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**Equality and Conscience:
Ethics and the Provision of Public Services**

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We live with the legacy of injustice, political as well as personal. Even if our governments are now democratically elected and governed, our societies are scarred by forms of power and privilege accrued from a time in which people's race, sex, class and religion were grounds for denying them a role in government, or in the selection of those who governed them.

What does that past imply for the treatment of religion in democratic states? The problem is particularly pressing once one accepts that religious freedom is not just a matter of individuals' freedom of conscience and worship, but of people's claims to associate with others through institutions whose powers, status and commitment to equality are very different (Laborde, 2015). If this means that churches pose some of the same philosophical and practical problems as families, from a democratic perspective, the fact that churches have no obvious point or justification, beyond being the repository of the claims to conscience of their members, appears to distinguish them from the former. In principle, this should make it easier to think about the claims of government, as compared to those of churches. In practice, however, it may simply bring into sharper focus philosophical and political challenges to equality that contemporary democracies now face.

Take, for instance, the question of whether Catholic adoption agencies should be required to serve gay couples because they are willing to serve non-Catholics? Or consider the question whether Catholic hospitals should be required to provide contraceptives to those who want them? Such questions lie at the heart of contemporary controversy, in Britain and the USA, over the appropriate scope for conscientious exemptions from antidiscrimination law, and over the implications of allowing voluntary associations a role in the provision of public goods and services. Freedom of conscience requires that faith-based institutions be free to serve their members' needs in accordance with their religious teachings. But what should happen when faith-based institutions serve the general public, often with public funds?

There are two logically coherent but opposed answers to these questions: 'conscience trumps all' and 'equality trumps all'. Cardinal Timothy Dolan, Roman Catholic Archbishop of New York and President of the US Conference of Catholic Bishops, represents the first position, and the British Humanist Association represents the second. Both illuminate the complexities of the issues, and their limitations – or so I will argue – highlight the scope for political choice in morally acceptable responses to such questions. This is partly because

states have duties to rectify injustices inherited from the past, even if this means depriving religious associations of the role in public service-provision which they have held, hitherto. Partly, however, difficulties arise in drawing the public/private distinction in religious matters, because states have duties of sensitivity to the religious aspirations and needs of their members. States may therefore subsidise religious associations that provide appropriate public services for citizens, rather than trying to provide them themselves, or choosing a secular provider. However, state duties of equality, inclusion and care mean that there is relatively little room for conscientious exemptions from equality legislation in the provision of public services, regardless of how those services are funded – or so I will argue.

The paper is structured as follows. First it casts a sceptical eye on Cardinal Dolan's expansive interpretation of freedom of conscience, which would require the State to enforce religious norms of conduct on Church employees, by denying them access to otherwise mandatory health insurance, and would justify extensive departures from non-discrimination laws whenever religious associations chose to provide important goods and services to the general public. It then turns to the claims of the British Humanist Association, and argues that while their substantive claims about state responsibility for the equality of citizens are generally persuasive, the normative assumptions behind their arguments are problematic. Specifically, it challenges the BHA view that the provision of important goods and services by religious groups *must* be more divisive and sectarian than provision by non-religious groups, and that a commitment to the equality of citizens requires us to track existing differences between those who are religious and those who are not.

Conscience vs. Equality?

According to Cardinal Dolan, conscience is as much implicated in the way Catholic-affiliated hospitals treat non-Catholic employees and patients as it is in the way that the Catholic Church handles purely internal matters, such as the selection of priests, or ministry to parishioners.¹ Consequently, he claims, religious exemptions from non-discrimination laws that apply to the Church's treatment of the faithful must apply to its provision of services to the general public as well. Hence, he insists, if it is wrong to force the Catholic Church to make contraceptive and abortion care accessible to the faithful, it would be wrong to force it to provide insurance covering such care, even in the case of non-Catholics employees in Catholic schools and hospitals open to the general public. Similarly, Dolan maintains, if

¹ Cardinal Dolan, 'ObamaCare and Religious Freedom', *Wall Street Journal* (2012) available online at <http://online.wsj.com/article/SB10001424052970203718504577178833194483196.html>

adoption services are precluded from serving gay couples when they minister only to the faithful, they must be allowed to discriminate against gay couples when they serve the general public.

Cardinal Dolan maintains that it would be morally wrong for the state to require the Catholic Church to provide health insurance that covers abortion and contraception for its employees, whether Catholic or not. That is not obvious. While the state cannot require Churches to abide by the full set of non-discrimination norms when selecting personnel for religious ministry and posts such as ‘Sunday-school teacher’, it can legitimately regulate the relationship between Churches and employees engaged in non-specifically religious jobs, such as administrators, cooks, cleaners and drivers (Rosenblum, 1998: 73-111 and 2000: 165-195). The state can ensure that they are hired without sexual or racial discrimination, and without invasions of their privacy – as would occur were they forced to describe their sexual status or preferences, their marital and procreative plans, or whether they have ever had, or might be willing to have, an abortion. In short, religious objections to abortion provide no justification for invading the privacy of employees, or of discriminating against female candidates for non-religious employment. It is therefore unclear why religious doctrine should entitle Churches to exempt themselves from forms of health-insurance which apply to other employers or how far democratic states could legitimately grant *Churches* exemptions that they were unwilling or unable to provide for individual believers.²

There are two puzzling features about Cardinal Dolan’s position, at least as concerns the right to abortion. The first, and most obvious, is that unless the Church wishes publicly to insist that even abortions necessary to save a mother’s life are murder, there is no justification for opposing all health insurance coverage of abortion. But the second puzzle is that Catholic priests and nuns are the people least likely to seek abortions in defiance of the Church’s teaching on the matter, so the reasons for the Church to seek exemptions from health-insurance *in their case*, is weak. Weak or not, however, the Church can scarcely require the State to force employees to behave as Catholic teaching requires, by depriving them of legal access to healthcare; and as the Church’s non-religious employees have the same interests in

² Cardinal Dolan is keen to maintain that *any* employer with a conscientious objection to abortion should be able to get an exemption from Obama’s health insurance policies. He is indifferent to the problems of moral hazard which such a policy would generate because he is clearly willing to make any form of health insurance impracticable if that is necessary to prevent insurance for abortion. However, even setting aside that issue, it is unclear how the state could finance health insurance through employer mandates (the necessary alternative to a ‘single payer system’ in the United States), on Dolan’s policy, even if employers did not lie about their conscience in order to avoid paying the full costs of insurance for their employees.

healthcare as employees working for other employers, it is hard to see what justification there is for granting the Church exemptions from healthcare insurance designed to protect the legitimate interests of employees.

Of course, what the state may require of Churches as employers does not automatically determine what it may require of Churches as *providers of services* to the public. What is at issue in cases such as that of the Catholic adoption agency, hospital or universities is not the conscience of employers in their relations with potentially vulnerable employees, but the conscience of some providers of public services to people who may have no particular ties to the Church. The challenge facing Cardinal Dolan's position then, is to see how conscience could trump considerations of equality and, in particular, of *non-discrimination* in the provision of public goods and services. Whatever the religious obligations that lead Churches to create or support religious schools, hospitals, old-age homes, nunneries and the like, it is implausible that religious obligations require them to provide goods and services for the general public, too.

No one has a conscientious obligation to provide goods and services to the general public for a fee, whatever their duties of charitable care to the poor and needy.³ It is one thing, then, to say that religious beliefs should determine religious care of the *faithful*, and quite another to say that they should determine the provision of non-profit goods and services for the *general public*, whether or not the state is subsidising those services. The state cannot reasonably object to adoption agencies that refuse to place children with homosexual couples, so long as the adoption agency serves *only* those who accept Church teaching on these matters, and there are suitable alternatives available for everyone else.⁴ However, in societies, such as our own, the ability to adopt is now difficult and highly valued by those who are unable to have children by other means. There are therefore good reasons why the State must ensure adequate access to non-discriminatory adoption agencies, if necessary by removing any subsidies it gives to agencies that discriminate on doctrinal grounds, and giving these to religious or secular bodies with more inclusive practices.

³ A 'calling' or 'vocation' to serve the 'heathen' does not mean that one has a religious obligation to serve *everyone without proselytising*; nor is the charitable provision of care, as an expression of faith, the same as the provision of services such as education, health-care or adoption *for money*, albeit in ways that are designed to be 'not for profit'.

⁴ For the legal battle over the right of Catholic adoption agencies in the UK to discriminate against gay couples see <http://www.guardian.co.uk/society/2011/apr/26/catholic-adoption-agency-gay-lesbian> and <http://www.pinknews.co.uk/2012/09/13/uk-catholic-adoption-charity-resumes-anti-gay-legal-fight/> .

Of course, it is likely that in at least some cases the reason why religious associations provide goods like education and health-care to the general public is because this helps to subsidise the provision of such goods to co-religionists (Rosenblum, 2000: 186). Catholic hospitals and universities, for instance, may now serve the general public as well as Catholics, because that is what was necessary to keep such expensive institutions going for the faithful. It might therefore seem as though I have tried to draw too strong a line between religious organisations that provide care or education to the faithful, and religious organisations serving the general public. If there is a conscientious duty to provide the former, practical concerns, it may seem, mean that this conscientious dimension constrains state regulation of the latter. However, states have no duties to ensure that religious people are able to fulfil their religious obligations, regardless of their cost (Jones, 2015 a, b), and democratic citizens may reasonably believe that it is a mark against a religion if its obligations can only be fulfilled by the wealthy or the fortunate. States therefore have no general obligation to subsidise the religious obligations of the faithful. Moreover, it is surely a complicated question, and one likely to vary from religion to religion (and from sect to sect), whether *churches* or their equivalents, have religious obligations to provide these goods for the faithful. Thus, even if it turns out that the reasons why a religious association provides goods and services to the general public is because this enables it to provide religiously appropriate care to the faithful, it is unclear that we are concerned with conscience-backed claims which might justify exemptions from otherwise justified laws.

Nonetheless, considerations of completeness, as well as of humanity, preclude leaving matters here. Even if it is true, as I've argued, that religious associations have no conscience-based claim for exemption from healthcare insurance, and can properly be required to abide by generally applicable laws when they serve the general public, states can and, often, should be sensitive to the need of religious organisations to provide religiously-appropriate care for members who are old or ill. For example, religiously orthodox Jews are required by their religion to lead lives which are dictated in minute, and quite specific, ways by their faith. If they live in a society in which they are a small minority, as is likely, some specialised medical facilities and old-age care may be necessary for them to live as their religion dictates. Co-religionists may be able to provide these specialised facilities in sufficient quantity and quality to meet the standards of care required by law. However, given the likely expense and difficulty of providing such specialised care in most modern democracies, co-religionist may simply be unable to cope. In such circumstances, states may need to subsidise the provision

of religiously appropriate care by creating appropriate spaces, food and clothing options in its old age homes and hospitals or by contributing to the costs of old age homes run for the devout. Such subsidies are consistent with the claim that states have no general duty to help people to fulfil their religious obligations. It is an accident, from the state's perspective, that citizens have different religious as well as secular convictions, which make 'one size fits all' unsuitable as a way to care for its members, once they are unable to care for themselves (Walzer, 1983, xi-xiii, 3-6). Hence, we can distinguish the role of religion in constituting legally required standards of care, from a general claim to state support for religion.

We have seen, then that 'conscience' does not automatically justify the different activities in which religious organisations are engaged. The fact that Churches now organise or administer activities, such as education or healthcare, does not mean that this is the religiously preferred, let alone obligatory, way to provide them. Conscientious exemptions, charitable status, subsidies and the like, if justified, are not the 'corporate' attributes of the Church, and should therefore be available to other people or organisations fulfilling that role, should they have comparable religious scruples. Governments may therefore prefer to provide those services themselves, through specialised state agencies, or to subsidise their provision by those who will not need exemptions from democratic forms of equality, whatever they are. However, States have duties to accommodate the religious needs of the sick and elderly, or to subsidise religiously appropriate care by non-state actors, because the old and sick do not need to hold majority beliefs in order to qualify for care, nor must they be willing to abandon essential elements of their faith in order to fit in.

The public/private line is not easy to draw, then, whether we look at it from the perspective of individual conscience, or the claims of religious associations. Nonetheless, equality and religious freedom are clearly inconsistent with Church exemptions from health-insurance mandates that include abortion. The differences between spiritual and political dominion shape relations amongst the faithful, as well as between the faithful and the secular. The Church is therefore precluded from asking the state to enforce Catholic teaching, even on its religious employees, let alone on those who are not Catholic.

Equality and State Duties

By contrast with Cardinal Dolan, the British Humanist Association maintains that equality and non-discriminatory public services require religious agencies either to abide by the same antidiscrimination norms as the State, or stick to serving their co-religionists. Hence the

Society's report, 'Quality and Equality: Human Rights, Public Services and Religious Organisations', concludes that 'all organisations involved in the provision of statutory public services should be secular ones, but if religious ones are to be given contracts, they must operate in an inclusive, secular manner'.⁵

The appeal of this view is obvious. There are, after all, excellent reasons why people wanted the state to replace benevolent societies as the provider, not merely the funder, of unemployment benefits, old age pensions, aid for those in financial straits and the like (José Harris, 1977, and Ben Jackson, 2011). At one level, what people wanted was a public affirmation of their status and dignity even at those times – *particularly at those times* – when these felt most vulnerable, the hardest to sustain (Walzer: 82-91). Beyond that, people wanted the state to ensure fairness in the criteria for qualifying for those benefits, in order to ensure that those in need do not have to prove that they deserve to be helped. Hence the Report rejects the idea that homeless shelters and residential care homes should be provided by religious providers, because 'in these circumstances the lack of choice – accept a service from the religious provider or go without – is, of course, problematic and objectionable' (BHA: 9).

Democratic concerns for the equality of citizens, as the BHA says, favour state provision of statutory public services and render religious provision acceptable only where religious associations abide by the norms of fairness, inclusiveness and equality applicable to the state. This is because *any* group or body that is acting *in place of the state* should have to abide by relevant norms appropriate to the state, just as those who act in place of parents need to abide by the relevant parental norms. However, it is important to distinguish the BHA's conclusions on this matter from several problematic assumptions in the way that they present their case.

According to the BHA, the use of religious provision in public service is problematic *in itself*, when it comes to statutory public services although they have no objection to the state subsidising the religious (and discriminatory) provision of non-statutory services such as soup kitchens, drug rehabilitation facilities and the like, as long as these are seen as *supplements* to statutory provision (BHA: Section 4). The BHA believes that the use of

⁵ 'Quality and Equality: Human Rights, Public Services and Religious Organisations', a report of the British Humanist Association, available online at <http://humanism.org.uk/campaigns/secularism/public-service-reform/quality-and-equality-report/>. By 'statutory public services' the report refers to ones that are actually mandated by law. But the distinction between statutory and non-statutory services, so described, is normatively problematic. See Chiara Cordelli's helpful way of describing the issue in Cordelli, 2012: 131-155.

religious bodies for statutory services is problematic *in itself*, even if there is no discrimination, no proselytising and the like, because religious organisations cannot ‘represent the whole society’ (BHA: Appendix A). State use of religious providers for statutory goods, ‘By the very fact of giving religious groups that role, the government would be according them a special status. It would be making a statement about the nature of our society. It would be saying that religious groups can properly speak and act on behalf of the wider society. And those of us – the clear majority of the British population – who adhere to no institutionalised religion – that would be forcing us into an identity which we do not wish to inhabit’ (BHA: Appendix A and see also section 2.3).

This is puzzling. If a religious group provides a service – however important – in a way that is non-discriminatory, involves no proselytising and occurs in a neutral setting (as opposed, say, to a Church), it is hard to see why those receiving the service are being asked to adopt any particular identity at all. Indeed, it is unclear what identity people are asked to adopt in order to access unemployment insurance, or medical care in an NHS hospital beyond the identity of being an unemployed person or a sick one. The conditions for acquiring the benefit will involve proving that one is eligible to receive it – but that will be true whoever provides the service on behalf of the state. As, in any case, many of these benefits are not limited to citizens, it is unclear what forms of identification, if any, are implicit in the provision of even statutory public services.

Moreover, it is tendentious to assert that it is inherently more problematic for the non-religious to receive statutory benefits from the religious (however ‘neutrally’ provided) than it is for the religious to receive them from a secular organisation (however ‘neutrally’ provided). It suggests that those of us with no religious beliefs must see all religious groups as ‘foreign’, potentially hostile and divisive, irrespective of the way that they behave, or how little we actually know about them. That seems to be the logic of the French ban on visible religious symbols, on the grounds that these are divisive, deliberately showy and a form of proselytising (Laborde, 2008: 31-55). But in Britain – rightly, in my view – we assume that women can represent other people whether or not they wear religious symbols, just as they can represent men, without looking, or living, like them. I am therefore sceptical that a commitment to equality requires us to favour secular over religious providers of public services, even in the case of statutory public services – though it will require *all* providers to act in ways that are non-discriminatory, respectful, sensitive to the needs and fears of service users, and to provide services in an environment that is suitably welcoming, accessible and

supportive. It would also require Catholic medical facilities that, for conscientious reasons, do not provide reproductive care such as abortion, to *inform* patients of alternative places where they could seek those services and to *advise* patients for whom this is medically appropriate, to seek such advice and care. As we will see, the practical and symbolic dimensions of equality may sometimes require religious hospitals to team up with a facility that provides abortions, as long as the religious hospital wishes to provide maternity care.⁶

Contextualising the Demands of Equality and the Claims of Conscience

Conscience is no justification for failing to inform patients of their legal rights, nor of the circumstances in which they might want to exercise them, although doctrinal limits on the range of medical services offered by a hospital are not, *ipso facto* more troubling for equality than limits set by geographical or historical traditions of specialisation. As with the latter, doctrinal limits on medical service are only acceptable if they do not compromise patient care, or imply that patients who seek those services are unworthy of care and attention. Hence, the failure of Catholic adoption agencies to serve gay couples is intrinsically objectionable in a public service provider, in ways that the refusal to provide contraception, sterilisation and abortion are not, in so far as those refused the latter are still eligible to receive other forms of care from the same provider.

Of course, what is troubling in the case of abortion, is that the failure to provide for it inevitably has a discriminatory impact, since only women can get pregnant, although both men and women may seek contraception and sterilisation. How troubling that discriminatory impact is depends on the context in which it occurs. Only women can get pregnant, and as the U.S Supreme Court minority insisted in *Harris v. McRae*⁷ – the decision to terminate or continue a pregnancy is dichotomous. To refuse a woman abortion, then, is to condemn her to continue her pregnancy. There are therefore practical and symbolic dimensions to a hospital's failure to provide abortion that we need to consider. The practical one is relatively simple; if there are enough other places a woman can access abortion care, without additional expense, worry or trouble, there is no reason to suppose that the doctrinal denial of abortion coverage is unjust because of its consequences for sexual equality. Although only women are affected

⁶ Compare the US Supreme Court decision in *Rust v. Sullivan*, 500 U.S. 173, (1991), which held that the U.S. constitution does not require medical facilities, using public money or land, to inform women that they have a right to abortion, or when it might be medically advisable or necessary to exercise it.

⁷ *Harris v. McRae* 448 U.S. 297, (1980), held that it was constitutional to deny women medically necessary (though not life-saving) abortions under the Medicaid programme's funding for healthcare for the poor. Its predecessor, *Maher v. Roe*, 432 U.S., 464, (1977) held that there was no constitutionally guaranteed right to Medicaid funding for abortions that were not medically necessary.

by the failure to provide abortions, if that failure has no consequences for their access to abortion, there is no reason to reject it *on practical grounds*.

Abortion and maternity are dichotomous within a pregnancy in ways that matter symbolically, as well as practically. Hence, it is one thing for a hospital to cover maternity but not abortion coverage in a country, such as the UK, where the latter is not particularly controversial, and where the Catholic Church is not particularly powerful, and quite another in countries such as Ireland, or the United States, where the Church has consistently intervened in politics in order to prevent women's access to abortion and contraception (Garrow, 1998, ch. 22). In such cases, the grant of an exemption means that the state appears to comfort and support one side in a very public struggle over the lives and rights of women – and will appear to side with the wrong side, if one cares about sexual equality. So what might be an acceptable political choice over the best way to fund public services in England, for example, would not be elsewhere, where considerations of sexual equality must more tightly constrain the provision of healthcare in such cases.⁸

If this analysis is persuasive, in countries such as the United States, democratic concerns for equality would require states to refuse Catholic hospitals exemptions for abortion, perhaps by denying Catholic hospitals the right to provide maternity care for the general public, in order to ensure that the full range of reproductive services is available to patients in one place, or by insisting that they partner with a provider who *will* provide appropriate coverage.⁹ In other circumstances, the fact that medical specialities, even within one hospital, are dispersed throughout a city, might mean that concerns for sexual equality, and for the quality and efficiency of care, can coexist with the coverage of abortion services by one medical provider and maternity services by another. Put simply, the geographical dispersion of medical facilities in many old cities, such as London, means that the image of one large, unitary hospital is often quite misleading. The geographical jumble of care, which can be so exasperating for patients and medical personnel, at least reminds us that the familiar picture of a hospital, providing comprehensive care in one place to all people, is often more fiction than reality. Where hospital care is dispersed in this way, the differences between

⁸ By contrast, if socio-economic inequalities were much larger in England than in Ireland, moral considerations of equality might allow the latter greater scope for fee-paying care than the former.

⁹ Of course, you might say that there should be No catholic hospitals at all – but in the US context an ideal of comprehensive secular coverage is almost certainly impossible to achieve, given traditions and constitutional constraints.

religious and secular providers of medical care may be less noticeable than we sometimes assume, and therefore much less threatening to equality.¹⁰

There are good reasons why NHS medical centres and hospitals work hard to make patients and their families feel welcome, and to make it plain that they are open to people with different linguistic, cultural and ethnic backgrounds. The mere fact that these are statutory public services does not mean that people will feel entitled to use them, or feel that these services are *for people like them*. In so far as state provision of statutory services is perceived as open, non-discriminatory and helpful, then, this is an *achievement* bought with a great deal of hard work, openness to criticism and patience, rather than the inevitable corollary of state provision. Thus, the reasons to agree with the Humanist association on the importance of having statutory services provided in ways that support, rather than undermine, people's sense of entitlement provides no reason to believe that religious provision must be inferior to secular provision.

However, I would be inclined to draw a distinction between primary and secondary education and other public services – although that is not to say that non-discriminatory provision of the former by religious organisations would therefore be objectionable. Once schooling becomes compulsory, we are not talking about a public service, which citizens may or may not use as needed, but an obligatory process which will dominate the formative years of all children – and, it should be said, of their parents. We should therefore question the second assumption of the Humanist Association's argument – namely, that all statutory public services are morally and politically alike – even if we share, as I do, their concern with the subcontracting of state education to companies and religious associations in Britain in recent years (BHA: Appendix). These companies and religious bodies have been given a great deal of independence in their choice of curriculum, in their choice of personnel, and in the selection of students. However, the reasons for concern with these developments, and their implications for quality, equality and solidarity extend as much to secular as to religious organisations. *Whoever* provides primary and secondary education needs to do so in a way that is sensitive to the enormous power and influence involved, and the heavy responsibility not merely for the wellbeing of individual children, but for the domestic and foreign relations

¹⁰ As a general matter, it is important to distinguish those requests for conscientious exemptions which are purely that, from those which – as with the Catholic and Evangelical Churches in America – are part of an organised political movement to impose doctrinally acceptable limits on democratic legislatures. The latter are, in good part, a power-play and responding to them adequately means considering how far, or whether, it is appropriate to take claims of conscience seriously *in their case*.

of the country. The constraints on government delegation of educational services are therefore much tighter in the case of schooling than in the case of other statutory services.

Transforming the Status Quo: Equality and the Creative Power of Politics

Finally, I would question the assumption that we should take the existing distribution of religious organisations as given, or assume that the state should choose the currently most competent, rather than trying to promote competence and its distribution amongst the population. The BHA is rightly concerned that if religious organisations are to be capable of competing with secular ones for the provision of statutory services, the United Kingdom will be dependent on only one or two organisations – the Salvation Army and Christian Aid (BHA: Appendix C). But why should governments take the power of existing religious associations as given, rather than seeking to encourage the formation or development of more egalitarian and more tolerant ones? (Lever, 2015, 1-15) And if we are concerned with unfair monopolies of power and privilege we cannot be indifferent to the way that our political representatives, and key parts of the political executive, judiciary and administration, are recruited and promoted either. Thus, the implicit contrast, assumed by the BHA, between a small group of socially and politically privileged believers and their associations, and a large group of socially diverse and politically representative ‘public officials’, is untenable, and remains question-begging even if we extend the comparison to include companies, like *Capita*, which seek government contracts for the provision of public services. In short, while it is right to worry about the way that public services are provided, and by whom, the force of these worries *crosses*, rather than *maps*, the secular/religious distinction.

Here it matters that statutory public services, interpreted empirically or normatively, are not equally difficult to provide, and differ in the extent to which they must be provided by one body, rather than by a coalition of different groups. It is not evident that if public services are contracted out, they must go to organisations that are already large. Granted, competence and experience matter – after all, these are services which are important, and which need to be provided properly. However, if we take seriously the idea that democracy requires people to develop the capacities to govern, not merely to elect those who govern, there is clearly considerable scope for broadening the range of people and organisations who can participate in providing even statutory public services, and for using the lure of government contracts to promote more egalitarian and tolerant religious associations (Lever, 2009: 223-227, 2013: 91-106, and Lever, 2015: 13-15).

We can therefore share the BHA's scepticism about the claims to special value or efficacy made on behalf of religious associations without supposing that religious organisations must be more sectarian or divisive than secular ones, and in need of some special justification which the latter lack. Any provider of statutory public services must be bound by antidiscrimination norms when serving the public. Hence, religious organisations are not entitled to exempt themselves from norms designed to protect the freedom, equality and solidarity of citizens, when they act on behalf of the state.

It does not follow that the state may not sometimes subsidise religious associations which provide non-statutory services to the public in ways that reflect their faith. Such subsidies are acceptable, as the BHA recognise, where adequate alternatives exist for those who cannot, or do not wish to, comply with any norms that are discriminatory. Above all, the State may cease to fund organisations (whether secular or religious) which discriminate, in order to sustain those which (whether secular or religious) do not. There is therefore a much greater scope for political choice in the way that states can provide important public services than either Cardinal Dolan or the BHA assume.

Conclusion

Our societies are deeply marked by forms of prejudice, hostility and fear which democratic political rights have struggled to lessen but have, on occasion, been used to exploit. It is therefore important to be clear about the scope and grounds for action open to governments that seek actively to promote equality or which, as in the case of 'Obama Care', seek to improve the freedom and security of those who have languished without affordable healthcare for far too long. Faced with the difficulties of reconciling claims of conscience and equality, we have seen that there is more scope for political choice and invention than is often supposed. Existing differences between secular and religious associations are a poor guide to democratic morality and politics, being themselves an artefact of powers and privileges that we are duty-bound to remove. Hence, a commitment to democracy requires us to supplement an emphasis on what equality requires or forbids citizens and their governments to do, with attention to the scope for *permissions* which democratic principles and institutions create. Only in this way can we acknowledge the grip that the past has on the present, without succumbing to false claims of necessity (Unger, 1987).

Bibliography

British Humanist Association. 2007. *Quality and Equality: Human Rights, Public Services and Religious Organisations*, available online at

<http://humanism.org.uk/campaigns/secularism/public-service-reform/quality-and-equality-report/>.

Cordelli, Chiara. 2011. “The Institutional Division of Labour and the Egalitarian Obligations of Nonprofits”, in *journal of political philosophy* 20.2: 131-155.

Garrow, David. 1998. *Liberty and Sexuality: The Right to Privacy and the Making of Roe V. Wade*, Cambridge University Press.

Harris, José. 1977. *William Beveridge; A Biography*, Oxford University Press.

Jackson, Ben. 2011. *Equality and the British Left: A Study in Progressive Thought, 1900-64*, Manchester University Press.

Jones, Peter. 2015 a. “Belief, autonomy and responsibility: the case of indirect religious discrimination”, in Geoffrey Brahm Levey, ed. *Authenticity, Autonomy and Multiculturalism*, (Tayler and Francis): 66-86.

Jones, Peter. 2015 b. “Liberty, Equality and Accommodation”, ch. 5 in eds. Varun Uberoi and Tariq Modood *Multiculturalism Rethought: Interpretations, Dilemmas and new Directions. Essays in Honour of Bhikhu Parekh*, Edinburgh University Press, ltd: 126-156.

Laborde, Cécile. 2008. *Critical Republicanism. The Hijab Controversy and Political Philosophy*, Oxford University Press.

Laborde, Cécile. 2015. “Religion in the Law: The Disaggregation Approach”, *Law and Philosophy* 34.6: 581-600.

Lever, Annabelle. 2009. “Democracy and Judicial Review: Are They Really Incompatible?” *Perspectives on Politics* 7.4: 805-822.

Lever, Annabelle. 2013. “Democracy and Lay Participation: The Case of NICE”, in eds. Henry Kippin, Gerry Stoker and Simon Griffiths, *Public Services: A New Reform Agenda*, Bloomsbury Academic Press: 91-106.

Lever, Annabelle (2015). “Democratic Equality and Freedom of Religion: Beyond Coercion v. Persuasion”, *Philosophy and Public Issues* 5.3, 1-15.

Rosenblum, Nancy L. 1998. *Membership and Morals; The Personal Uses of Pluralism in America*, Princeton University Press.

Rosenblum, Nancy L, 2000. ed. *Obligations of Citizenship and Demands of Faith: Religious Associations in Pluralist Democracies*, Princeton University Press.

Unger, Roberto Mangabeiro. 1987. *False Necessity; Anti-Necessitarian Social Theory in the Service of Radical Democracy*, Cambridge University Press.

Walzer, Michael. 1983. *Spheres of Justice*, Basic Books, New York.

List of Supreme Court Cases

Harris v. McRae 448U.S. 297, (1980)

Maher v. Roe, 432 U.S. 464, (1977)

Rust v. Sullivan, 500 U.S. 173, (1991)