 'cogent or compelling reasons' not to.[369] This requirement to take requests seriously, is an instance where the prominence of the good of religion (via the goods-rights synthesis) enables a right to religious liberty. However, in the latest

[360] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [24] (Lady Hale).
[361] *Bull v Hall* [2013] UKSC 73.
[362] Ibid. Lady Hale in this case did consider reasonable accommodation but ultimately found against finding for the concept: 'I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases.' Ibid [47] (Lady Hale).
[363] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [55] (Lady Hale).
[364] Equality and Human Rights Commission, *Religion or belief in the workplace: An explanation of recent European Court of Human Rights judgments* (n 265) 2.
[365] Pitt, 'Taking Religion Seriously' (n 33) 404.
[366] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 213.
[367] Equality and Human Rights Commission, *Religion or belief in the workplace: An explanation of recent European Court of Human Rights judgments* (n 265) 2.
[368] Ibid.
[369] Ibid 5.

Equality and Human Rights Commission's report: *Review of Equality and Human Rights Law Relating to Religion and Belief*,[370] the EHRC considered the extent to which a duty to accommodate religion or belief might be beneficial to employers and employees. This report was not so encouraging for reasonable accommodation. Here it was found that there are a 'range of different views … about the perceived advantages and disadvantages of such a duty.'[371] Taken together, all these publications suggest the EHRC has shown commitment to debating a concept of reasonable accommodation.

Thirdly, Hepple, a drafter of the EqA 2010, has called for a more expansive approach in the operation of reasonable accommodation, arguing for a 'clearer conceptual framework in the case of religious discrimination'[372] by 'adopting a concept of discrimination arising from religion or belief, which combines direct and indirect discrimination and reasonable accommodation.'[373] It follows from Hepple's analysis, as outlined in chapter 4, that, although something 'akin' to a duty of reasonable accommodation has been imposed in the public sector via the equality duty, no such duty exists in the private sector.[374] This has been termed the Act's biggest failure[375] and provides a problem as the 'fundamental values of equality of law involve respect for dignity of individuals and freedom of choice.'[376] This approach to the individual has shades of the NNL public good approach. It has been shown that the modified NNL approach to reasonable accommodation depends upon the goods-rights synthesis to secure flourishing for the individual via the public good of religion. By doing so this accommodates matters of conscience in the workplace concerning religion.

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[370] P Edge and L Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law Relating to Religion and Belief' Equality and Human Rights Commission (Manchester, September 2015) <http://www.equalityhumanrights.com/sites/default/files/publication_pdf/RR97_Review%20of%20equality%20and%20human%20rights%20law%20relating%20to%20religion%20or%20belief.pdf> accessed 5th December 2015.

[371] Ibid 4. Chapter 6 will further detail the Equality and Human Rights Commission's finding for reasonable accommodation in the 2015 report - 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law Relating to Religion and Belief' ibid.

[372] Hepple, *Equality: The New Legal Framework* (n 40) 39.

[373] Ibid 43.

[374] Ibid 181. There is no private sector duty to advance equality within the EqA 2010.

[375] Ibid 179. This is not to say that all have viewed equality law as a terrible concept for religion: as Gibson notes, the principle of equality may provide a principle upon which legal protection of religion can be based - Gibson (n 217) 591.

[376] Hepple, *Equality: The New Legal Framework* (n 40) 43.

Hepple errs in his approach to reasonable accommodation, however, in two respects: first, the public sector equality duty, as earlier mentioned in chapter 4, only requires under s.149 'due regard', that is, a regard for accommodation, which can also practically equate to a suitable response or, on the other hand, exclusion. It does not ensure compliance. In fairness, Hepple qualifies this to the extent that reasonable accommodation should only occur 'where this could be done without other hardship to others'.[377] 'Hardship' would provide an equitable relief from wrongs but not address the good prior to the right. This presents a 'patch-work solution' that does not address the underlying rights discourse tensions between religion or belief and sexual orientation. Secondly, his underlying reasoning that the 'fundamental values of equality of law involve respect for the dignity of individuals and freedom of choice'[378] depends upon a protective theoretical approach to equality. This is an unsatisfactory conclusion because, firstly, it fails to take into account Lord Neuberger's warning about placing too great a reliance upon the question of choice: 'I do not accept that the fact that a condition has been adopted by choice is of much, if any, significance in determining whether that condition is a status for the purposes of Article 14'.[379] Secondly, following the analysis in chapter 4, it also fails to see reasonable accommodation as founded upon a conception of the human good that ensures the promotion of religion as a public good. This position does not merely protect an employee's religious rights through preventing an employer from shifting the job description boundaries, but protects and promotes an individual's religious beliefs in the workplace as an aspect of human flourishing beyond the individual.

As has been shown, reasonable accommodation would secure religious liberty as a public good. As earlier identified, the principles of a public good are axiomatic with both the judiciary and drafters of the EqA 2010 considering calls for reasonable accommodation following the decision in *Eweida.* It will be detailed in chapter 6 that Lady Hale already considers the concept of reasonable accommodation to be in force. This section has engaged with the concepts of reasonable accommodation and autonomy in order to engage with the leading religious equality case law in this section. This section has further used the

[377] Ibid 177.
[378] Ibid 43.
[379] *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [47].

concept of choice that was introduced in section 5.3. Through engagement with these concepts it was held in this section that, firstly, reasonable accommodation secures flourishing within the modified NNL basis, through protecting and promoting an individual's religious beliefs as an aspect of flourishing. The 'goods-rights synthesis' provides a natural rights basis to legitimise an individual's belief as a distinctive aspect of human flourishing. Secondly, protecting religion as a public good could accommodate matters of conscience concerning religion by engaging the modification of George's thought, in order to provide a solution to the tensions surrounding religious liberty. This chapter highlights how reasonable accommodation can solve the problem of difference within the protected characteristics in discrimination law and further solve the inherent problems surrounding the religious liberty provisions in the EqA 2010. This was further supplemented with the 'common origin' approach to reasonable accommodation that displayed the modern concept of equality as caught in tension between a) equality of persons and b) equality of lifestyle. It follows that despite different understandings of reasonable accommodation, the modified NNL conception is to be favoured with the public good of religion as an aspect of human flourishing.

George's modified understanding broadly speaking thereby goes further than *Eweida* and is dependent upon freedom of conscience. An examination of freedom of conscience will be the focus of the next section.

5.5 The concept of freedom of religious conscience

In chapter 2 it was argued that George's NNL theory is a tripartite reflection on human reason, morality and law. This stems from George's assertion that the basic goods, as intrinsic aspects of well-being and flourishing, create a space for making ethically autonomous moral decision making. The normative basis for moral judgment is built upon practical reasoning, whereby 'freedom and reason are mutually entailed'.[380] It is for this reason that, in line with the basic goods, I have identified that George understands a basic human right to religious liberty.[381] By analysing George's thought this section will argue that religious freedom is secured by religious liberty being seen to lead to human fulfilment.

[380] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 89.
[381] Ibid 85.

Religious liberty is also connected to freedom of religious conscience. The natural law argument for religious liberty is founded upon the obligation to 'pursue the truth about religious matters and to live in conformity with … conscientious judgments.'[382] A basic human right to religious liberty, despite the Roman Catholic bias identified throughout this thesis, is dependent upon freedom of conscience. Moving from reasonable accommodation, this obligation would require therefore an express position for freedom of conscience. It was identified in chapter 5.3 that when George talks about the concept of conscience, George specifically refers to freedom of religious conscience. This concept of freedom of religious conscience is useful because it will be further used to analyse the right to religious freedom in equality law throughout this section.

Rivers observes that Lord Hoffmann in *Begum*[383] set out a conception of reasonable accommodation for religion that is 'diametrically opposed to a conception of the rule of law rooted in individual conscience.'[384] Trigg has further written that the pursuit of equality is leading the courts to fail to respect the dictates of conscience.[385] This suggests that currently the law is not effectively incorporating freedom of religious conscience.

George, in his approach to freedom of conscience, instead follows the logic employed by V. Bradley Lewis. Bradley Lewis views religion to be a function of conscience (with conscience being a human capacity) and so freedom of religion is based on respect for this.[386] He has argued that a justification for religion is based on the goodness of religion itself.[387] For George, this obligation towards religious freedom is rooted in the proposition that religion, as a method of ascertaining meaning and value, is 'a crucial dimension of human well-being and fulfilment.'[388] This understanding veers quite closely to a philosophical evaluation of conscience within value. In such an approach conscience is respected, as this

[382] Ibid.
[383] *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100 [54]. For the opposite view see Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islam and Multiculturalism* (n 256) 163.
[384] Rivers, 'The Secularisation of the British Constitution' (n 11) 390.
[385] Trigg, *Equality, Freedom and Religion* (n 19) 156.
[386] Bradley Lewis, 'Religious Freedom, the Good of Religion and the Common Good: The Challenges of Pluralism, Privilege and the Contraceptive Services Mandate' (2013) 2(1) Ox. J Law Religion 39. See also M Nussbaum, *Liberty of Conscience, In Defense of America's Tradition of Religious Equality* (Basic Books, 2008); C Tollefsen, 'Conscience, Religion and the State' (2009) 54 Am. J. Juris 93, 100.
[387] Bradley Lewis, 'Religious Freedom, the good of Religion and the Common Good: the Challenges of Pluralism, Privilege and the Contraceptive Services Mandate' (n 386) 48.
[388] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 85.

approach to conscience ensures a debate surrounding human flourishing, particularly concerning the debate for religious freedom.

Both George and Bradley Lewis' approaches to conscience are mirrored by the ECtHR holding that freedom of thought, conscience and belief is one of the foundations of a 'democratic society', a precious asset for both atheists and believers alike and their individual conceptions of life.[389] The ECtHR has held that religious freedom is primarily a matter of conscience.[390] The Supreme Court has further held that freedom of conscience is an internal, subjective matter that each person must work out for herself.[391] In this section, my modified natural law critique for respecting freedom of conscience will, first, be argued to protect matters of conscience from invasion by the state, presenting religious liberty as both a basic and public good, and so, religious freedom will once more be substantiated as a public good. This will be followed by, second, critically analysing Articles 9 and 14 of the ECHR in conjunction with *Eweida*. By applying the modification of George's thought, this presentation of the public good of religion will be drawn upon. It will be drawn upon to show that viewing law as form of public morality provides an obligation towards freedom of religious conscience. This will set out an express reconstructed NNL position for enhanced protection of freedom of religious conscience.

Freedom of Conscience: an obligation towards conscience based upon the common good in NNL

In *Conscience and its Enemies,*[392] George relies upon John Henry Newman's understanding of religion to produce an account of freedom to enable human flourishing.[393] He draws from Newman's own Hohfeldian connection between autonomy and conscience within public morality and upon an individual basis: '[c]onscience has rights because it has duties; but in this age, with a large portion of the public, it is the very right and freedom of conscience to dispense with

[389] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79]-[80].
[390] Peroni, 'Deconstructing 'Legal' Religion in Strasbourg' (n 2014) 3(2) Ox. J Law Religion 235, 237. See further *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [80]; *Kokkinakis v*. *Greece* (14307/88) [1993] ECHR 20 [31].
[391] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [31] (Lady Hale).
[392] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32).
[393] Ibid 110.

conscience … It is the right of self-will.'[394] This approach supports the earlier definition given for conscience and provides George with a conception of freedom of religious conscience opposing autonomy. In other words, it draws obligations for religious conscience from, for instance, morality. This conflicts with Martha Nussbaum's assessment that the law should protect conscience, defined as a 'precious internal faculty for searching for life's ethical basis and its ultimate meaning.'[395] That being said, both approaches here recognise that it is important to follow conscience.

For George, with matters of religious liberty, the duty to follow religious conscience 'is a duty to do things or refrain from doing things not because one wants to follow one's duty but *even* if one strongly does not want to follow it.'[396] As such, my analysis of George's natural law thought includes religious liberty as a basic good following from the 'dignity of man as a conscientious truth seeker.'[397] I suggest that this provides a higher place for religious freedom – a centrality and priority of religious freedom 'among the basic civil liberties.'[398] This is key as it suggests that the 'first freedom' in the American Bill of Rights (religious freedom) and the First Amendment to the American Constitution[399] can be analogous to a higher position for religion or belief within the protected characteristics of the EqA 2010 and the basic goods. This is because both would protect an 'aspect of our flourishing as a human person key to the living of life' which 'represents our efforts to bring ourselves into a relationship of friendship with transcendent sources of meaning and value.'[400] This is an important observation when analysing the right to religious freedom in the EqA 2010. This higher place follows from chapter 4

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[394] Newman, *Certain Difficulties Felt By Anglicans Considered…A Letter to the Duke of Norfolk* (n 189) 250.

[395] M Nussbaum, 'Liberty of Conscience: The Attack on Equal Respect' (2007) 8 J Human Dev 337, 342. Nussbaum advocates that as conscience is so important, it should be protected even when in error by laws, institutions and individuals – ibid.

[396] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 112 [Emphasis added]. This is an important point: many regularly see all actions motivated by religious belief as matters of choice; however, Trigg has helpfully noted that a religion typically makes demands of its adherents – obligations imposed upon them. This is very different from a 'subjective' self-imposed choice made by an individual - R Trigg, *Equality, Freedom and Religion* (n 60) 106.

[397] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 85.

[398] Ibid 113.

[399] These rights have been identified by Edge as providing the most important guarantee of religious freedom: providing that '[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' For Edge, this does not prohibit establishment of religion and guarantees 'free exercise' of religion - Edge, *Religion and Law: An Introduction* (n 2) 68. This shows some comparison between the basic human goods and protected characteristics.

[400] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 113.

identifying the American Constitution as a paradigm natural rights discourse. This I argue, for George, leads the direction of good (prior to the right), and leads George to view characteristics and interests that are exercised in ways that have *integrity*.[401] Does this favour the view that there should be no other protected characteristics/rights? Clearly not as George states, following Finnis' *Natural Law and Natural Rights*, that:

> Religion is not the only basic human good; nor are the other basic human goods mere means to the fuller realisation of the good of religion. But religion *is* an intrinsic and constitutive aspect of our integral human flourishing as human persons and also a good that shapes and integrates all the other intrinsic and constitutive aspects of human well-being and fulfilment.[402]

I argue that religion permeates George's view of equality and conscience through the conception of religion as a public good, with religious liberty being a self-evident 'moral-knowledge' thereby leading to flourishing.[403] This conceptual approach is very helpful because it presents religious liberty as both a basic and public good: religious liberty is a public good that provides a form of freedom in human flourishing. The approach to religious liberty follows the definition given for human flourishing in chapter 4.4, where religious liberty allows individuals to flourish. This conclusion is supported by Peter Petkoff who has suggested that understanding belief and its manifestations as 'internal aspects' of freedom of religion, will emphasise *flourishing* rather than the containment of freedom of religion.[404]

The strongest defence for religious freedom logically can be based upon the intrinsic and foundational goodness of religion itself.[405] Yet why for George is the good of religious liberty/freedom to be cherished? Religious freedom, for George, I identify is a way of 'limiting the role of the government and checking the power

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[401] Ibid.
[402] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) referencing J Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 89-90.
[403] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 75.
[404] P Petkoff, '*Forum Internum* and *Forum Externum* in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights' (2012) 7 Religion and Human Rights 183.
[405] Bradley Lewis, 'Religious Freedom, the good of Religion and the Common Good: the Challenges of Pluralism, Privilege and the Contraceptive Services Mandate' (n 386) 26.

of the state.'[406] My analysis of George's thought here provides a distinctive approach to religious freedom, this is because moving from the natural rights discourse brought about by the secular humanist tradition,[407] contemporary religious liberty provides authority structures and 'where it flourishes and is healthy, is among the key institutions of civil society providing a buffer between the individual and the state.'[408] This is because religious freedom protects all those who practise, and logically also all those who do not practise faith,[409] including those who dissent from official teaching.[410] The purpose of this is that it is a 'vital way in which religion and religious institutions, when they respect the legitimate autonomy of the secular sphere and avoid illiberalism … serve the common good.'[411] Religion can serve the common good by ensuring that the analysis and application of George's thought effectively functions within the state. I suggest that this is why religion has such an important place within George's theory.

Rivers conversely identifies that claims of religious conscience have given way to a 'neutral conception of the common good as expressed through the law of the state.'[412] This is because claims of conscience; claims of systems of religious law, and claims of alternative religious versions of social flourishing have 'no publically cognisable weight'.[413] Certainly this is shown by the lowly protected remit of Article 9 of the ECHR and failure of cases taken in this area in English domestic courts (see section 4.2), which in turn highlights that contemporary judgments involving conscience display misunderstanding surrounding the good of religion. However, the common good within George's theory provides a higher level of protection, one that would arguably provide a greater level of protection for religious freedom against the state. This protected level of religious freedom then protects matters of conscience from being damaged by the state.

[406] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 114.
[407] This was argued and established in chapter 3.
[408] Ibid. George's modification enlarging the good to encompass the natural rights discourse, via the work of the secular humanists, was noted in chapter 3 to provide a 'good based opposition'.
[409] Adhar, 'Solemnisation of Same-sex Marriage and Religious Freedom' (n 150) 286.
[410] *R (on the application of Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1820 [233].
[411] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 114.
[412] Rivers, 'The Secularisation of the British Constitution' (n 19) 396.
[413] Ibid.

George's approach to religious freedom can be seen to be analogous to the approach taken by Waldron, for whom satisfaction involves a concern for freedom, which in turn is a requirement for individualism.[414] Liberty (and the right to freedom of conscience) involves the elementary condition of material well-being. Therefore it follows that 'rights involve not merely freedom but the active protection of this freedom for the securing of this right in material accommodation which produces flourishing.'[415] Freedom requires security on the basis of reasonable accommodation. It is in this sense that to achieve the earlier ideal of reasonable accommodation, freedom of religious conscience is already required. It has been shown in this section that a high level of freedom of religious conscience allowing human flourishing is required, to protect matters of conscience from invasion by the state.

Balancing protection for freedom of conscience

This higher place and promotion of flourishing is why Edge has identified problems occurring within the manifestation of religion: on the whole, the right of an individual to hold a belief; to identify with a religion; and to identify as part of a religious community, are all uncontentious. The problem arises when the individual seeks to act upon one of these statuses.[416] Sandberg, writing in 2011, predicted that, following the earlier appellate court hearings in *Ladele*[417] and *McFarlane*,[418] a 'growing concern' would emerge in that laws protecting religious freedom would have little effect, while laws protecting sexual orientation would constrain religious freedom.[419] Following the Court of Appeal decision in *Ladele*,[420] Sandberg commented: 'the laudable aim of preventing discrimination on grounds of sexual orientation was used to annihilate the claim of religious discrimination.'[421] This is why it has been observed that religion or belief appears to be frequently subordinated to sexual orientation with 'some arguing that any hierarchy is a straight-forward by-product of anti-discrimination law juridification.'[422] Although in chapter 4 it was denied that a balancing of protected

[414] Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (n 241) 185.
[415] Ibid 157.
[416] Edge, *Religion and Law: An Introduction* (n 2) 41.
[417] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.
[418] *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880.
[419] Sandberg, 'The right to discriminate' (n 45) 180.
[420] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.
[421] Sandberg, *Law and Religion* (n 19) 111.
[422] Gibson (n 217) 588.

characteristics has led to a hierarchy emerging, Sandberg has acknowledged a trend in which the United Kingdom has forgotten discrimination is outlawed on grounds of religion or belief.[423] This has led Sandberg to question whether 'the equality policy protects discrimination on grounds of religion as well as sexual orientation.'[424] Indeed, it was earlier identified in this chapter that there has been academic argument suggesting a different level of protection may be emerging.[425] This different level of protection applies to discrimination on grounds of religion or belief, and protecting conscience within these areas, from the protection available for other equality grounds.[426] If this is the case, then in order to critique the place of religious liberty within equality law what role has balancing conscience played within *Eweida*?

Hill has identified that in balancing the protection between the consciences of the employees against the promotion of principles on equality in the provision of a public service, *Eweida* provides a 'flashpoint' in litigation.[427] In *Eweida*,[428] the joint partly dissenting opinion of Judges Vučinić and de Gaetano identified the role of conscience in equality claims. This was not discussed in the majority judgment. Interestingly, however, the dissenting judges attached conscience to reason, within a religious understanding.

I argue that this connection between conscience and reason is similar to the process within George's NNL: conscience is a judgment of human reason – practical, human rationality which may or may not be informed by religious beliefs.[429] For George, I submit that human reason actively informs conscience through the discernment of the common good, proposed by the earlier identified method of 'common human reason.'[430] This would dictate laws on religious freedom and provide a place for the conscience of religious believers in the critique and modification of George's thought. Linking into the previous discussion of reasonable accommodation, the issue of conscience and reason

[423] Sandberg, *Law and Religion* (n 19) 127.
[424] Ibid 111.
[425] See Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (n 134).
[426] Ibid 298.
[427] Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (n 49) 203.
[428] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (Judge Vučinić and de Gaetano judgment).
[429] Ibid [2] (Partly dissenting judgment).
[430] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 121.

arising from Ms Ladele's objection to carrying out civil partnership ceremonies was not just an objection that it was contrary to her religious beliefs but 'also that she was being required to act by her employers in ways which were contrary to her conscience.'[431] Sandberg has provided the context by suggesting that the individual cases within *Eweida* constitute claims brought by employees forced to carry out obligations arising from new laws protecting sexual orientation.[432] Should employees be forced to marry a couple against that person's religious beliefs or conscience?[433] The important finding to note for Ms Ladele is that in the partly dissenting opinion it was not so much about freedom of religion and belief as one of freedom of religious conscience.[434]

Freedom of Conscience: applying George's thought indicates that conscience violations precede law within a public morality

George's understanding of the concept of public morality was very clearly offered and analysed in chapter 3. In short, it was shown that the concept of public morality is dependent upon law. For instance 'law is the only public morality that we can have.'[435] For Robert George, law is a form of public morality and religious freedom is part of political morality.[436] It was suggested that law by shaping morality prescribes a public morality. George believes that the common good of public morality generates obligations in justice,[437] in order to preserve morals.[438] Further, George's belief that governmental respect for individual freedom and the autonomy of governmental spheres of authority is a requirement of political morality[439] holds because law and government fundamentally exist to protect

[431] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 214.
[432] Sandberg, 'The right to discriminate' (2011) (n 45) 171.
[433] Adhar, 'Solemnisation of Same-sex Marriage and Religious Freedom' (n 150) 283 – Adhar, for instance, does not believe that individuals should be forced to act against their conscience.
[434] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [2] (Partly dissenting judgment). From this position the test proposed by the dissenting judges followed 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) and negatively (by refraining from actions which punish the objector or discriminate against her or him) - ibid [3]. This would provide protection from discrimination by the state.
[435] R P George and C Wolfe (eds), *Natural Law and Public Reason* (Georgetown University Press, 2000) 20.
[436] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 91-92. I suggest that this dichotomy is an extension of George's views concerning morality: the choices and actions of political institutions, similarly to actions by individuals, carries moral direction – ibid 85.
[437] R P George, 'The concept of public morality' (2000) 45 Am. J. Juris 17, 19.
[438] Ibid 19.
[439] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 91-92.

human persons and their well-being. As such, it is evident that Ms Ladele's standpoint is one that would be supported by George: to legislate against conscience would prove to be an action taken against religious liberty. This would be contrary to well-being and hence fulfilment. This is useful in our analysis of religious equality law because it identifies that, for Ms Ladele, providing a registrar service to those of a different sexual orientation would be an action against her conscience motivated by her religious belief and so taken against her religious liberty.

A fundamental tenet of liberalism, a plea for religious liberty, was supported in the dissenting opinion in *Eweida*, that is, 'that no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience.'[440] For comparative purposes, it is worth remembering that acting against conscience would be discriminatory, falling within the ambit of Articles 9 and 14 of the ECHR and that this would be similar to traditional conscientious objections towards abortion and involvement in military service.[441]

It should be noted that, in *Ladele*, the claim of indirect discrimination was defeated by the legitimate aim of 'protecting the rights of others [gay and lesbian individuals] which are also protected under the Convention'.[442] For the dissenting judges this legitimate aim did not arise as 'the aim of the Borough of Islington was to provide equal opportunities and services to all without discrimination and the legitimacy of this aim is not and was never at issue'.[443] Importantly, the Borough of Islington, in the opinion of the dissenting judges, was *prima facie* liable to Ms Ladele's claim of discrimination. This was because, firstly, no service user or prospective service user of the Borough ever seemed to have complained, which leads to, secondly, because the legitimacy of the aim was not in issue, then no balancing exercise could be carried out between Ladele's right to conscientious objection and a legitimate state of public authority policy to determine whether

[440] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [2] (Partly dissenting judgment).
[441] See J Finnis, J Boyle and G Grisez, *Nuclear Deterrence, Morality and Realism* (Clarendon Press, 1987). Though see the recent decision rejecting conscientious objection in *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.
[442] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [106].
[443] Ibid [6] (Partly dissenting judgment).

'the means used to pursue this aim were proportionate.'[444] Following from this absence of a rights-based discourse conflict surrounding indirect discrimination, it follows that Ladele's situation primarily centred upon a conscience issue. The fact Ms Ladele was prepared to lose her job because of her beliefs indicates the centrality of beliefs to her conscience.[445] The role of conscience, therefore, provides an important factor in the analysis and application of George's thought concerning the protection of rights within the state.

Rivers has taken against the state implementing freedom of conscience. A theme that recurs throughout his *Law of Organized Religion*[446] is criticism of the 'limiting individualistic tendency'[447] of regarding religious liberty primarily as a matter of freedom of conscience.[448] Rivers worries that religious freedom would be unduly restricted by the 'expansive application of the equalities approach … [that] has recently started to apply the standards only expected of states to religious associations themselves'.[449] Dignity within a standardised approach has enforced a restrictive public duty of equality which is applicable to the organisation rather than the individual. This approach does not, however, engage with the connection between common human reason and religious conscience at an individual level. Unlike George's thought it does not therefore recognise the interrelation between the good of religion and religious liberty leading to human flourishing. George's approach to religious liberty adjudication that I have analysed is, conversely, focused upon the individual's practical rationality broadly-speaking.

The provision of services and religious conscience

The provision of services has also been seen to restrict individual conscience. McCrea has suggested that any equality approach concerning provision of services further harms the individual. This is because Islington's policy was called 'Dignity for All' and not 'services for all'. From this position McCrea has observed

[444] Ibid.
[445] Trigg, *Equality, Freedom and Religion* (n 60) 96.
[446] Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (n 7).
[447] McCrea, 'Book review: J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)' (n 184) 665.
[448] Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (n 7) 30.
[449] McCrea, 'Book review: J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)' (n 184) 665; Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (n 24) 36.

that a deprivation of services has an impact upon the dignity of individuals.[450] For McCrea the dissenting judges in *Eweida* erred here.[451] McCrea's objection is misconceived. I argue that the application of George's understanding of moral judgement shows that the good precedes law within a public morality. George has viewed the concept of public morality as what he terms a type of 'public good'.[452] Here any action preventing an individual from following their conscience intrinsically violates the good of an individual. Following George's logic outlined in the earlier sections, the obligation to protect conscience precedes that of any rights discourse. Instead the purpose of law as a form of public morality is to preserve morals.[453] This is dependent upon branches of the state such as the legislature and established institutions such as the church upholding the good of individual conscience to sustain public morality.[454]

The protection for provision of services has been positively noted by the ECtHR. This has received judicial support in the form of the learned judge, Lady Hale, finding in the negative that laws which ignore Christian consciences might not be 'sustainable'.[455] Further, in response to the ruling in *Bull v Hall,*[456] Lady Hale has called for, first, as we have seen, a new proportionality assessment for reasonable accommodation[457] and, secondly, more importantly, the law to develop a 'conscience clause'[458] for Christians who, like the Bulls and Ladele, would find providing services contrary to the pursuance of their own conscience and manifestation of religious freedom. Here I suggest that the deprivation of services would allow the individual to flourish in line with the common good, by not violating conscience. Proportionality in judicial attempts to manage clashes

[450] McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom'* (n 154) 283.
[451] Ibid.
[452] George, 'The concept of public morality' (n 437) 19. I take this further and term religion to be a public good in chapters 4 and 5.
[453] Ibid.
[454] Ibid 24.
[455] Hale, 'Religion and Sexual Orientation: the Clash of Equality Rights' (n 356); Doughty, 'I may have been wrong to condemn Christian B&B owners for banning gay couple because people with religious beliefs have rights too, says top judge' (n 354).
[456] *Bull v Hall* [2013] UKSC 73.
[457] '[reasonable accommodation] was to be taken into account in the overall proportionality assessment, which must therefore consider the extent to which it is reasonable to expect the employer to accommodate the employee's right.' *Bull v Hall* [2013] UKSC 73 [51] (Lady Hale). The dissenting judgment in *Eweida* proposed a more radical method: in cases of individual's moral conscience, such as Eweida, the state's margin of appreciation does not enter into the equation for individual moral conscience. See *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [5] (Dissenting judgment).
[458] Hale, 'Freedom of Religion and Belief' (n 354).

of interests will, however, only secure religious liberty if claims of religious people and their religious freedom have sufficient weight.[459]

Ms Ladele was denied this religious freedom for two reasons: first, the majority in the ECtHR feared that requiring a religious exemption for Ms Ladele would send the Court down a slippery slope, with an exemption which may have to be extended from sexual orientation in couple registration services to discrimination on any ground (e.g. sex or race). Trigg has opposed this on the basis that devaluing religious conscience may in contrast lead to all claims of conscience equally being ignored.[460] This indicates that there will not be a slippery slope impact, but instead lesser protection given to individual conscience. Secondly, the fact that Ms Ladele's job need not have been redefined by Islington to require her to act as a registrar of civil partnerships[461] - the Council may have 'accommodat[ed] her conscientious objection without depriving anyone who wished to enter into a civil partnership in Islington the opportunity to do so.'[462] The fact that the Council did not do so, and the ECtHR reached a comparable conclusion, was a flagrant violation of conscience, and so, religious liberty. These examples are misunderstandings surrounding the good of religion. The analysis of George's thought indicates that they represent conscience violations of the public good of religion within a public morality. The concept of the public good of religion does not here receive sufficient protection.

Religion as a public good: failing to protect religious conscience demeans individuals

A test was proposed by the dissenting judges in *Eweida*: could Islington have accommodated Ms Ladele's conscientious objection without impinging on the rights of service users?[463] The question remains: does this go far enough to accommodate the good? Applying the test, *prima facie* the earlier identified concept of reasonable accommodation may not under my application of George's thought ensure freedom as a public good or religion as a public good to ensure

[459] Rivers, 'The Secularisation of the British Constitution' (n 19) 399.
[460] Trigg, *Equality, Freedom and Religion* (n 60) 106.
[461] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [25] (Majority judgment).
[462] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 214. This would in effect be an operation accommodating conscience. See also Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (n 10) 202.
[463] McIlroy, 'A Marginal Victory for Freedom of Religion' (n 71) 215.

the flourishing of believers. The good of religion is fundamentally misunderstood. For example, in a hypothetical society that does not embrace conceptions of liberty or religion, one which actively discourages such rights, a rights basis would be logically prevented from accommodating either of these concepts. Reasonable accommodation is thus a fragile concept, one which can provide momentary relief, but is not sustainable in a long-term legal landscape. At both a level of principle[464] and practicality, the problem with reasonable accommodation is that religious conscience is susceptible to widespread moral relativism.

The concept of religion as a public good is instead to be preferred to reasonable accommodation: where a claimant argues that she or he has been the victim of religious discrimination, what should matter is whether the belief or act which triggered the discriminatory conduct 'was truly religious'.[465] This goes further than viewing the act of discrimination alone being in and of itself as wrong. This approach requires discrimination based upon a particular characteristic triggered by a belief or act. The belief or act requires a form of protection, one that could be effectively secured if religion was seen to be a good in and of itself. With more protection being conferred, space would be given to religious freedom for making ethically autonomous decisions. This is a form of religious freedom leading to flourishing in line with George's NNL. Religious freedom in equality law secures freedom of conscience.

Reliance upon the sincerity of the claim to establish religious discrimination differs from Hellman's earlier thesis.[466] Both approaches can be applied to the question: when is religious differentiation morally permissible? This question provides a deeper insight into equality. To answer the question posed above: drawing distinctions among people is morally permissible, 'when doing so does not demean any of those affected. We can treat people differently if, in doing so, we do not demean them.'[467] The problem with the EqA 2010, and religious liberty law, as has been shown in this chapter, is that it, through failing to protect religious

[464] This goes further than viewing discrimination in and of itself as wrong. It could perfectly well be argued that the problem lies in discrimination rather than discrimination based upon a particular characteristic.
[465] Hatzis, 'Personal Religious Belief in the Workplace: How Not to Define Indirect Discrimination' (2011) 74(2) MLR 287, 292.
[466] As a reminder, discrimination is wrong when differentiation demeans. See generally Hellman, *When is Discrimination Wrong* (n 254).
[467] Ibid 169.

conscience and failing to accommodate religious liberty, *demeans* religious individuals when differentiating them. Religion as a public good, which is drawn from the analysis of George's thought would not do this. Instead, religion can be seen within an understanding of the public good.

This section has outlined a position for the concept of freedom of religious conscience. It has been argued that George views law as a form of public morality, which provides an obligation towards freedom of religious conscience (political morality). This is based upon the public good of religion discerned through 'common human reason'.[468] In this chapter, first, analysis indicated that George uses the concept of religious freedom to protect matters of conscience from invasion by the state. As such, second, *Eweida*[469] has brought to life the priority of the good in religious conscience over legal rights within the concept of public morality. The analysis and application of George's thought suggests that the EqA 2010 could benefit from presenting religion within the remit of a public good to protect religious conscience in a balancing of rights, legitimate interests and protected characteristics.

5.6 Conclusion

To conclude, this chapter has shown Robert George's critique of equality law. The modification and application of George's thought has been necessary in order to critique the place of religious freedom within equality law throughout this chapter. Engagement with George's thought has been analysed to provide a justification for the greater protection of religious freedom. For instance, it has been argued, following from the codification prescribed by the EqA 2010 and jurisprudence outlined in *Eweida and Others v United Kingdom*,[470] that George's critique of equality law regarding religious freedom would, in contrast, ensure that employees do have a right to manifest religion in their workplace. This is a right not merely gained by accommodating religious belief, but instead through ensuring freedom of conscience is actively promoted. This would correct current misunderstandings surrounding the public good of religion.

[468] George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (n 32) 121.
[469] *Eweida v British Airways* [2010] EWCA Civ 80.
[470] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

This chapter has clearly defined and then engaged with concepts that have been drawn from George's thought. This chapter has particularly drawn upon how the recurring concepts in this chapter relate to each other. These concepts have then usefully analysed the right to freedom of religion in equality law. For instance, chapter 5.2 engaged with the concept of human flourishing. It was shown in this chapter that following *Eweida*,[471] employees do have a positive right to manifest religion in the workplace. It was conveyed that this is a readily enforceable position for the manifestation of religious liberty in the workplace as a natural right. This was argued to be necessary to protect the good of religion that leads to the concept of human flourishing. It was further discussed at length that the enforcement of equality law in *Eweida*[472] has forced a practical shift from 'non-discrimination to anti-discrimination'[473] which limits the scope of Article 9 in relation to religion and belief.

It was further shown that the ECtHR have rejected the 'specific situation rule'. Freedom to change jobs is definitively not seen as sufficient to guarantee freedom of religion. I argued that George's use of 'legal liberty' is not confined to the freedom to change jobs. Instead, a proportionality assessment and common human reason dictate laws on religious freedom.

A solution to religious liberty restrictions may be evident in the form of the concept of reasonable accommodation. George's goods based NNL approach, however, was shown to be favoured over contemporary calls for reasonable accommodation. The conclusion was supported for two reasons: first, reasonable accommodation secures flourishing within George's version of NNL. This is through the 'goods-rights synthesis' providing a rights basis to legitimise an individual's belief as an aspect of human flourishing over rights for service provision. This preferable method for reasonable accommodation solves the conflict in current equality law between: a) equality of persons and b) equality of lifestyle and behaviour. Secondly, religion as a public good was shown to accommodate matters of conscience by engaging George's approach. So building from the dissenting judgment in *Eweida*,[474] it was shown that the modified

[471] Ibid.
[472] Ibid.
[473] Sandberg, 'The Right to Discriminate' (n 45) 157.
[474] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (Partly dissenting judgment).

NNL conception of reasonable accommodation is founded upon the public good of religion. This was argued to address the problem of difference in the EqA 2010 surrounding protected characteristics. As such, the critique of George's NNL conception is to be favoured - the public good of religion as an aspect of human flourishing. Religion is here protected as a public good. This will be further considered in the conclusion to this thesis.

This chapter also detailed an express position for freedom of conscience. It was argued that George, broadly speaking, goes further than the dissenting judgment in *Eweida*[475] by arguing for a basic human right to religious liberty dependent upon freedom of religious conscience.

In this chapter I further argued: a) that George uses the concept of religious freedom to protect matters of conscience from invasion by the state. Once again, this presented religious liberty as a public good. It was identified that religion has a higher place within George's theory because religion serves the common good by ensuring that the George's thought can effectively function within the state. This was followed by identifying b) that this higher, public good of religion contributes towards George's view of law as a form of public morality. This enables freedom of religious conscience and argues for enhanced protection for freedom of religious conscience.

In sum, chapter 5 has provided a modified, altered version of George's NNL in light of earlier criticism provided throughout this thesis. The resolution of George's theory, through the critique of his thought, speaks into a current issue of concern within equality law. It has been shown that the current state of reasonable accommodation and indirect discrimination law conflicts with my approach to George's thought. The modification and application of George's thought would therefore require religion to be advanced as a form of public morality within the guide of the public good. An express position for religious liberty has been argued, as both a basic and public good, and so, religious freedom is a public good. *Eweida*[476] has brought to life the priority of the good in religious conscience over legal rights within public morality.

[475] Ibid.
[476] See both - *Eweida v British Airways* [2010] EWCA Civ 80; *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

The concluding chapter will summarise the themes and issues that have been drawn through the critical application of George's NNL views on equality law and will demonstrate that equality legislation could benefit from presenting religion within the remit of this public good. This would protect religious conscience in a balancing of protected characteristics, legitimate interests and legal rights.

Chapter 6 – Conclusion

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Chapter 6 - Conclusion

This thesis has undertaken a critical application of Robert George's views towards the Equality Act 2010. In doing so, it has drawn novel conclusions about, and attempted to provide an answer to, George's NNL approach to English religious liberty case law.

The findings throughout this thesis have presented religion and religious freedom as a public good. This arose from a research question considering what George, with his view of religion as a basic human good, might think about the religious liberty cases taken under the provisions of the Equality Act 2010. In answer to this question, the critique and modification of George's thought was shown to engage the public good of religion in order to provide a more effective approach towards equality law. It has been argued this position is sufficient to resolve irreconcilable tensions within equality law, such as those that have arisen regarding the current state of reasonable accommodation and proportionality analysis within indirect discrimination law. A new basis was set down for a concept of reasonable accommodation regarding the protected characteristic of religion or belief within equality law. This was shown to rely upon a conception of the good which ensures promotion of religion as a public good. A conception that is not merely protective of religion but one that actively promotes an individual's religious beliefs in order to attain human flourishing.

This thesis has also shown that viewing religion as a public good could expressly accommodate matters of conscience by reconstructing George's theory and providing a modified NNL approach. The discussion surrounding religious conscience developed from the thematic analysis of *Eweida*.[1] This discussion, in dialogue with George's work, emphasises the priority of the good in religious conscience over legal rights within public morality. It is a form of public morality[2] providing an obligation towards freedom of religious conscience. This freedom would extend to religious freedom under Articles 9 and 14 of the ECHR. Yet, this form of freedom is no mere human right, rather it was displayed as, once more, the key public good of religion.

[1] See both - *Eweida v British Airways* [2010] EWCA Civ 80; *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

[2] The definition for the concept of public morality in this thesis was provided in chapter 3 and repeated in chapter 5.5.

This chapter will bring together the individual conclusions in the chapters of this thesis and draw implications from these. By doing so this final chapter will justify and support the finding that equality legislation could benefit from presenting religion within the remit of the public good. Religion is presented in this manner in order to protect religious conscience in a balancing of protected characteristics, legitimate interests and human rights.[3]

Chapter 2 considered a key theme within George's thought, namely, the reliance upon practical reason. As such, this chapter showed how George's neo-scholastic NNL approach differed from Thomist thoughts in several notable ways. This provided a basis for application, which also highlighted institutional consequences arising from the analysis of George's thought. George's 'minimum standard of reasonableness' approach towards legal validity was shown here to suppose practical reasoning as a guiding principle. George was shown to hold a unique position within the NNL School and to contribute particularly in the understanding of practical 'common human reason[ing]', which is a social contractarian method to put forward political claims based upon democratically informed opinion, one which is drawn from George's interpretation of practical reasoning within Aquinas.[4] George was further presented to hold a position which subtly differs to that of the rest of the Grisez School by his approach to Rawlsian public reasoning. This critique displayed the extent to which George differs from existing scholarship in his use of practical reason. Yet disagreement with both legal reasoning and legal adjudication is welcome. After all, this is why appellate courts have an odd numbers of judges to resolve such disagreement. So despite

[3] A recent example of the equality narrative failing to protect religion can be seen by Digital Cinema Media (DCM) refusing to screen a commercial advert featuring the Lord's Prayer. This was due to play in cinemas before the *Star Wars: The Force Awakens* feature film. The advertisement produced by the Church of England was banned because of its religious content. DCM suggested they have a policy of not accepting 'political or religious advertising' content for use in cinemas and that in this regard, they treat 'all political or religious beliefs equally'. Once again, this highlights that religion requires further protection. See H Horton, 'Church of England: banning Lord's Prayer adverts will have a 'chilling' effect on free speech' (*The Daily Telegraph*, 23rd November 2015) <http://www.telegraph.co.uk/news/religion/12010305/church-of-england-banning-lords-prayer-adverts-chilling-effect-free-speech.html> accessed 9th December 2015; H Siddique, 'Cinemas refuse to show Church of England advert featuring Lord's Prayer' (*The Guardian*, 23rd November 2015) <http://www.theguardian.com/world/2015/nov/22/cinema-chains-ban-advert-featuring-lords-prayer> accessed 9th December 2015.

[4] R P George, 'Science, Philosophy, and Religion in the Embryo Debate' (Anscombe Memorial Lecture 2011, 21 October 2011) <http://www.bioethics.org.uk/page/resources/multimedia> accessed 1st August 2012. Also see, R P George, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (Isi Books, 2013) 125.

the criticisms and tensions outlined in this thesis surrounding George's work, this does not prohibit the critique of George's thought from successfully providing a way forward for natural law reasoning in order to analyse religious equality law.[5] With this in mind, this chapter presented the role of practical reasoning within George's theory, which opened the way for the substantive case law and textual analysis carried out within the later chapters.

To further prepare for the later critique of equality law regarding religion, chapter 3 concentrated upon the key theme of natural rights within George's work. This theme was established by conveying George's narrowing from theological conceptions of natural law jurisprudence towards non-theological designations found in a natural rights discourse. Through these the chapter analysed the influence upon George of the modern secular humanist tradition. It was shown that this tradition embraced the interplay between the Roman Jurists' classifications of laws to narrow natural law themes into natural rights jurisprudence. A motif of fundamental rights to secure liberty repeated throughout the chapter, such as George's movement from Hobbes to provide individual, natural rights protection against the state and detailing the Lockean property right of liberty. It was argued that George draws upon this property right to provide a 'goods based opposition' in additional disagreement towards certain state made law. To further detail the transformation of natural law reasoning into natural rights jurisprudence within George's work, Pufendorf's influence in contributing to the rationalist basis within NNL was analysed. This set the stage for the equality law critique which followed by providing a clear basis for opposition towards state made religious equality law through, for instance, George's protective stance regarding religion which was argued to be a pro-active stand for the manifestation of religion in the workplace. This was argued to provide George with a protective approach to religious liberty.

Equality law: a new balance?

Only because of the work in the latter chapters of this thesis is it possible to conclude that equality legislation can benefit from presenting religion within the remit of the public good to protect religious conscience. These chapters critically analysed George's NNL approach towards substantive religious equality law in

[5] The working definition for 'religious equality law' was given in chapter 4.

order to solve those tensions identified earlier.[6] The resolution of George's theory spoke into a current legal issue of concern and this process was essential to solving the tensions within both George's theory and equality law impacting religion. In chapter 4, first the analysis and application of George's thought was shown to engage the public good of religion in order to provide a more effective approach towards discrimination/equality law. The chapter addressed how George has dealt with discrimination law, particularly religious discrimination law.[7] It was shown that George views law as the medium in which it is possible to talk about the good and, more specifically, about religion not only as a basic human good but also as a public good (in the sense that the good is prior to the right and rights within equality law). This arose from discussion that NNL may now be dictated under the banner of equality and enforced by a 'due regard' public sector duty under s.149 of the Equality Act 2010 (EqA 2010). Tensions here, such as the problems with the public sector equality duty, are unsurprising.[8] It was shown that the courts are attempting to assess the correct parameters for the protection of religion at work.[9] Secondly, through thereby engaging with the concepts of human dignity and religious liberty it was explored why, in part, the modification of George's thought showing religion as a public good is a more effective approach and solution for the protection of religion at work.

Despite this thesis identifying that religion can be viewed as a public good in chapter 4, Lady Hale, writing extra-judicially in the Ecclesiastical Law Journal,[10] has recently drawn doubt upon whether religion can, as argued, be viewed as a

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[6] Such as the 'unresolvable problems' between religious rights and sexual orientation rights - P Edge and L Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law Relating to Religion and Belief' Equality and Human Rights Commission (Manchester, September 2015) <http://www.equalityhumanrights.com/sites/default/files/publication_pdf/RR97_Review%20of%20equality%20and%20human%20rights%20law%20relating%20to%20religion%20or%20belief.pdf> accessed 5th December 2015, 40. See chapters 1, 4 and 5.

[7] By doing so this thesis addressed key research questions identified in chapter 1: first, has George contributed to the discussion of religious equality law? Second, how has George dealt with discrimination law, particularly discrimination on grounds of religion and belief? Third, can analysing George's approach to US law provide a set of transferable criteria and concepts to analyse religion?

[8] I agree with the suggestion in the 'EHRC Report – Review of Equality and Human Rights Law Relating to Religion and Belief' that more research is needed to ascertain how the public sector equality duty has been implemented with regard to religion or belief. By doing so this will determine its practical effectiveness in this area - Edge and Vickers (n 6) 58.

[9] For instance, these 'parameters' are being tested because religious equality was only introduced in most member states in response to the need to implement the 2000/78 Directive in 2003 - L Vickers, 'Law, Religion and the Workplace' in S Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge, 2015) 275.

[10] Lady Hale, 'Secular Judges and Christian Law' (2015) 17(2) Ecc. L.J. 170.

public good. Lady Hale's initial position is that 'no special protection is to be given to belief in Christianity'[11] and that religious freedom, for any religion, is not an absolute right.[12] In setting down eight general issues governing the secular courts' approach to religious issues,[13] she draws doubt upon religious liberty by suggesting 'religious beliefs provides no exemption from having to obey general laws which are designed for the *common good*.'[14] What is the common good identified here? Does the common good suggest that in legal adjudication religious rights will lose? A branch of the state (the judiciary) is here justifying its own secular common good. Lady Hale does not outline here what constitutes laws designed for the common good. It is not a NNL understanding of the common good. As such, this suggestion conflicts with the vision of religion provided for in this thesis. It has been outlined that if religion is considered part of the common good, when litigated alongside the other protected characteristics, then in matters of religious liberty adjudication (Ms. Eweida excluded), religion and belief will always lose. The research conducted in this thesis certainly shows both a clear direction and a clear development of the law regarding religious liberty. This highlights why in analysing the right to religious freedom, religious freedom needs to be protected as a public good.

To build upon this conclusion, an implication for further work may be to analyse these comments in the light of future Supreme Court cases. For instance, the conception of the common good needs to be assessed in connection with the view of religion as a public good.

A further conclusion in chapter 4 conveyed that George holds the American Constitution as a paradigm for natural rights discourse. For George, it was noted that this provides authority to enforce the natural law and to protect the natural rights held by the legislature or judiciary. The role of common human reason in George's approach to religious liberty was also considered to produce a 'reasonableness test' to balance religious exceptions. The concept of 'reasonableness' provides direction for application to achieve 'legal liberty'. Through combining this test with a 'responsibilities discourse', this demonstrated

[11] Ibid 173.
[12] Ibid. For instance, it is subject to the limitations in Articles 9(2) and 10(2) of the ECHR.
[13] Ibid 172.
[14] Ibid 175 [Emphasis added].

George's unique approach to religious liberty adjudication and the institutional consequences that arise when addressing this approach to equality law.[15]

This responsibilities discourse in chapter 4 also allowed conclusions drawn from the analysis and application of George's NNL thought to answer the conflicting rights discourse that has featured throughout this thesis. The discourse reflects a current trend where, in order to secure protection for religious beliefs, the narrative 'needs to be in a language that speaks as loudly of responsibility as it does of rights.'[16] To do so echoes the second Biblical 'Great Commandment' to '[l]ove your neighbour as yourself'.[17] As such, a responsibilities discourse finds connection with the basic human goods because it establishes responsibility to pursue human choices which fulfil obligations towards others.[18] In George's approach towards religious equality law, the implication is that this conclusion is a better way to ground and balance the good of religion. Religion is presented as a public good which mitigates the problems surrounding rights confliction.

George's NNL approach was further applied in the fifth chapter. It was shown that, following from the codification prescribed by the EqA 2010 and jurisprudence outlined in *Eweida*,[19] George's critique of religious equality law provided that employees do have a right to manifest religion in their workplace as a natural right. George's use of 'legal liberty' was further demonstrated not to be confined to the freedom to change jobs. In rejection of the 'specific situation rule', freedom to change jobs was not seen to be enough to guarantee freedom of religion under Article 9 of the ECHR. Instead, proportionality assessments[20] and common human reason dictate laws on religious freedom.

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[15] This process addresses the following research question which was identified in chapter 1: does Robert George's natural law theory provide a solution to the identified tensions facing religious freedom within equality law?

[16] M Hill, 'Equality of all faiths under the law is best for religious freedom' (*The Times*, *Law Section*, 11 June 2015).

[17] Matthew 22:39 - *Holy Bible, English Standard Version* (Collins, 2002).

[18] N Biggar, '"God" in Public Reason' (2006) 19(1) Studies in Christian Ethics 9, 13. By responsibility Biggar means two things: 1) a capacity to respond to 'respond to goods given in and with the natural of things prior to human choices' and 2) the 'capacity to respond to a vocation from God to play an inimitable part in the salvation of the world' - ibid.

[19] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

[20] The doctrine of proportionality is merely another structured legal mechanism which seeks to unnecessarily avoid limiting rights. While the critique of George's thought applied to adjudication is preferred, Vickers provides a good summary of the law concerning proportionality: in negotiating the relationships between religion and other human rights, proportionality allows religious interests and

This thesis has addressed the contested issue of reasonable accommodation.[21] This chapter allows for deeper insight into, and practical insights to be drawn from, the concept of reasonable accommodation. Chapter 5 provided that a public good may now be evident in the form of support from both judiciary and drafters of the EqA 2010 seriously debating reasonable accommodation. Post *Bull v Hall*,[22] Lady Hale was shown to be considering protecting of Christian conscience via reasonable accommodation.[23] This links to some of the conclusions found earlier in this thesis. For instance, it was shown in chapter 5 that the modified understanding of reasonable accommodation is founded upon the public good of religion.[24] Reasonable accommodation under the modification of George's thought was also shown to solve the problem of difference within the protected characteristics under the EqA 2010. Yet Lady Hale has come to the conclusion that reasonable accommodation is already in force. She believes that, following *Eweida*,[25] justification for indirect discrimination has now to be looked at in the light of the Convention right to manifest one's religion without unjustified interference, otherwise our law will become 'deeply incoherent if the analysis does not reach the same result in each case.'[26] As such, Lady Hale is calling for a change in domestic law to incorporate reasonable accommodation. Following *Eweida*, Lady Hale believes that 'employers and other providers may be expected to make reasonable adjustments to their rules and practices to accommodate the religious beliefs of their employees.'[27] Chapter 5 detailed that no direct

other issues to be taken into consideration – L Vickers, 'Twin approaches to secularism: organized religion and society' (2012) 32(1) OJLS 197, 209.

[21] The concept of reasonable accommodation was defined and analysed in chapter 5.4.

[22] *Bull v Hall* [2013] UKSC 73.

[23] B Hale, 'Religion and Sexual Orientation: the Clash of Equality Rights' (Comparative and Administrative Law Conference, 7 March 2014) <https://www.supremecourt.uk/docs/speech-140307.pdf> accessed 25th September 2017; B Hale, 'Freedom of Religion and Belief' (Annual Human Rights Lecture for the Law Society of Ireland, 13 June 2014) <https://www.supremecourt.uk/docs/speech-140613.pdf> accessed 25th September 2017; B Hale, 'Are we a Christian Country? Religious Freedom and the Law' (Oxford High Sheriff's Lecture, 14 October 2014) <https://www.supremecourt.uk/docs/speech-141014.pdf> accessed 25th September 2017.

[24] Later in this chapter it will also be repeated that viewing religion as a public good could expressly accommodate matters of conscience under the modification of George's thought.

[25] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10).

[26] Lady Hale (n 10) 177.

[27] Ibid 176. This is troubling, because in cases following *Eweida*: *Bull v Hall* [2013] UKSC 73 and *Greater Glasgow Health Board v Doogan* [2014] UKSC 68, both were earlier noted as rejecting reasonable accommodation. Although *Greater Glasgow Health Board v Doogan* involved discussion concerning reasonable accommodation, Lady Hale believes reasonable accommodation for midwives' beliefs was a separate question - Lady Hale (n 10) 177. Hale notes that the Supreme Court held the right of conscientious objection in s.4 of the Abortion Act 1967 did not extend to administrative, managerial and

comparison between reasonable adjustment and accommodation can be made. And even so, neither reasonable accommodation, nor reasonable adjustment for religion, was brought in by the judgment in *Eweida*. It is submitted that this is likely more of a figurative approach to reconciling indirect discrimination adopted by Lady Hale. As has been consistently shown, reasonable accommodation is not in force. Reasonable accommodation is not, currently, law.

Equality and Human Rights Commission Report 97

An important development concerning reasonable accommodation can be seen in the recent Equality and Human Rights Commission's report, *Review of Equality and Human Rights Law Relating to Religion and Belief*.[28] It is pleasing to see this report agree with my own conclusions in chapter 5 concerning problems with Article 9 and the conflict between religion and sexual orientation equality.[29] However, the report highlighted two of its own conclusions regarding reasonable accommodation. First, a duty of reasonable accommodation may not be needed because it does not materially differ from the protection provided by indirect discrimination.[30] This is because a failure to 'accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal to accommodate can be justified.'[31] Second, an alternative to reasonable accommodation might be to introduce a mechanism similar to the current right for employees to request flexible working, in order to cover those religion or belief workplace issues which are not covered by the right to request

supervisory tasks as opposed to 'hands on' patient care during the termination. Further, as was discussed in chapter 5, Lady Hale notes that the practicalities of reasonable accommodation was better suited to resolution in employment tribunal proceedings where, 'all agree at that stage the midwives' rights to manifest their religion will come into play.' As such, reasonable accommodation under this logic was not decided here - Lady Hale (n 10) 177.

[28] Edge and Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law Relating to Religion and Belief' (n 6).

[29] Ibid 41-42. The report notes and welcomes developments such as the protection of the manifestation of belief under Article 9 and the rejection of the 'specific situation rule' - ibid 24.

[30] Ibid 51.

[31] Ibid 52. Chapter 5 detailed that I disagree with this comparison with indirect discrimination by following Fredman's argument: through the proportionality analysis, justification for indirect discrimination would maintain the 'status quo' and be detrimental towards those claiming discrimination on grounds of religion and belief - S Fredman, *Discrimination Law* (2nd edn, Oxford University Press, 2011) 270.

flexible working.[32] For instance, to adapt a uniform to comply with religious teaching or a request to opt out of certain work tasks.[33]

The impact of both of these measures can be seen to weaken and discredit calls for reasonable accommodation, as neither provide a coherent basis for reasonable accommodation.[34] Both suggestions do not see the promotion of religion as founded upon a public good that is key to an individual's beliefs. They do not see that the right to religious freedom logically requires the protection of the right to religious liberty, via accommodation, to produce flourishing.[35] Consequently the suggestions in this recent report are important but inferior to the basis set down for reasonable accommodation in chapter 5: one that is founded on a conception of the good that ensures promotion of religion as a public good, not merely protective of religion but one that actively promotes an individual's religious beliefs in order to attain human flourishing.[36]

George's goods based NNL approach was further shown to be favoured over contemporary calls for reasonable accommodation for two reasons in chapter 5. First, the 'goods-rights synthesis' provides a rights basis to legitimise and accommodate an individual's belief as an aspect of human flourishing in line with the common good over rights for service provision.

An example of why this modified approach is to be preferred can be teased out here. The approach solves a problem inherent within equality legislation impacting religion. It was identified in chapter 5 that there is current conflict in equality law between two different conceptions of equality: 1) equality of persons and 2) equality of lifestyle and behaviour. This is why equality is not a concept that can provide a sufficient guide to many of the difficult questions in religious discrimination law. The legal approach towards secularism brings out value in this distinction. To develop this point, it was noted in chapter 4 that the President of

[32] Edge and Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law Relating to Religion and Belief' (n 6) 4-5.
[33] Ibid 56.
[34] This is because the right to request only requires employers to consider the request in a reasonable manner - ibid 56. Further in chapters 4 and 5 of this thesis Christian litigants have been shown to be consistently unsuccessful when claiming indirect discrimination (*Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [15]).
[35] J Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, 1987) 157.
[36] For the working definition of 'human flourishing' see chapter 4.4 and chapter 5.2.

the Family Division, Sir James Munby, has stated that the courts are secular,[37] with the starting point of the common law being 'an essentially neutral view of religious beliefs.'[38] An aggressive form of secularism is present that has been shown to exclude religious discourse from the public sphere and promote an individualist value of equality.[39] Nazir-Ali has drawn attention to this form of secularism as deriving from a form of multiculturalism that is rooted in ideas of equality. However, this is rooted in the earlier identified ideas of equality which are separated from the Biblical foundations of equality.[40] The modified account that is applied to reasonable accommodation may solve the tensions between equality of persons and equality of lifestyle and behaviour. The approach may here offer a solution centred upon accommodation of the person. This is based upon inherent characteristics of the person. The modified NNL approach is a Biblical approach[41] to the good in line with flourishing. It takes an inclusive approach to accommodate all people, while still providing a broad-brushed approach to encompass *all* preferences and differences. This may overcome a secular focus upon habits and lifestyle in line with the NNL human flourishing focus. As such, this finding reconciles the tension at the heart of contemporary religious equality law discourse.

The second reason why the modification of George's thought that is applied to reasonable accommodation is to be favoured over contemporary calls for reasonable accommodation, is because religion as a public good can accommodate matters of conscience under the analysis and application of George's thought. Building from the dissenting judgment in *Eweida*,[42] it was shown that the modified understanding of reasonable accommodation is founded upon the public good of religion. As such, the critique of George's NNL conception

[37] C Baski, 'The courts are secular says top family judge' (*The Law Society Gazette*, 29 October 2013) <http://www.lawgazette.co.uk/law/the-courts-are-secular-says-top-family-judge/5038456.article> accessed 13th November 2013.
[38] *R (Eunice Johns and Owen Johns) v Derby City Council and Equality and Human Rights Commission* [2011] EWHC 375 [41]. See also J Munby, 'Law, Morality and Religion in the Family Courts' (2014) 16 Ecc. L.J. 131, 137.
[39] M Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islam and Multiculturalism* (Bloomsbury, 2012) vii; M Nazir-Ali, 'Calling all Christians: Prepare for Exile' (*Standpoint Magazine*, January 2012) <http://www.standpointmag.co.uk/node/4797/full> accessed 3rd December 2015.
[40] M Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islam and Multiculturalism* (n 40) vii.
[41] Acts 17:26 - *Holy Bible, English Standard Version* (Collins, 2002).
[42] *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) Partly dissenting judgment.

presented the public good of religion as an aspect of human flourishing. This understanding (of reasonable accommodation) thereby broadly speaking goes further than *Eweida* and is dependent upon freedom of conscience. Rather than a restriction upon flourishing, this may provide a legal system that is instrumentally good in ensuring that people are able to participate in a wide range of forms of human flourishing. This would coordinate our behaviour in mutually beneficial ways. In this way, law is presented in accordance with nature.

George also goes further than the dissenting judgment in *Eweida*[43] by arguing for a basic human right to religious liberty dependent upon freedom of conscience.[44] This was argued in chapter 5 to protect matters of conscience from invasion by the state. A basic human right to religious liberty establishes an express position for freedom of conscience for religious believers. For an express position given to freedom of religion has been described as the paradigm freedom of conscience and the essence of a free society.[45] Religion was presented as a public good in chapter 5. The public good of religion, discerned through common human reason, was further shown to contribute towards George's view of law as a form of public morality. This will enable freedom of religious conscience.

Chapter 5 displayed Robert George's critique of religious equality law. This thesis has critically analysed George's thought and then found George's theory, at least in part, useful to exploring religious liberty in English equality law. In doing so, the presentation of religion as a public good can be seen to adequately protect claimants under Articles 9 and 14 of the ECHR in adjudication concerning human rights, legitimate interests and protected characteristics. This thesis has clearly established that viewing religion as a public good could expressly accommodate matters of conscience. *Eweida*[46] has been analysed to promote the priority of both the common and public good in religious conscience over legal rights within law viewed as a public morality. As a consequence, this provides a viable solution to those tensions that have arisen regarding the current state of reasonable accommodation and proportionality analysis within indirect discrimination law. Human flourishing promotes a form of freedom. This is a religious freedom which

[43] Ibid.
[44] The working definition of 'conscience' was given in chapter 5.3.
[45] J Dingemans, 'The need for a principled approach to religious freedoms' (2012) Ecc. L.J. 12(3) 371, 378.
[46] Eweida v British Airways [2010] EWCA Civ 80.

is dependent upon being promoted as a public good, in order to solve the identified contemporary tensions impacting religious liberty within equality law.

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