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# The Supreme Courts' Icing on the Trans-Atlantic Cakes

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## I Introduction

A gay customer wants a cake for a same-sex wedding or to promote that cause. A Christian-owned bakery declines the order citing the owners' religious convictions on not endorsing something they believe is morally wrong. The customer is aggrieved and complains to the human rights authorities. The Supreme Courts on both sides of the Atlantic, within months of each other in 2018, ruled in favour of the defendant bakeries in Colorado and Northern Ireland respectively. This article reviews the decisions in *Masterpiece Cakeshop*<sup>1</sup> and *Ashers Baking*.<sup>2</sup>

Part II briefly outlines the facts and Courts' rulings in each case<sup>3</sup>. Part III analyses the compelled speech doctrine as it applies to the supply of commodities requiring the application

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<sup>1</sup> *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*, 584 US \_\_\_ (2018), 138 S Ct 1719 (2018); (2018) 7(3) Ox J Law Religion 574. The Superior Court of California, Kern County, Bakersfield Dept 11 also considered a similar case in *Department of Fair Employment and Housing v Cathy's Creations, Inc.*: (BCV-17-102855); (2018) 7(2) Ox J Law Religion 348

<sup>2</sup> *Lee v Ashers Baking Co Ltd* [2018] UKSC 49.

<sup>3</sup> Both cases have been explored in the Oxford Journal of Law & Religion and elsewhere, this explanation will consequently be brief: see on *Masterpiece Cakeshop*, for example, Anton Sorkin, 'A Starch Reality—What comes Next After *Masterpiece Cakeshop*?' (2018) 7(1) Ox J Law Religion (2018) 153 and; 'A Starch Reality: Redux – What Comes Next After *Masterpiece Cakeshop*?' (2018) 7(3) Ox J Law Religion 551; Melissa Murray 'Consequential Sex: #Metoo, *Masterpiece Cakeshop*, and private sexual regulation' (2018-2019) 113 NwUL Rev 825; Jeremiah Ho 'Queer Sacrifice in *Masterpiece Cakeshop*' (March 22, 2019) Yale Journal of Law & Feminism, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=3358659> accessed 1 December 2019; Mark L

of some skill or creativity. Part IV examines the religious liberty arguments in the litigation and part V reconsiders a nagging question: Were these *kulturkampf* cases a prodigal exercise for all concerned? Part VI puts forward extra-legal suggestions for a collaborative approach in the light of the inevitable ongoing attempts by both sides to maintain a presence in the public square and part VII contains some concluding observations.

## II The Cake Cases

In *Masterpiece Cakeshop*, a bakery in Lakewood, Colorado, owned and operated by Jack Phillips, a devout Christian, was approached in the summer of 2012 by a gay couple.<sup>4</sup> Charlie Craig and Dave Mullins explained they were planning to marry and wanted a wedding cake. Phillips responded that he did not create or bake wedding cakes for same-sex couples because of his religious opposition to same-sex marriage. The Colorado Civil Rights Commission followed up the couple's complaint. The Colorado Anti-Discrimination Act was held to be infringed insofar as the cakeshop had engaged in discrimination in the provision of goods or services based on the customers' sexual orientation. An appeal by Masterpiece to the Colorado

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Movsesian 'Masterpiece Cakeshop and the Future of Religious Freedom' (2019) 42 Harv J L & Pub Pol'y 711.

See on *Ashers*, for example; Ilana Hirschberg 'Lee v Asher's Bakery: The Final Tier' (2019) 8(2) Ox J Law Religion 422; David Lawrence 'What's Wrong with Homophobic Bakeries? A Critical Discussion of Discrimination and its Interaction with Political Freedoms and Religious Conscience, Drawing on the Asher's Baker Case in Northern Ireland and Kasper Lippert-Rasmussen's Theory of Discrimination' (2019) 22 Ethical Theory and Moral Practice 61-76; Andrew Hambler 'Cake, Compelled Speech, and a modest Step Forward for Religious Liberty: The Supreme Court Decision in *Lee v Ashers*' (2018) 181 Law & Just. -Christ L Rev 156; Mel Cousins 'Taking equal protection beyond its proper scope. Why people with sincere religious beliefs can continue to discriminate' (2019) 41(2) Journal of Social Welfare and Family Law, 222-224

<sup>4</sup> See Sorkin (2018) FN 3.

Court of Appeals was unavailing.<sup>5</sup> Phillips' argument that his First Amendment rights of religious freedom and free speech were infringed were dismissed.

The Supreme Court heard the appeal in December 2017 and in June 2018 reversed the Colorado Court of Appeals judgment. The Court, by 7 votes to 2, held that the Commission's actions had infringed Phillips' religious liberty. The Commission had exhibited religious bias and hostility to Phillips contrary to the Constitution's guarantee of the free exercise of religion. The Commission's order must be set aside. But the case was not remanded back for another, animus-free, hearing.<sup>6</sup>

In *Ashers Baking*,<sup>7</sup> Gareth Lee, a gay man who volunteered with a LGBT organisation called QueerSpace, decided in May 2014, to buy a cake from Ashers Bakery, a family-operated business located in Belfast. The cake was not for a wedding but for a private event run by QueerSpace to mark the end of anti-homophobia week and to advance the cause of same-sex marriages in Northern Ireland. Ashers offered a specialised service whereby images or designs supplied by a customer would be iced onto a cake. Lee placed an order for a cake based on a coloured picture of Sesame Street TV series characters Bert and Ernie, the QueerSpace logo and the words "Support Gay Marriage". After initially accepting the order, the owners, the McArthurs, recanted. Mrs McArthur apologised to Mr Lee and refunded his money.

Lee successfully complained to the Equality Commission for Northern Ireland. The District Court in 2015 held that by refusing to fulfil the order, Ashers had engaged in direct discrimination on the grounds of his (Lee's) sexual orientation, religious beliefs and political opinions.<sup>8</sup> The bakery was fined £500. The Court of Appeal affirmed the lower court's decision

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<sup>5</sup> *Craig v Masterpiece Cakeshop, Inc*, 370 P 3d 272 (2015).

<sup>6</sup> Chad Flanders and Sean Oliveira 'An Incomplete Masterpiece' (2019) 66 *UCLA Rev Disc* 154, 159 and 175.

<sup>7</sup> See Hirschberg (2019) FN 3

<sup>8</sup> [2015] NICTy 2.

and dismissed the McArthurs' appeal.<sup>9</sup> The United Kingdom Supreme Court heard the appeal in May 2018 and, in October 2018, reversed the lower courts, holding, unanimously, that the McArthurs had not infringed equality law. There had been no sexual orientation discrimination, and even if there had been discrimination based on political opinion (something they doubted had occurred) the rights of the McArthurs to religious liberty and freedom of expression under the European Convention on Human Rights ought to carry the day.

In *Ashers* the Court held that the refusal to take the order and ice the cake was not due to Lee's sexual orientation. The District Court had made the crucial finding that Ashers did not refuse to complete the order because of Lee's actual or perceived sexual orientation.<sup>10</sup> The operative reason was the message Lee wanted to be iced on the cake. The Court of Appeal pointed out that the District Court did not disagree with the bakery's contention that it would also have refused to decorate a cake with the message sought to a heterosexual customer.<sup>11</sup> In *Masterpiece* we see the same picture. The "undisputed facts" were that Phillips would have refused to create a cake for any customer for a same-sex wedding, regardless of the customer's sexual orientation.<sup>12</sup>

Returning to *Ashers Bakery*, how then did the District Court conclude there had been direct discrimination? Here the judge held that the criterion used by the bakery was "indissociable" from the protected characteristic: support for gay marriage was inseparable from sexual orientation. To refuse a customer's order because of his support for same-sex marriage is tantamount to doing so because of his or her sexual orientation. The Supreme Court disagreed:

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<sup>9</sup> [2016] NICA 39.

<sup>10</sup> *Ashers Baking* [2018] UKSC 49 at [22].

<sup>11</sup> *Ibid.*

<sup>12</sup> *Masterpiece* at 1735 per Gorsuch and Alito JJ (concurring with the Majority). Phillips had, according to the factual record, refused a cake order from Craig's mother: *ibid.*

there is no such identity between the criterion and sexual orientation of the customer. People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation.<sup>13</sup>

Was this nonetheless “associative discrimination”? The Court of Appeal had held that this was so: “this was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community.”<sup>14</sup> But the evidence did not bear this out:

The evidence was that they both employed and served gay people and treated them in a non-discriminatory way. Nor was there any finding that the reason for refusing to supply the cake was that Mr Lee was thought to associate with gay people. The reason was their religious objection to gay marriage.<sup>15</sup>

It might well be that the refusal here “ha[d] something to do with the sexual orientation of some people”, but that was, stated the UK Supreme Court, “very far” from concluding that the disadvantageous treatment was on the basis of sexual orientation.<sup>16</sup> Neither was it the case that the benefit of the message on the cake could *only* accrue to the gay or bisexual community:

It could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in

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<sup>13</sup> Ibid at [25].

<sup>14</sup> Ibid at [28].

<sup>15</sup> Ibid at [28].

<sup>16</sup> Ibid at [33].

marriage, as well as to the wider community who recognise the social benefits which such commitment can bring.<sup>17</sup>

The Supreme Court felt the need to affirm that sexual orientation discrimination ought never to be downplayed:

I do not seek to minimise or disparage the very real problem of discrimination against gay people. . . Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. It is deeply humiliating, and an affront to human dignity to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics.<sup>18</sup>

Be that as it may, sexual orientation discrimination was not what had transpired here and “it does the project of equal treatment no favours to seek to extend it beyond its proper scope.”<sup>19</sup>

Had the bakery discriminated on the ground of Lee's “religious belief or political opinion”? The Supreme Court did not doubt that support for gay marriage could be a political opinion for this purpose.<sup>20</sup> Obviously Ashers knew Lee supported same sex marriage due to the very nature of the message he wanted on the cake. Perhaps, said the Court, the same response could meet this claim as met the claim of sexual orientation discrimination. Ashers would have

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<sup>17</sup> Ibid at [35].

<sup>18</sup> Ibid per Lady Hale (with whom Lords Mance, Kerr, Hodge and Lady Black agreed).

<sup>19</sup> Ibid at [35].

<sup>20</sup> Ibid at [41].

refused the order from anyone who sought such a customised cake, regardless of the political (or religious) opinions they held. But it was harder to dismiss the indissociable argument in this context, as there was a “closer association” between the political convictions of the customer and the message he sought to promote.<sup>21</sup> This then required the Court to consider whether the Ashers’ religious liberty or free speech rights could nonetheless protect them from a discrimination charge.

### III Compelled Speech

“The objection was to the message not to the messenger.”<sup>22</sup> This pithy sentence captures a point made repeatedly in *Ashers Bakery*.<sup>23</sup>

The Supreme Court affirmed that the right to freedom of expression under Article 10 of the European Convention includes “the right *not* to express an opinion”.<sup>24</sup> There was, said the Court, the possibility that the facts in *Ashers* were an instance of direct discrimination on the grounds of Lee’s political opinion. It then became a matter of reading the anti-discrimination legislation in a manner that was compatible with, and gave effect to, the Convention—in this case, Article 10. If the Northern Ireland equality legislation was read in a way to respect

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<sup>21</sup> Ibid at [48].

<sup>22</sup> *Ashers Bakery* at [22].

<sup>23</sup> *Ashers Bakery* at [34] (‘In a nutshell, the objection was to the message and not to any particular person or persons.’); ibid at [36]; ibid at [47] (‘The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man.’); ibid at [54] (‘...what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed’) and [55] (‘...obliging them to supply a cake iced with a message with which they profoundly disagreed’); ibid at [62].

<sup>24</sup> Ibid at [52] (*italics in original*).

Convention rights it led to the ineluctable conclusion was there was no infringement of the anti-discrimination law. The equality legislation in question:

should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so. . . . If and to the extent that there was discrimination on grounds of political opinion, no justification has been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order. . . . The SORs do not, at least in the circumstances of this case, impose civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.<sup>25</sup>

Could the compulsive nature of the expression be offset by a disclaimer or by the fact that others might not think that the bakery supported the message? First, in *Masterpiece* the disclaimer argument was rejected:

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. . . . Because the government cannot compel speech, it also cannot “require speakers to affirm in one breath that which they deny in the next.”<sup>26</sup>

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<sup>25</sup> *Ashers* at [56] and [62] and [36].

<sup>26</sup> Thomas J in *Masterpiece* at 1745 (quoting *Pacific Gas & Electric Co v Public Utilities Commission of California* (1986) 475 US 1 at 16).

Second, the argument that others might not associate the bakery with its product was likewise rejected. In *Ashers Bakery* the Court of Appeal had observed that “the fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either.”<sup>27</sup> However, the Supreme Court responded:

there is no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message. Mrs McArthur may have been worried that others would see the Ashers logo on the cake box and think that they supported the campaign. But that is by the way: what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed.<sup>28</sup>

Is there a difference between baking and selling a cake versus baking a cake with a particular message upon it? We might call this the difference between supplying a cake simpliciter (a generic cake) and a customised cake.

In *Ashers Bakery* the order was unequivocally for a customised cake—a cake with the particular features, most notably the pro-gay marriage slogan as well as the QueerSpace logo (and the Sesame Street characters). Ashers specialised in a “Build-a-Cake” service.<sup>29</sup> In *Masterpiece* neither the particular design of the cake, nor any wording on it, was discussed when the order was placed.<sup>30</sup> The couple simply asked the shop to “creat[e] a cake to celebrate

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<sup>27</sup> *Ashers* at [54].

<sup>28</sup> *Ashers* at [54]. In *Masterpiece* a similar argument—that “a reasonable observer” would think that Masterpiece was simply complying with Colorado law—was also rejected: see Thomas J at 1744.

<sup>29</sup> *Ashers* at [11].

<sup>30</sup> *Masterpiece* at 1724.

their same-sex wedding”<sup>31</sup>. The Court did find however that the order was for a customised cake.<sup>32</sup> But for Justices Gorsuch and Alito, the fact that no details about the actual wording or decoration were discussed was immaterial: “Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding.”<sup>33</sup> As Phillips put it, he had to “use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation.”<sup>34</sup> The Court implicitly agreed with this characterisation of his labour.<sup>35</sup>

If the cake had been a cake simpliciter, a pre-made wedding cake straight-off-the-shelf, so to speak, the solicitude of the Court may not have been forthcoming. The Court observe:

If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that *might be different* from a refusal to sell any cake at all. In defining whether a baker’s creation can be protected, these details might make a difference.<sup>36</sup>

A further clue is this passage:

And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker

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<sup>31</sup> *Masterpiece* at 1735 per Gorsuch and Alito JJ.

<sup>32</sup> *Masterpiece* at 1740 per Thomas J.

<sup>33</sup> *Masterpiece* at 1738.

<sup>34</sup> *Masterpiece* Majority at 1728.

<sup>35</sup> Justice Thomas in his separate concurring opinion expounds at some length upon the “exceptional” creative input that Phillips expended upon wedding cakes: *Masterpiece* at 1742-1743.

<sup>36</sup> *Masterpiece* at 1723 (italics supplied).

refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.<sup>37</sup>

The Court Majority refers to "any cakes" for gay weddings, suggesting perhaps a generic wedding cake could not be refused to be sold simply because the vendors knew its *purpose* was to feature at a same-sex wedding.

However, in their separate concurring opinion, Justices Gorsuch and Alito appeared to take a more expansive and generous view, at least insofar as the religious baker is concerned. To the submission that this case was only about "wedding cakes", and not a wedding cake celebrating a same-sex wedding, their Honours disagreed that this was the correct level of generality at which to characterise the cake supplied in this case.<sup>38</sup> Moreover, these two concurring justices imply that the religious meaning attached by the vendor to the act in question (supplying a cake) *is* relevant and can transform an apparently mundane act into one implicating the faith of the participant. Thus:

It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.<sup>39</sup>

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<sup>37</sup> *Masterpiece* at 1728.

<sup>38</sup> They speak rather caustically about the dangers of "fine tuning" or "calibrating" the level of generality to achieve the result the court desired: *Masterpiece* at 1739.

<sup>39</sup> Gorsuch and Alito JJ in *Masterpiece* at 1739-1740 (italics in original).

The religious significance that a person may invest in an apparently everyday act or object is what is at stake.

Here we encounter what some American scholars call “complicity-based conscience claims”, pleas to be exempt from having to be complicit in others’ immoral activities, or facilitate them. Nejaime and Siegel explain: “Complicity claims are faith claims about how to live in community with others who do not share the claimant’s beliefs and whose lawful conduct the person of faith believes to be sinful.”<sup>40</sup> More important than any direct material consequences that might arise from the conduct at issue (a refusal to supply cakes) may be the social significance or meaning of any state permission of the conduct itself. An accommodation granted by the state to the claimants, they contend, sends an adverse social signal, one with the power to stigmatize those who engage in the conduct in question. Those who engage in the conduct incur “dignitary harm”. In terms of our present discussion, allowing a religious bakery to refuse to bake and decorate a wedding cake stigmatizes those who wish to participate in same-sex marriage and the customers experience dignitary injury. Moreover, the critics add, accommodation of the complicity-based claims further fuels the fires of the culture war and “provide[s] an avenue to extend, rather than settle, conflict about social norms in democratic context.”<sup>41</sup>

## **V Religious Liberty**

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<sup>40</sup> Douglas Nejaime and Reva Siegel ‘Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics’ (2015) 124 *Yale LJ* 2516, 2519.

<sup>41</sup> *Ibid* at 2520.

In *Ashers Bakery* the Supreme Court cite Convention case law to the effect that “obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9(1) rights.”<sup>42</sup> Here, the bakery “was being required to express a message with which they deeply disagreed.”<sup>43</sup> The Court comment that the situation before them was “akin to a Christian printing business being required to print leaflets promoting an atheist message.”<sup>44</sup>

There was the potentially thorny issue of whether Ashers Baking as a limited liability company could avail itself of the protection of Article 9.<sup>45</sup> In the Supreme Court’s view the company and its owners were really the alter egos of each other:

In this case . . . to hold the company liable when the McArthurs are not would effectively negate their convention rights. In holding that the company is not liable, this court is not holding that the company has rights under article 9; rather, it is upholding the rights of the McArthurs under that article.<sup>46</sup>

In *Masterpiece Cakeshop*, the Supreme Court was not called upon to tackle the key religious freedom issues. The reason was a distinct want of neutrality exhibited by the Colorado Civil Rights Commission at first instance:

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality. The reason and motive for the baker’s refusal were based on his sincere religious beliefs and

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<sup>42</sup> *Ashers* at [50]. The case cited is *Buscarini v San Marino* (1999) 30 EHRR 208 (Grand Chamber).

<sup>43</sup> *Ashers* at [54].

<sup>44</sup> *Ibid* at [47].

<sup>45</sup> See further Ahdar, ‘Companies as Religious Liberty Claimants’ (2016) 5(1) *Ox J Law Religion* 1.

<sup>46</sup> *Ashers* at [57].

convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here.<sup>47</sup>

The Majority found various instances of religious hostility, perhaps the most telling being this:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>48</sup>

To say Phillips' invocation of his religious faith was akin to insincere attempts by benighted religionists to justify slavery or the Holocaust clearly went too far. Furthermore, the Commission had upheld, on three separate occasions, the refusals by other Colorado bakeries of orders to create cakes with images or messages (in combination with religious texts) that conveyed disapproval of same-sex marriage or relationships.<sup>49</sup> The Commission had ruled in

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<sup>47</sup> *Masterpiece* at 1723-1724.

<sup>48</sup> *Masterpiece* at 1729, quoting the Commissioner.

<sup>49</sup> These three cases brought by the same individual (*Jack v Gateaux Ltd*; *Jack v Le Bakery Sensual Inc*; *Jack v Azucar Bakery*) are discussed by the Majority at 1730.

the *Masterpiece* case that any message on the cake would not be attributed to Masterpiece cakeshop, but only to the customer. Yet this same logic was absent when the Commission did not even entertain the no-connection-with-the-shop argument in upholding the right of refusal of the bakeries in the three anti-gay-marriage cases. It seemed inconsistent that bakeries could decline an order with a pro-gay-marriage message but not one with an anti-gay-marriage one. In their dissent, Justices Ginsburg and Sotomayor held that the bakery in *Masterpiece* was discriminating because of the customers' sexual orientation and not the implied message of the cake, whereas in the three Jack cases, it was the message that the bakeries objected to.<sup>50</sup> With respect, this attempt to distinguish the cases is not persuasive. Nor is the Minority's reasoning that it was "irrelevant" that Phillips *would* have supplied other sorts of cakes or baked products to Craig and Mullins.<sup>51</sup> If anything, that buttressed the Majority's conclusion that the material objection was to the particular product and not the nature or characteristics of the customer. Whatever the sexual orientation or religion of the customer, the objection (as in *Ashers Baking*) was to the message not the messenger.

In the previous section we mentioned complicity-based conscience claims as well as the dignitary harm suffered by those who are denied goods or services. Yet, the talk of dignitary harm can be rather one-sided. It ignores the hurt suffered by suppliers whose consciences tell them not to carry through with this proposed action. "Those seeking exemption", Douglas Laycock explains, "believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their

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<sup>50</sup> *Masterpiece* at 1750.

<sup>51</sup> *Masterpiece* at 1750. The Minority (*ibid*) also assert that Phillips would have supplied a gay wedding cake (or a cake destined for a gay wedding) to a heterosexual couple. This is, with respect, conjecture and would surely equally have violated Phillips' religious beliefs.

fates.”<sup>52</sup> Indeed, the entire critique of complicity-based claims may be a red herring. To say that the objector does not wish to participate, or be complicit in or facilitate the wrongdoing of another seems to imply that the harm to the claimant is more removed or indirect than any immediate and direct personal toll upon his or her conscience. But in no way should it obscure the fact that the objector believes he or she—not just the other person—is doing something that is deeply wrong. The McArthurs, the owners of Ashers Baking, believed that by fulfilling the order they would be doing something sinful. Are the religious bakeries “merely” complicit in the moral wrongdoing (as they see it) of another or are they engaging in immoral activity *themselves*? As Laycock argues: “It is not a line worth drawing, and characterizing it one way or the other does not change the moral stakes.”<sup>53</sup>

## VI A Brief Reality Check

It is no answer to discrimination to be told that there is another vendor, employer or landlord just down the road. Having said that, there is, we submit, a distinct air of unreality, if not farce, to the cake cases and their progeny involving florists, photographers, caterers, wedding planners, musicians, chauffeurs, reception-venue hirers and the like. A cake worth let us say US \$100 or £36.50 is all that was at stake—at least in tangible measurable economic terms—in the *Masterpiece Cakeshop* and *Asher Baking* cases. At one level these disputes involve entirely trivial matters, bordering on, if not squarely centred in, the realm of the *de minimis*. It is hard to find much in the way of direct material or economic injury to the complainants. Few, if any, would-be consumers would be denied the nuptial-related goods or services, or be forced

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<sup>52</sup> Douglas Laycock, ‘Religious Liberty for Politically Active Minority Groups: A Response to Nejaime and Siegel’ (2016) 125 *Yale Law Journal Forum* 369, 378.

<sup>53</sup> *Ibid* at 383.

to incur considerable time and cost to secure them elsewhere. Certainly, Mr Lee had many other bakeries in Belfast to ice his cake<sup>54</sup>. The same could be said of Mr Craig and Mr Mullins in Lakewood, Colorado.<sup>55</sup> Absent some sort of local monopoly—or the objecting provider being in a remote rural area—there are nearly always other providers available to service the needs of the consumers rebuffed. Granted that the consumers’ feelings were hurt and they may have felt genuinely slighted or offended. They suffered “dignitary harm”, as some term it. Yet to be offended by the moral stance of another is surely part of the hurly-burly of living in a liberal democracy. It is well established that speech is not subject to be curtailed by the state simply because it offends or hurts the feelings of some group.<sup>56</sup>

The real motivation behind the complaints is the persons’ desire to make a broader political point. They were seeking publicity for their cause. Mr Lee was a LGBT activist. A Christian activist, Mr William Jack, brought three cases against Colorado bakeries to get them

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<sup>54</sup> Taking this one step further a system of referring customers who require goods or services subject to conscience based exception might also provide a mechanism for addressing this issue. Such a system is in place in 49 states in the USA in respect of pharmacists refusing to supply abortifacients: see Giles Lee v McArthur: a proportionate restriction on religious freedom rights? [2016] PILARS CC 3: 11-12: <http://law-school.open.ac.uk/research/research-clusters/law-and-religion/case-comments> (accessed 26 July 2019).

<sup>55</sup> The population of Lakewood was 154, 368 in 2016: <http://www.city-data.com/city/Lakewood-Colorado.html>. There were, it seems, close to 70 bakeries in the Denver metropolitan area listed as serving same-sex weddings: Thomas Berg, ‘*Masterpiece Cakeshop: A Romer for Religious Objectors?*’ (2017-2018) 17 *Cato Sup Ct Rev* 139, 169.

<sup>56</sup> See Thomas J’s Opinion in *Masterpiece* at 1746: ‘States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”’ (citing *Texas v Johnson*, 491 US 397, 414 (1989)). In the European Convention case law, see eg *Handyside v United Kingdom* (1976) 1 EHRR 737 at [49].

to supply anti-gay-marriage cakes.<sup>57</sup> The suppliers too wished to draw a line in the sand. In their own way, the religious merchants were making a political point in refusing to offer a pre-textual explanation (“sorry, the bakery is swamped with business”) to just make the matter quietly go away.

At the risk of making a trite emperor’s-new-clothes-like observation, these cases are really the manifestation of the underlying and ongoing *kulturkampf*. The so-called culture wars are conducted through newspapers, magazines, radio talkback, television, film and multifarious social media platforms, as well as through the more austere and considered chambers of parliaments, commissions of inquiry, administrative tribunals and the courts. It is this last-mentioned forum that we wish to comment upon. It seems to us that the pursuit to the appellate courts (and even the highest court in the land or region<sup>58</sup>) of the wedding-cake-type cases is a misdirected exercise.

For one thing, it may end in frustration. As the Court in *Masterpiece* observed: “whatever the outcome of some future controversy involving facts similar to these, the Commission’s actions *here* violated the Free Exercise Clause.”<sup>59</sup> The infelicitous language of the human rights commission (that evidenced religious hostility) undid them and enabled the Court to sidestep the larger arguments of constitutional principle. This was an example of

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<sup>57</sup> Douglas Laycock, ‘The Wedding-Vendor Cases’ (2018) 41 *Harvard J of Law and Public Policy* 49, 54-55 comments: “What little we know of William Jack is not very attractive, but he served a purpose. . . . [he] smoked out the state of Colorado and forced it to make explicit what is usually left to speculation: the refusal to protect conscientious objectors in these cases is discriminatory and one-sided. Colorado protects conscientious objectors who support gay rights or marriage equality, but it does not protect conscientious objectors who oppose marriage equality.”

<sup>58</sup> Mr Lee has now lodged an application with the European Court of Human Rights:

<https://www.bbc.co.uk/news/uk-northern-ireland-49350891> (date accessed 27 November 2019)

<sup>59</sup> *Masterpiece* at 1724 (emphasis added).

“minimalist” judging.<sup>60</sup> As Sorkin has commented, if the business community wanted guidance it was not to be found in *Masterpiece*<sup>61</sup>. Indeed, the US Supreme Court alluded to the many hypothetical permutations that might yet present a challenge:

The same difficulties [of deciding if a bakery’s creation is constitutionally protected] arise in determining whether a baker has a valid free exercise claim. A baker’s refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.<sup>62</sup>

Many of these symbolic culture-war test cases would be better not coming to court at all. In the usual course of events, complaints are usually first heard in the human rights and equality commissions. Such governmental bodies are required to consider and investigate such matters, encourage mediation and achieve amicable outcomes where feasible, but are hardly required to prosecute the firms or suppliers concerned. They have a prosecutorial discretion not to proceed. If the providers are prosecuted and fined and (as will sometimes be the case) made to apologise, they most certainly have a right to appeal. But, again, they have a decision to make. They could decide to bear the loss nobly and perhaps take some solace for being punished for their stand for God or conscience. Is it really worth all the effort and everyone’s time? The reply will be there is “a principle at stake”. Indeed, there is, but are the courts the optimal place

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<sup>60</sup> The strategy of deciding only the case before it and avoiding larger, policy-like pronouncements: see Flanders and Oliveira (2019), at 157.

<sup>61</sup> Sorkin (2018) 7(3) *Ox J Law Religion* 551.

<sup>62</sup> *Masterpiece* at 1723.

to debate and resolve it? The political process with full public discussion and democratic debate are, we suggest, a better avenue. Such a process can facilitate a plural approach to living collaboratively together within the public square. This could, for example, involve on the one hand the realigning of terminology by faith communities around the permanent union of couples and/or a closer examination of conscience by ‘closely-held’ businesses seeking to manifest a religious conscience. On the otherhand it could be met with a willingness on the part of the LGBT community to recognise the protected characteristics and rights of other groups within a liberal plural public square.

## **VII Irreconcilable Difference or a Matter of Terminology?**

The legalising of same-sex marriage in many Western liberal democracies, coupled with the inclusion of same-sex status as a protected characteristic in anti-discrimination codes, usually carries with it an exemption for religious organisations for otherwise unlawful discrimination. This has left both marriage (in the eyes of the church) and same-sex marriage (as a protected relationship in the eyes of the state and much of society), with something of an identity crisis. How has this arisen? First, the church’s understanding of marriage is (again) at odds with the state’s. Whilst this has been so for some time in respect of heterosexual marriage, for many in the Christian community same-sex relations add yet another layer of complexity which they find morally problematic. Secondly, for the LGBT community it is deeply challenging because same-sex marriage does not enjoy absolute protection as a preferred category of human relationship. Members of the same-sex community now have the right to marry each other in a registry office. But what appears to be at stake is not the just right to marry (although that is not insignificant), but the right to have everyone recognise this and support it. This is no doubt so for Mr Lee. We may surmise that while the iced cake was indeed requested to support his cause,

his ultimate aim is to promote greater acceptance across society so that same-sex couples may go into any cake shop, florist, photographer and so on, to order their nuptial requirements.

An ongoing problem here is the *manner and extent* in which any same-sex exemption operates in those countries where same-sex relations are recognised and protected by the law. While same-sex couples have rightly come to expect absolute protection from discrimination generally (since society, for the most part, accepts this phenomenon) the church is still permitted a limited exemption. This provides state sanction for direct discrimination in certain defined circumstances. It permits tranches of the population to hold and act upon an understanding of same-sex relations at odds with the officially accepted state position. The very fact of an exemption generates expectations on the part of some members of faith communities that they might not only practice their religious beliefs in private, or in public places of worship, but might also manifest that faith in *other* public spaces—including in employment and in the running of ‘closely-held’ businesses. In a pluralistic liberal democracy there should, we suggest, be space for both communities. The question is *how* to contour the public sphere so as to enable each community to adhere to beliefs and values which its members regard as inseparable and integral to their identity and very being.

The difference between the two sides can be said to hinge on what was once the church’s monopoly in defining marriage. This monopoly first arose, for example, in England under the Marriage Act 1753, by which all marriage ceremonies (except for those of the Jewish faith or between Quakers) in England had to be conducted by a minister in a parish church or chapel of the Church of England to be legally binding. This monopoly was partially surrendered in 1836 when non-conformists and Catholics were allowed to marry in their own places of worship and non-religious civil marriages could be held in registry offices in towns and cities. The church has had time to acclimatise and adjust to this marital environment, as have bed and breakfasts and retailers (including bakeries). The introduction of registry office marriages occurred, in any

event, at a time when rights claims were not at the forefront of efforts to foster amicable social relations. A couple married in a registry office, and not the church, in the 1850s may well have faced myriad forms of prejudice, but they would not have been able to avail themselves of civil rights, or turn to human rights bodies, to seek redress.

It was at the point when same-sex civil partnerships, and subsequently (and inevitably) same-sex marriage, was made legal that marriage suffered something of a crisis in the eyes of large sectors of the Christian global community, as well as within other major religions. For some, perhaps many, within that community ('conservatives', 'traditionalists', 'fundamentalists', the labels vary) same-sex unions are altogether different than relationships between couples of the opposite sex, whatever their marital status.

Where protected characteristics on both sides are inextricably bound up with identity, finding a way forward to facilitate living together is essential. Given that the new definition of marriage, incorporating persons of the same-sex, is now firmly entrenched in law and in the hearts and minds of society at large, is it possible that a route to facilitating harmonious co-existence may be found by way of the *redefinition* by faith communities themselves of that which is blessed or sacred within that community? Is there perhaps some kind of parallel solution?

Just as some nations have effectively redefined (or perhaps in the eyes of some within faith communities 'hijacked') marriage to include same-sex couples, and all states, certainly within Europe, are expected to afford same-sex couples some form of legal protection,<sup>63</sup> so religious communities might look to their own definition of marriage in order to protect what they regard as essential to their faith. This necessarily involves faith groups accepting that they are unlikely to ever exert sufficient influence upon society that public policy reverts back to the

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<sup>63</sup> See Jessica Giles *Oliari and others v Italy* (2016) 5(1) Ox J Law Religion 176-177 (note).

recognition of marriage as an exclusively heterosexual union. At the same time, it involves them protecting their own position by redefining what it is that *they* offer. We suggest that the Christian church offers what can be termed *holy matrimony*—the union of one man with one woman for life. What the state offers can be (still) called *marriage*—the legal recognition of two people as partners in a personal relationship. Where the church blesses a second union after divorce, it would be blessing a ‘marriage’ (in the situation where it has separately defined ‘holy matrimony’ as a life-long union between one man and one woman).

This ability to adapt does not involve “compromise” (if that be a vice word), but could be seen to stem from a religious community’s inherent ability to develop their own tradition and doctrine, to contextualise their faith over time and within a given society.<sup>64</sup> In order to guarantee freedom of religion a state necessarily needs to enable religions to manifest those elements of their belief that are essential to that faith. However, over the centuries it has also been accepted that states can expect, and faith groups will willingly (and sometimes not so willingly!) allow, members of religious communities to conform to changing social norms to the extent that this adaption can take place without disturbing core beliefs. Although there are notable exceptions to this (such as the Amish in rural regions of the United States), this process has been ongoing for centuries and, indeed, many faith communities have their own apparatus—such as ethics committees, special advisory groups and even internal systems of adjudication using experts in faith-based judicial reasoning—to establish the parameters within which enculturation might take place.

Where does this leave the Christian baker? Arguably, this depends on the *particulars* of the bakery’s objection to same-sex marriage. Are the bakers objecting to marriage (even where marriage comes to mean that offered by the state) or are they objecting to what they see as

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<sup>64</sup> For further discussion on this see: Jessica Giles. ‘Tradition as a Peacebuilding Tool’ in Jessica Giles, Andrea Pin and Frank S Ravitch (eds) *Law Religion and Tradition*, Springer, Switzerland. 2018. 153-191.

inappropriate sexual relations? If the latter, then one would expect to see some consistency in the bakery's approach, so that, for example, a cake order would also be declined where a request was made by a heterosexual couple, both of whom are divorcees and whose marriage arose as a result of the prior adultery of both parties. The bakery's refusal here would, again, be because it facilitates a marriage that, according to scripture, is sinful. For a bakery to judge a particular type of sin (and thus prospective customer) as more egregious within *that* category would be inappropriate. The law, in justifying and carving out exemptions, requires at least a level of coherence or consistency even though the law has difficulty in assessing religious claims in order to resolve disputes. The devout baker would thus, in the kind of proposal we have in mind, only be able to refuse to sell and create iced cakes for those who do *not* take part in a service of holy matrimony—but not otherwise. We concede that this kind of proposal is not without its teething troubles. It would, for example, potentially trammel upon a customer's right to privacy insofar as the baker would need to enquire as to whether the customers' intimate relationship aligned with that mandated by scripture. So, we might have to consider whether the dignitary affront to the heterosexual couple refused a cake weighed any differently against the bakers' rights of conscience than the dignitary affront to the same-sex couple in the same scenario.

As we said, the devout bakers in defence of the exercise of their conscience would need to exhibit some coherence and logical consistency for their claim to hold water. If their issue was with marriage outside the biblical 'norm', they would need to address the exercise of their conscience *to all* putative marriages outside the biblical 'norm'. If it was to sexual sin, then they would need to exercise their conscience in the same manner towards *all* types of sexual sin. Suppose a marriage counsellor who specialised in counselling couples in second marriages wanted a cake for a party they were holding for all their clients to celebrate their successful

second marriages. Would or could the baker refuse to bake the cake with a supportive message.

What if some of those couples were ‘no-fault’ second marriages and others were not?

Here we might pause for a moment and provocatively pose questions of the validity of making a selective choice against one form of sin. What about, for example, greed? Arguably, greed wreaks more harm globally than consensual sexual activity between life-long consenting partners. Stretching (if not over-stretching) the argument yet further, could one, to take an all-too poignant hypothetical, argue that icing an anti-Brexit message on a cake ought to be refused by a Christian baker? Brexit could be interpreted in some quarters as resistance to the neo-functional rationale supporting EU integration which instrumentalises citizens. This is because supranational EU law based around a customs union and factor mobility regards individuals primarily as economic entities. Where supranational law (including a Court with the overarching aim of facilitating integration) takes precedence over national law, safeguards built in at a national level may not be sufficient to protect the identity of the individual as of value because they are made in the image of God. Should a baker who refuses to ice a slogan concerning a gay marriage also, in all conscience, refuse a request to ice an anti-Brexit slogan on a cake? We may speculate that the church’s conscience has not yet become as ‘de-sensitised’ to same-sex relations as it has to extra-marital heterosexual sexual relations that likewise contravene the biblical norm. Perhaps over time this will occur—after all, we do not hear of heterosexual couples bringing cases against bakers because they refused to supply a (second) wedding cake. Or is the objection by devout business owners to facilitating conduct that violates their conscience likely to be with us for some time to come? If so, a deeper understanding of authentic pluralism and what needs to be accomplished lies ahead.

What is tolerably clear is that businesses that choose to act upon their (owners’) religious conscience might be well advised to take advice upon the nature and scope of their actions. From CSR (Corporate Social Responsibility) policy and practice we know that

stakeholder theory has gained considerable ground over and above shareholder primacy, ensuring that the bottom line does not consist solely of the profit motive. So, what might be needed here? Is there a role for chaplains for business just as we have prison and NHS chaplains? Or, at the very least, would the promulgation of clear, accessible guidelines from the faith community be of assistance? These might expound the rationale and scope of various commonplace exercises of conscience in a commercial setting. To allow a devout business to choose which sins to object to may be as dangerous as allowing MNEs to choose which rights to incorporate in their CSR policies. Both approaches give to private business the right to pick and choose which principles to facilitate in their business practice. The principles set out in scripture and the fundamental rights set out in international rights frameworks are part of an indivisible whole. If business is to engage in supporting either or both it would need to do so with an even-handed approach.

## **VIII Conclusion**

It is gratifying that the Supreme Courts on each side of the Atlantic came to the decision that they did.<sup>65</sup> As Justice Thomas noted: “Because the Court’s decision vindicated Phillips’ right to free exercise, it seems that religious liberty has lived to fight another day.”<sup>66</sup> Small-scale owner-operator businesses run by devout religionists ought not to be bludgeoned into providing goods or services when their consciences would genuinely be violated. This, nonetheless, can never be a blanket immunity. The precise circumstances need to be taken into account (the type of goods or services, the creative input of the vendor, monopoly-like conditions in the locality,

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<sup>65</sup> For one commentator ‘it is one of those rather rare examples of a higher court adopting a more sympathetic stance towards the religious claimants.’ Andrew Hambler (2018) FN 3 at 166 .

<sup>66</sup> *Masterpiece* at 1748.

to name but a few) and, on the other side, due weight must be given to purchasers' rights to be free from unjustified discrimination. There is no suggestion a firm can put up a notice saying, "No gays served here", or, as the US Supreme Court in *Masterpiece* suggested, "No goods or services will be sold if they will be used for gay marriages"<sup>67</sup>.

There are few lessons to be taken out of the wedding cake cases. Compelled speech is unlawful in Europe as it is in the United States. But awkward questions of what constitutes "expression" and "expressive conduct" in this context remain.<sup>68</sup> A customised wedding cake and a photographer's or florist's work obviously call for some artistic and creative skill. The hire of a hall or driving the couple from the church or registry office to the hall, by contrast, seem to lack the requisite characteristics to fall within compelled expression doctrine. Meanwhile, a steady stream of more complaints from aggrieved customers or suppliers of products for same-sex weddings is likely and some will work their way relentlessly through the courts.

Can the church enter the fray with a considered and workable proposal to redefine, or at least rename, the union between a man and woman that accords with the doctrines of the church? If so, perhaps it can satisfy its own members that the expression of their core beliefs remains intact and protected, whilst enabling the faithful to successfully navigate their way in

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<sup>67</sup> *Masterpiece* Court Majority at 1728-1729. The full sentence is: 'And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons.'

<sup>68</sup> On what constitutes 'expressive conduct' see Thomas J's Opinion in *Masterpiece* at 1741-1742. The Minority Opinion of Justices Ginsburg and Sotomayor failed to see how the provision of a wedding cake had the necessary communicative dimension—as adjudged by an objective observer—to constitute expressive conduct for the purposes of the doctrine. For an illuminating discussion, see Abner Greene, 'Barnette and *Masterpiece Cakeshop*: Some Unanswered Questions' (2019) 13 *Florida International University L Rev* 667, 677-685.

a public square which is increasingly intolerant of actual or perceived discrimination against the LGBT community. Certainly, for those closely-held devout businesses that respond to the call of conscience, they must tread carefully. The state will be searching for sincere, coherent and internally-consistent exercises of conscience.

Finally, it may be wise to abandon a sort of winner-takes-all mindset. A collaborative approach on the part of the both the communities of faith and the LGBT community pays due regard to the ineradicable fact of deep and, at times, opposing views in contemporary pluralistic societies. Each new millennium calls for new *modus vivendi*, and this one is no exception.