SYMPOSIUM

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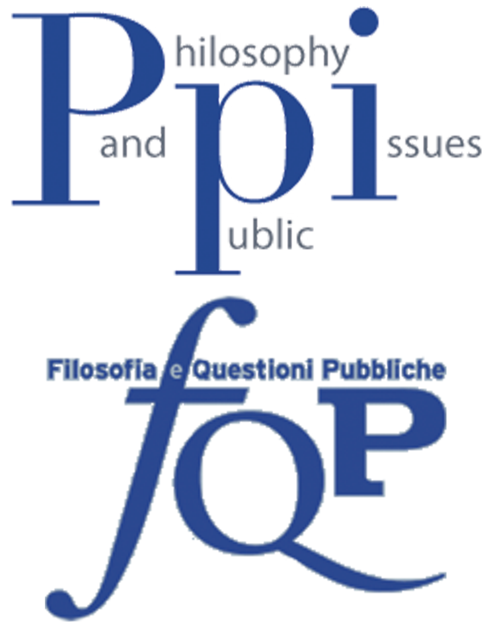

FREEDOM OF RELIGION AND FREEDOM OF CONSCIENCE IN POSTSECULAR SOCIETIES

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© 2013 – *Philosophy and Public Issues (New Series)*, Vol. 3, No. 2 (2013): 159-200
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

Exemptions to the Law, Freedom of Religion and Freedom of Conscience in Postsecular Societies

François Boucher

Abstract. In this paper, I argue that the diversity characteristic of postsecular societies challenges the special legal status of religion and confronts liberal egalitarians to a dilemma. I first argue that there are no good reasons to single out religion for special legal treatment and to make conventional religious convictions the only legitimate candidates for exemptions to neutral laws of general applicability. Then, I show that once they acknowledge this point, liberal egalitarians find themselves at a crossroad, contemplating two seemingly unattractive options. On the one hand, they can expand practices of religious exemptions so as to offer similar legal protection to non-religious commitments. However, many think that this runs the risk of an uncontrollable proliferation of exemptions. On the other hand, liberals can adopt a deflationist strategy and deny that the protection of freedom requires granting exemptions to the law, for both religious and secular commitments, thereby abandoning practices of exemptions which are sometimes needed to treat individuals with equal concern. I show that this dilemma is central in the recent accounts of religious freedom proposed by Ronald Dworkin and Brian Leiter, who both adopt the deflationist approach. I argue that fears related to the proliferation of exemptions are exaggerated and that citizens of postsecular societies are in no rush to turn their back to the expansionist approach to exemptionism.

© 2013 – *Philosophy and Public Issues (New Series)*, Vol. 3, No. 2 (2013): 159-201
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I

Postsecularism and The New Religious Pluralism

In this article, I want to address one particular challenge that the reasonable accommodation of religion poses in postsecular societies. As one Canadian jurist puts it, reasonable accommodation requires that public institutions as well as private corporations adapt their norms and policies to the religious and cultural practices with which they conflict, unless such an adaptation generate an excessive constraint either by violating the rights of certain citizens, by imposing a significant financial burden to the institution or by preventing the law to achieve its otherwise legitimate aims.[1] I want to focus on one particular form of religious accommodation which consists in granting legal exemptions to neutral and generally applicable laws to enable individuals to live in accordance with their convictions when those conflict with laws and regulations.

Exemptionism is practiced in several countries. For instance, in the United Kingdom, Sikhs are exempted from laws requiring motorcycle drivers to wear a helmet and from laws requiring the wearing of helmets on construction sites.[2] In Canada, the legal obligation of reasonable accommodation has been mobilized to authorize young Sikhs to carry the kirpan (a symbolical dagger) in classrooms.[3] In the United States, Christian workers who

[1] José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse," *Revue de droit de McGill* 43 (1998): 325-358.
[2] See the *Motor-Cycle Crash Helmets (Religious Exemption) Act*, 1976 and Section 11 of the *Employment Act* of 1989.
[3] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 1 S.C.R. 256 (2006) SCC 6.

have been fired after having refused to work on Saturday for religious reasons have been entitled to unemployment compensation.[4] Those are just a few examples of legal exemptions that have been granted by courts in order to accommodate individuals' religious convictions and practices. Many demands for accommodation are much more controversial and several have been rejected by tribunals. For instance, recently in Canada, a group of Catholic parents demanded to be exempted from a mandatory course titled *Ethics and religious culture*, which aims at familiarising pupils with religious diversity, dialogue and critical thinking in relation to ethical questions. The Supreme Court rejected their demand.[5] In 1990, the Supreme Court of the United States refused to exempt members Native American Church from laws prohibiting the consumption of peyote (a psychoactive drug) although they claimed this practice was essential to further their spiritual aims.[6]

[4] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[5] *S.L. v. Commission scolaire des Chênes*, (2012) CSC 7.

[6] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Before *Smith*, since the *Sherbert* decision, States could not restrict religious freedom unless this was necessary to protect a compelling interest. *Smith* considerably lessened the protection of religious freedom by making it possible for States to adopt a "valid and neutral law of general applicability" infringing the free exercise of religion even in the absence of a compelling interest. In 1993, Congress adopted the *Religious Freedom Restoration Act* (RFRA) which reintroduced a pre-*Smith* level of protection for religious freedom. However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court asserted that Congress had exceeded its authority in passing the RFRA. Since then, it is understood, roughly, that the RFRA applies to the federal government only. However, several States have adopted their own RFRAs. See Greenawalt, Kent, *Religion and the Constitution. Volume 1: Free Exercise and Fairness* (Princeton, NJ: Princeton University Press, 2006), 29-33. In

Exemptionism poses a distinctive normative challenge in postsecular societies. Postsecular societies, as I will understand them in this paper, are societies that are marked by a new dynamics of religious pluralism in which there is an explosion of diversity due to phenomena of the individualization of belief and contemporary patterns of immigration. The term "postsecular" is somehow a buzzword in the social sciences and several meanings and connotations are attached to it.[7] To avoid ambiguities, I shall simply stipulate what I mean by "postsecular."

As I will understand it, postsecularism is a societal condition defined in relation to the idea of secularization. Secularization is a complex descriptive notion in sociology: it purports to refer to a multifaceted phenomenon characterized by the autonomisation of different spheres of activity (economic, political, religious, etc.), the rise of a disenchanted worldview, the decline of the influence of religion, and the individualization of religious practices and beliefs. Following sociologist José Casanova, we can break the concept of secularization down into different subparts. For Casanova, we should distinguish the core thesis of the theory of secularization from two sub theses. The core thesis of secularization asserts that functional differentiation in modern societies emancipates the

1996, the State of Oregon granted members of the Native American Church an exemption from drug laws allowing its members only to use peyote for ritualistic purposes, see the *American Indian Religious Freedom Act*, 42 U.S.C. § 1996a.

[7] For some clarification regarding the varieties of postsecularism, see James A. Beckford, "SSSR Presidential Address: Public Religions and the Postsecular: Critical Reflections," *Journal for the Scientific Study of Religion* 51 (2012): 3-13. Beckford distinguishes six groups or clusters of ideas and meanings associated with the term "postsecularism."

religious sphere of activity from secular ones and opens the door for a process of individualization of beliefs by which individuals' convictions come to be less and less under the influence of government and of official religious authorities. The first sub-thesis of secularization predicts the decline of religion; it postulates the progressive shrinkage and, eventually, the disappearance of religion. The second sub-thesis affirms the privatization of religious beliefs; it asserts that religion in the modern era is bound to become a personal affair and to assume a marginalized place in the public sphere.[8]

I understand postsecularism as a societal condition in which only the core thesis of secularization obtains. Postsecular societies are not societies in which religious belief is on a sharp and steady decline (let alone, on its way to disappear) and they are not societies in which religious practices tends to be more and more privatized. They are rather societies in which there is great religious diversity and which are marked by the deprivatization of religion.[9]

Postsecular societies are thus secularized only in the thin sense that, as religion is emancipated from other spheres, most notably from political authority, they embrace freedom of religion and allow each individual to decide for himself how to pursue salvation, enlightenment or the ultimate meaning of human life. This process leads to an explosion of diversity of beliefs. This means at least three things.

[8] José Casanova, *Public Religions in the Modern World* (Chicago and London: University of Chicago Press, 1994), 19-39.
[9] On the deprivatization of religion, see ibid., 66.

First, the processes of immigration and of individualization of belief lead to a proliferation of religious groups. Hinduism, Islam, Sikhism and Buddhism, just to mention a few, are now practiced by many in Western societies. Religious diversity is no more contained within the boundaries of Western monotheistic religions. Moreover, new ways of believing have appeared in those societies in the last decades. Just think for instance about the emergence of the Church of Scientology, of New Age spirituality, or of the Western reinterpretation of Asian and Indigenous religions, without forgetting the emergence of surprising and eccentric cults such as Wicca[10], the International Church of Jediism[11] or the Missionary Church of Kopimism.[12]

Secondly, this new religious pluralism is also characterized by a wide variety of modes of religiosity, ranging from orthodox religions, in which the emphasis is put on external conformity in the performance of rituals, to 'protestantized' religions, in which the emphasis is put on the subjective dimension of religion and the intimacy of the individual conscience.

[10] A modern pagan cult based on belief in witchcraft.

[11] Basing their views on the fictional world depicted in the *Star Wars* movies from George Lucas, Jediists believe that the "force" unites all living creatures, people, plants and animal and teach that humans should learn to not let emotions cloud their judgment and to channel their emotions for constructive purposes. See http://www.churchofjediism.org.uk/about.html. Accessed on February 19, 2014.

[12] Kopimism is an officially recognized religion in Sweden and it has many chapters around the world. It professes that knowledge, as well as the copying and sharing information are sacred. See http://kopimistsamfundet.ca/. Accessed on February 19, 2014.

Thirdly, postsecular societies are also marked by the fact that atheism, agnosticism and non-religious lifestyles are now viable options, if not the dominant option. As Charles Taylor notes, our current age is one in which belief in God and adherence to mainstream or official forms of religiosity are not taken for granted; unorthodoxy and unbelief now share the stage with dominant and traditional forms of religion.[13] Postsecular societies are thus marked by an increasing gap between believers and nonbelievers, as well as by a multiplication of religions and of modes of religiosity.

As Western societies become more and more postsecular, they face an important normative question regarding religious freedom. What should be the basis for justifying legal exemptions? Should the citizens of such societies extend the legal protection currently granted to conventional religious beliefs to unconventional beliefs and to secular commitments? In 1965, in *United States v. Seeger*, and in 1970, in *Welsh v. United States*, the U.S. Supreme Court took this road and decided to grant the status of conscientious objector to induction into the armed forces to individuals who did not belong to any religious sect and whose views were derived from "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those" who had been granted the status of conscientious objector on religious grounds.[14] In a similar way, the Federal Court of Canada decided in 2002, in *Maurice v. Canada*, that a prison was violating the plaintiff's freedom of conscience by denying

[13] Charles Taylor, *A Secular Age* (Cambridge MA: Harvard University Press, 2010). 1-22.
[14] United States v. Seeger 380 U.S. 163 (1965), 176.

him the right to receive vegetarian meals despite the fact that he did not embraced any religious beliefs.[15]

Is this expansive strategy the right way to proceed? Should the citizens of postsecular societies instead treat religion as being special under the law and as being the unique legitimate beneficiary of legal protection not granted to analogous secular commitments and unconventional spiritual beliefs? Several decisions of the U.S. Supreme Court favour this approach. For instance, in 2012, in *Hosanna-Tabor Lutheran Evangelical Church and School v. EEOC*, the Court affirmed that religious organizations are entitled to a special legal exemption from federal laws against employment discrimination (the ministerial exception) on the basis that religious freedom prevents government from interfering with the freedom of *religious* groups to select their own ministers. In *Wisconsin v. Yoder*, the Court rejected the possibility of granting exemptions to reasonable state regulations in matters of education for secular ways of life insisting that "to have the protection of the Religion Clauses, the claims must be rooted in religious beliefs."[16]

It may seem that the accommodation of non-conventional religions and of non-religious convictions of conscience is a trivial matter. Yet, as I will explain, it raises important questions of legal philosophy. Moreover, as the number of adherents to non-conventional faiths and of non-believers is rising, we can expect that more and more claims of religious freedom will have to do with the new postsecular diversity. For instance, in the Canadian

[15] *Maurice v. Canada* (Attorney General), 2002 FCT 69, [2002] 2 F.C. D-47.

[16] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 215.

province of Ontario, in the 2011-2012 fiscal year, roughly 15% of the applications received by the Human Rights Tribunal of Ontario citing creed as a ground of discrimination were made by applicants who did not adhere to a conventional religion or to any religion.[17]

The question of whether or not religion should be given special legal treatment is of particular interest for liberal egalitarian political philosophers because it exposes them to an unsettling dilemma. As I will argue, there are good reasons, from a liberal point of view, to oppose favouring religious beliefs by making them the only type of foundational commitment that can ground an exemption (II). Moreover, the main arguments supporting the view that religion should be given special treatment are unconvincing (III). Once it is established that religion should not be regarded as special and that analogous secular convictions of conscience should benefit from equivalent protection, liberal egalitarians found themselves at a crossroad, contemplating two seemingly unattractive alternatives. On the one hand, the acknowledgement that religion is not special *vis-à-vis* areligious foundational commitments could entail that the purview of exemptionsim should be broadened so as to offer equivalent protection to secular commitments. Yet, this

[17] This includes people adhering to atheism, Witchcraft, Elemental magic, Ethical veganism, Kabala, Rastafarian, Taoism, Wiccan, Yoga system and cosmology, Zen, Zoroastrianism, and people who claimed they are not be affiliated to any creed. Ontario Human Rights Commission, *Human Rights and Creed Research and Consultation Report* (2013), Section 3.1.2. http://www.ohrc.on.ca/en/human-rights-and-creed-research-and-consultation-report. Accessed on February 20, 2014.

solution appears to be overinclusive since it potentially leads to an unwelcome and uncontrollable proliferation of exemptions to the law. On the other hand, if we seek to avoid the pitfalls of unrestricted multiplication of legal exemptions in a fair manner, by offering no or almost none legal protection for both religious and secular convictions, then we jeopardized our egalitarian and liberal commitments which sometimes requires exemptionism. I illustrate this dilemma in section IV by discussing two different recent liberal egalitarian approaches to exemptionism in postsecular societies, which have been developed by Ronald Dworkin and Brian Leiter. I conclude by suggesting that the threat of proliferation is overstated and that the option of expanding the purview of exemptionism to accommodate postsecular pluralism is still a viable one (V).

II

Egalitarian Theories of Religious Freedom

For liberal egalitarians, according special treatment to religious convictions alone but not to secular ethical convictions is inherently suspicious, as this seems to arbitrarily privilege believers over unbelievers and to affirm that only the former are worthy of respect and toleration. For instance, opposing the idea that religion should be privileged under the law, American legal scholars Christopher Eisgruber and Lawrence Sager assert that: "[to] single out one of the ways that persons come to understand what is important in life, and grant those who choose that way a license to disregard legal norms that the rest of us are

obliged to obey, is to defeat rather than fulfil our commitment to toleration."[18]

Moreover, one of the main challenges to the idea that religion should treated as special is that in order to offer legal protection to religion *qua* religion, the state has to settle on a definition of religion. It is however very hard to come to an uncontroversial definition of religion which is not underinclusive and does not exclude certain forms of worship which should arguably benefit from legal protection if other forms of worship benefit from such protection. Should we define religion by the belief in a transcendent supreme being, thereby excluding non-theistic religions? Should we define religion by the existence of an official institutional structure codifying rituals, beliefs, norms of conduct and so on, thereby excluding believers which are not affiliated to any religious organization? Should we rather simply work with a list of all the historically important religions we know of, thereby excluding new forms of spirituality? Given the exclusive character of any objective definition of religion, it is hard to avoid the conclusion that having the government using such a definition to determine which beliefs can benefit from legal protection, and which ones cannot, is tantamount to having public authorities deciding what count as truly religious. This is an unwelcomed form of doctrinal establishment of religion. As Eisgruber and Sager claim: "in order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are

[18] Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," *University of Chicago Law Review* 61 (1994): 1325.

entitled to special treatment as 'religious' while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore."[19]

The quandaries associated with the singling out of religion for special treatment under the law have lead several liberal egalitarians to develop a new approach to religious freedom which places religious convictions on par with non-religious deep ethical commitments. They have developed "egalitarian theories of religious freedom," to take an expression recently coined by Cécile Laborde. According to Laborde, those theories share the view that "religious freedom is not a distinctive freedom and that it should be treated under a more general equality-based regime" and they assert that "[r]eligious beliefs and activities might be *specially* protected, but not *uniquely* so: if and when they are, it is as a sub-set of a broader category of respect-worthy beliefs and activities."[20] For example, Dworkin insists that religious freedom should be treated as an instance of ethical independence from government with regard to foundational matters:

> we cannot declare a right to religious freedom and then reject rights to freedom of choice in […] other foundational matters without striking self-contradiction. For if we insist that no particular religion be treated as special in politics, then we cannot treat religion itself as special in politics, as more central to dignity than sexual identification, for example. So we must not treat religious freedom

[19] Christopher L. Eisgruber and Lawrence G. Sager, "Does it Matter What Religion Is?," *Notre Dame Law Review* 84 (2009): 807.
[20] Cécile Laborde, "Equal Liberty, Non-Establishment and Religious Freedom," *Journal of Legal Theory* (forthcoming), 3. Available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160896.

as *sui generis*. It is only one consequence of the more general right to ethical independence in foundational matters.[21]

Another prominent egalitarian theory of religious freedom asserts that freedom of religion should be understood as deriving from, or as being subsumed under, freedom of conscience. For instance, Maclure and Taylor argue that religious convictions ought to be legally protected, but only *qua* convictions of conscience understood as "meaning-giving beliefs and commitments."[22] In a similar way, Eisgruber and Sager deny that religion should be given a special treatment under the law but affirm that religious convictions should be protected as a member of the broader category of "deep commitments."[23] More recently Brian Leiter claimed that "[i]f matters of religious conscience deserves toleration […]

[21] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), 376. See also Ronald Dworkin, *Is Democracy Possible Here?* (Princeton: Princeton University Press, 2006), 61.

[22] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge MA: Harvard University Press, 2011): 75-76. As Maclure and Taylor explain, these convictions play an important and very deep role in one's life. Convictions of conscience give a moral orientation to people's life, they are the fundamental beliefs and commitments that make it possible for persons to have a moral identity and to make moral judgments (*Ibid.*, 77). Convictions of conscience are thus what Taylor earlier called "strong evaluations": that is, evaluations about right or wrong, better or worse, higher or lower which are not reducible to mere preferences, desires and inclinations but are rather the standards by which desires, preferences and inclinations can be judged. See Charles Taylor, *Sources of the Self: The making of Modern Identity* (Cambridge, MA: Harvard University Press, 1989): 4.

[23] Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007): 6. *Cf.* Andrew Koppelman, "Is it fair to Give Religion Special Treatment?," *University of Illinois Law Review* 3 (2006): 571-603.

then they do so because they involve matters of conscience, not matters of religion."[24]

In the next section, I explain why the main arguments contradicting egalitarian theories of religious freedom and purporting to establish that religion is special are mistaken.

III

Is Religion Special?

Several legal scholars and political philosophers have directly addressed the question of whether or not religion is morally and legally distinctive and of whether or not legal exemptions should be extended to similarly situated nonbelievers.[25] Matthew McConnell is one of the most refined proponents of the view that religion should be singled out by law for special treatment. He offers several arguments in support of this view. In this section, I discuss three of those arguments: first I discuss the idea that

[24] Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013): 64.

[25] See for instance Sonu Bedi, "Debate: What is so Special About Religion? The Dilemma of Religious Exemption," *The Journal of Political Philosophy* 15 (2007): 235-249; C. Eisgruber and L. Sager, *Religious Freedom and the Constitution*; Anthony Ellis, "What is Special About Religion?," *Law and Philosophy* 25 (2006): 219-241; A. Koppelman, "Is it fair to Give Religion Special Treatment?"; C. Laborde, "Equal Liberty, Non-Establishment and Religious Freedom"; B. Leiter, *Why Tolerate Religion?*; J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 85-97; Michael W. McConnell, "The Problem of Singling Out Religion," *De Paul Law Review* 50 (2000): 1-47; Micah Schwartzman, "What if Religion isn't Special?," *University of Chicago Law Review* 79 (2013): 1351-1427.

religion is special because it involves duties to God, something which finds no parallel in secular worldviews and unconventional new religious creeds. Second, I discuss the idea that religion is a fundamental and irreducible good which cannot properly be accounted for by being subsumed in a larger, more general category. Third, I discuss the view that religion should benefit from special legal protection because it also is specially burdened by the law given its disabilities under the non-establishment principle.

McConnell claims that religion is distinctive from non-religious worldviews since it involves duties to God; no single feature of secular worldviews parallels believers' sincere belief in the existence of divine authority. This distinctive feature of religion is morally significant, for the purpose of singling out religion as the unique basis for justifying exemptions, because no atheist or agnostic can experience a conflict between what he sincerely perceives to be divine commands and civic obligations. As McConnell puts it, freedom of religion is special because "no other freedom is a duty to a higher authority."[26]

Is this argument receivable in a postsecular society? One may object from the start that this argument cannot be offered as a public justification in such a society since it requires nonbelievers to recognize God's authority. However, this objection misses the target. McConnell is well aware that many citizens are nonbelievers and that laws and policies cannot be justified to them by appealing to the existence of God and to divine authority. His argument does not demand citizens to recognize the objective validity of God's commands; it does not, for instance, claim that

[26] M. McConnell, "The Problem of Singling Out Religion," 30.

religion is special because, as a matter of fact, not respecting a divine commandment is a ticket to Hell or because it is objectively bad that God's will remains unfulfilled. It rather simply demands nonbelievers to give due moral consideration to the fact that, from their subjective point of view, believers experience a disturbing conflict between divine and temporal authority. As he explains:

> belief in the reality of a God is not necessary to the argument. An individual needs only to believe conditionally that if there is a God, this idea can be revealed only through the "conviction and conscience" of the individual and not through the hand of the state. […] Moreover, it is logically possible, indeed humane and praiseworthy, for those who do not believe in the existence of God, but who recognize that many of their fellow citizens do, to refrain from using the power of the state to create conflicts with what are perceived (even if incorrectly) as divine commands.[27]

McConnell is surely right to claim that nonbelievers can appreciate the burden placed on the conscience of believers who cannot comply with their perceived religious duties while fulfilling civic obligations. Yet, in making this point, McConnell also makes a significant concession to the opponents to the view that religion should singled out for special legal treatment. What his argument implies is that religion is not politically salient (in relation to the issue of legal exemptions) because of its objective truth, but because of some aspects of the subjective experience of believers. Religion is salient not because there are clashes between law and what God truly demands of his followers, but because there are clashes between law and what believers perceive

[27] Ibid., 30.

to be their religious obligations. However, it is very implausible that what follows from this subjective understanding of religion is the conclusion that it is morally legitimate to single out religion as the sole valid basis for claiming exemptions to the law.[28]

Firstly, it is not logically impossible that, from a subjective point of view, many nonbelievers experience the demands of (secular) morality as being as much categorical, fundamental and central to their identity as divine commands are from the believers' point of view.[29] Secular morality also has sources of authority which are 'higher' in the sense that they 'transcend' the individual by presenting themselves as binding regardless of the desires and preferences of individuals. For instance both Kantian morality, since it is based on the universal law of reason, and political morality, understood as the norms recognized by a political community, are independent from the wills and whims of any particular individual. Furthermore, is there any reason to think that religiously motivated vegetarians have a commitment to vegetarianism which is necessarily stronger, more intense, deeper and more central to their identity than the commitment of ethical vegetarians opposed to meat-eating on secular grounds (for animal welfare considerations, for example)? If what matters is the strength of the perceived moral imperatives, then religious

[28] Note that this argument in itself cannot justify giving legal protection to non-theistic conventional religion such as Buddhism, for instance. For a similar objection to McConnell, see Koppleman, "Is it fair to Give Religion Special Treatment?," 593.
[29] Many have highlighted this point. Maclure and Taylor, *Secularism and Freedom of Conscience*, 97; Koppleman, "Is it fair to Give Religion Special Treatment?," 592-593; Martha Nussbaum, *Liberty of Conscience* (New York: Basic Books, 2008): 168-169.

and secular vegetarians are similarly situated when they find themselves in situations where they cannot live by their vegetarian commitments. McConnell's argument offers no reason to rule out this possibility.

Secondly, McConnell is concerned with providing a public justification for the singling out of religion.[30] As mentioned, he deems it important to explain why nonbelievers can and should give due consideration to the fact that believers have stringent duties to their God. But if nonbelievers are expected to give due consideration to the fact that some religious citizens sincerely believe that they have to comply with duties that conflict with the law, is it not legitimate to also expect religious citizens to give due consideration to the fact that some nonbelievers sincerely believe they also have important conscientious duties that conflict with the law? Public justification is underpinned by a norm of reciprocity which is undermined if only nonbelievers have to give proper consideration to the

[30] McConnell does not use the term "public justification." I offer this interpretation as a reconstruction of his argument. In doing so, I assume that the reason why McConnell points out that non-believers citizens can recognize and understand the special importance that their religious fellow citizens attach to being able to comply with God's commands is that he implicitly recognizes the value of justifying laws by considerations that every citizens can understand and accept. If I am right, this makes him very close to embracing the idea that the constitutional singling out of religion as the sole basis for granting legal exemptions is compatible with something akin to the principle, central to Rawls's conception of public reason, of liberal legitimacy which asserts that: "[the] exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason." John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 137, 217.

sincere beliefs of their religious co-citizens and if the latter can ignore the sincere beliefs of the former.

A second argument for singling out religion as special under the law claims that religion is an irreducible good. Religion's special legal status is based in this case on the impossibility to assimilate its value to something else. There are two variants of this argument.

First, some claim that religion is an intrinsic good. In this view, religion is politically salient *qua* religion because it is valuable in itself and is not merely a means to achieve some other value.[31] This argument asserts that the legal status of freedom of religion is based on the intrinsic moral worth of religion as such. Michael Sandel thus claims that: "[t]he case for according special protection to the free exercise of religion presupposes that religious belief, as characteristically practiced in a particular society, produces ways of being and acting that are worthy of honor and appreciation-either because they are admirable in themselves or because they foster qualities of character that make good citizens."[32] Similarly, in a recent article

[31] Rafael Domingo, "Religion for Hedgehogs? An Argument against the Dworkinian Approach to religious Freedom," *Oxford Journal of Law and Religion* 1 (2012), 1-22. The argument that religion is an intrinsic good ought not to be confused with the argument, for instance put forth by Tariq Modood, that religion is a public good. See Tariq Modood, "Moderate Secularism, Religion as Identity and Respect for Religion," *The Political Quarterly* 88 (2010), 6. Modood claims that religion is a good that benefits the whole society because it is a source of important moral intuitions and of political mobilization, and because certain religious organizations are providers of social services. This view does not imply that religion is an intrinsic and irreducible good, but only an instrumental one.

[32] Michael Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), 257; see also

criticizing the Dworkinian approach to religious freedom, Rafael Domingo asserts the irreducibility of the value of religion to any other good or value : "[l]ike life, property and security, religion calls for a particular status in law because it is a foundational good, not simply an implication of ethical independence."[33] Both Sandel and Domingo assert that the essential meaning of freedom of religion is lost in approaches to religious freedom attempting to "assimilate religious liberty into liberty in general."[34] They claim that religious freedom should be understood as protecting intrinsically valuable religious activities, not as protecting the freedom to make autonomous choices in matters of religion. For instance, Sandel argues that the understanding of religious liberty as an instance of liberty in general trivializes religion, exalts the value of free and voluntary choice as an end in itself, and confuses "the pursuit of preferences with the exercise of [religious] duties."[35] Similarly, Domingo claims that viewing religious freedom as an instance of ethical independence, "replaces the search for moral truths with a criterion of personal authenticity that inescapably leads to a subjectivist conception of ethical and moral judgement without the possibility of an external rule."[36]

These authors adopt what we may call a substantial and perfectionist conception of religious freedom. It is

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Michael Sandel, "Religious Liberty: Freedom of Choice or Freedom of Conscience," in *Secularism and its Critics* ed. Rajeev Bhargava (Oxford : Oxford University Press, 1998), 85-92.

[33] R. Domingo, "Religion for Hedgehogs?" 3.

[34] M. Sandel, "Religious Liberty: Freedom of Choice or Freedom of Conscience," 92.

[35] Ibid., 92. Cf. M. Sandel, *Public Philosophy*, 255-257.

[36] R. Domingo, "Religion for Hedgehogs?," 16.

substantial, by opposition to being procedural, because it views freedom of religion as protecting the participation of individuals in certain activities considered to be properly religious and it is perfectionist because it holds that the justification of freedom of religion is to be found in the value of those religious activities. By contrast, a procedural understanding of religious freedom conceives that the purpose of religious freedom is to protect the capacity of individuals to make autonomous choices with regard to religious matters, regardless of the content of those choices. Such a conception is not a perfectionist one since it does not tie the justification of religious freedom to the content of individuals' choices or to specific activities. It rather makes the justification of religious freedom rest on the view that it is wrong for a government to force someone to act against his deepest convictions, regardless of what those are (provided, of course, that they are compatible with respecting others' rights).

What is problematic with a substantive and perfectionist conception of religious freedom is that it requires governments and tribunals to rely on judgements about the moral worth of individual beliefs and practices which are alienating and disrespectful to individuals and groups who disagree with the official or the majority's view on the worth of religion. How can a government adopting such a conception of religious freedom protect unpopular religious minorities dissenting with officially recognized religious views? How can atheists avoid feeling as second class citizens when the government openly affirms that religion is intrinsically good and worthy of special respect? It is not a secret that some mainstream religions embrace views which are disrespectful to many persons such as homosexuals, non-believers or the members of a different

religion. How can a government relying on the substantive and perfectionist conception of religious liberty avoid the dilemma of having to choose between putting its stamp of approval on those disrespectful religious views or drastically curtailing the religious freedom of those mainstream religious groups? The substantial and perfectionist conception of religious freedom entails a too great proximity between state and religion to protect the equal status and religious liberty of citizens.

McConnell offers a different version of the argument that religion should be special under the law because it is an irreducible good. In this view, it is not that religion in itself is intrinsically valuable, but rather it is a unique mix of several things which are themselves valuable. McConnell claims that religion is a special phenomenon because it is a complex bundle of several aspects, the sum of which is never found in totality in its alleged secular analogues. Religion is distinctive because it is composed of a list of many valuable elements and it is the only thing to have all these elements together:

> Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity—to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human

> phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.[37]

It should be stressed that the only conclusion that can be drawn from the premise that religion is a thing composed of a bundle of aspects which are never found all together in another human activity is that religion is a unique phenomenon, not that it is irreducible to any other good or value. Quite to the contrary, the argument relies on the view that religion is reducible to many goods (personal identity, collective identity, answer to ultimate questions, and so on). Moreover, to conclude from the aforementioned premise that religion should be special under the law in the sense that it should benefit from legal protection not granted to secular commitments, organizations and activities, one needs to make the very demanding (and very implausible) assumption that every single element which defines religion is a necessary condition for special legal protection. For although religion may be the only thing to combine all those elements, many other things are characterized by at least one of those elements—to be sure, nations, professions and families also sustain ties of personal loyalty and secular ethical convictions can also be sources of personal identity. McConnell relies on the claim that the discrete constitutive elements of religion are all necessary conditions for special legal protection (they are conjointly necessary), yet this claim is left undefended despite its being quite implausible. For instance, is it really legitimate to deny a religious exemption because the claimant is not part of an institutionalized religion or because her religion does not link her to a particular community even if this claimant has

[37] M. McConnell, "The Problem of Singling Out Religion," 42.

a sincere belief that she has a religious obligation deeply rooted in her moral identity? Why would a secular conviction, which is a source of personal and collective identity, not be considered as a legitimate basis for legal protection if those characteristics are seen as playing a role in the justification of the legal protection offered to religion? Why is lack of connection to 'transcendence,' in the previous case, so important that it justifies a denial of legal protection?

A third argument in support of the view that religion should be special claims that the special status of religion does not constitute a privilege which only benefits believers but is rather "a matter of balance."[38] As McConnell recalls, in the United States, the two religious clauses of the First Amendment (non-establishment of religion and free exercise of religion) single out religion both for its privileges, since the free exercise clauses singles out religions as the special beneficiaries of legal exemptions, and for its disabilities, since non-establishment forbids government to proclaim the truth or falsity of a religion and to promote one religion over the others. The counter part of free exercise exemptions is that no religion may use the coercive arm of the state to promote its own sectarian objectives. This disability specially targets religions since governments are under no interdiction to promote secular values and objectives. The separation between religion and politics takes the form of a twin protection (of religion from government and of government from religion): although government cannot infringe on religious liberty,

[38] Ibid., 10; *Cf.* Abner S. Greene, "The Political Balance of the Religion Clauses," *Yale Law Journal* 102 (1993), 1611-1644; M. Schwartzman, "What if Religion Is Not Special?", 1368.

believers cannot use state laws to further their religious ends. According to McConnell, this hands-off approach to religion and politics "creates a trade-off that few other ideologies or system of belief would care to make."[39] For instance, although a conscientious environmentalist may not benefit from an exemption under the free exercise clause, governments are free to promote environmentalist values and objectives. Thus, there would be something unfair in allowing, on the one hand, non-believers to both be able to claim exemptions from generally applicable laws and to use the coercive apparatus of the state to further their aims and, on the other end, to allow religious citizens to be exempted from laws conflicting with their beliefs while forbidding them to use the arm of the state to promote their own ends.

This argument for the singling out of religion is mistaken. First, religion is not specially targeted for its disability. For instance, it would be as much wrong for a government to assert the truth of atheism or to promote agnosticism as it would be to establish any religion. Moreover, although governments may promote environmentalists' objectives on the (neutral) grounds of intergenerational justice and concern for the health and safety of citizens, it may not do so on the ground that the metaphysical doctrine of deep ecology, for instance, is true. Most importantly, the balance and trade-off argument is problematic because it is dubious that the rationale for religious exemptions is found in the idea that religious citizens should be compensated for the disability created by the non-establishment of religion. Non-establishment of religion is not an arbitrary compromise that can only be

[39] M. McConnell, "The Problem of Singling Out Religion," 10.

morally justified if some compensation is provided to religious citizens. Non-establishment is justified on its own terms because when the state puts its stamp of approval on one religion, it does not treat non-adherents of that religion with equal respect since it symbolically creates a hierarchy of ranks and sends the message that some are second-class citizens.[40]

IV

A Liberal Egalitarian Dilemma

So far, I have argued that there are good reasons to oppose the claim that religion should benefit from special protection *qua* religion. If religion is singled out for special legal treatment, one needs to rely on an official definition of religion and this generates just the kind of religious orthodoxy that religious freedom should combat. Moreover, it seems arbitrary to refuse to treat one religion as special *vis-à-vis* other religions but to treat religion itself as special *vis-à-vis* non-religious deep ethical commitments, unless we can highlight some features of religion which introduce a morally significant difference. Yet, the main attempts to highlight such a morally significant distinction fail. Indeed, secular moral imperatives can also be deeply rooted in one's sense of identity and integrity. In addition, attempts to show that religion is a foundational and irreducible good are unconvincing. Finally, religious

[40] See for instance, Cécile Laborde, "Political Liberalism and Religion: On Separation and Establishment," *Journal of Political Philosophy* 21 (2011), 82-86; M. Nussbaum, *Liberty of Conscience*, 227.

exemptions are not granted to compensate believers for the disability religion suffers under non-establishment regimes.

What conclusions should liberal egalitarians draw from the view that it is morally problematic to single out religion as the sole basis for justifying legal exemptions? Should we adopt an expansionist strategy and claim that exemptions must also be available for non-believers whose deep commitments clash with government's laws and regulations? Eisgruber and Sager as well as Maclure and Taylor adopt this option.[41] Or, should we rather adopt a deflationist strategy asserting that, from a moral point of view, no exemptions are required, neither for secular commitments nor for religious beliefs? Brian Barry defends such a no-exemptions position in *Culture and Equality*.[42]

In this section, I want to illustrate that the acknowledgement that religion should not be singled out as special for the purpose of justifying legal exemptions confronts liberal egalitarians with a dilemma. One the one hand, the deflationist strategy is unsatisfactory from the point of view of justice since exemptions are often required to alleviate an unfair burden imposed on minority groups by the uniform application of laws, even when those laws have a neutral justification and do not explicitly aim to discriminate against those minorities or to restrict their freedom.[43] Yet, on the other hand, the expansionist

[41] C. Eisgruber and L. Sager, *Religious Freedom and the Constitution*; J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*.

[42] Brian Barry, *Culture and Equality. An Egalitarian Critique of Multiculturalism* (Cambridge MA: Harvard University Press, 2001).

[43] See for instance, Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 114-115; Jonathan Quong, "Cultural Exemptions, Expensive Tastes, and Equal Opportunities," *Journal of Applied Philosophy*, 23 (2006): 53-71.

strategy, especially when practiced in a postsecular society, seems to open the door to an unlimited proliferation of exemptions threatening the authority of the state and its capacity to pursue legitimate societal objectives in all spheres of legislation. Two very different recent egalitarian theories of religious freedom, one proposed by Brian Leiter[44], the other by Ronald Dworkin[45], exemplify this dilemma.

Leiter adopts a version of the deflationist strategy in his recent book *Why Tolerate Religion?*. He claims that "the No exemptions approach to claims of conscience […], religious or otherwise, is the most consistent with fairness."[46] This approach asserts that there should be no exemptions for "burden-shifting" claims of conscience which conflict with laws pursuing neutral objectives. Burden-shifting exemptions are those exemptions that impose a burden on individuals who have no legitimate claim of exemption.[47] For instance, Leiter argues that a conscientious objection to

[44] B. Leiter, *Why Tolerate Religion?*.

[45] R. Dworkin, *Religion without God*, 105-147. The main difference between both approaches lies in the different conceptions of religion which underpin them. Leiter views religious commitments as being radically different from secular ethical commitments since the former are based on beliefs that are "insulated from reasons and evidence" (*Why Tolerate Religion?,* 33-35) and, consequently, are harmful (Ibid., 60-66) and do not deserve our esteem (Ibid., 68-91). Dworkin, by contrast, argues for an expansive concept of religion: "the religious attitude accepts the full, independent reality of value" and "rejects all forms of naturalism" (*Religion without God*, 10, 13. Thus, for Dworkin there are godless and secular religions and secular ethical commitments are, from the start, on par with the conscientious commitments of theistic religions.

[46] B. Leiter, *Why Tolerate Religion?*, 130-131.

[47] Ibid., 99.

military service is burden-shifting since, presumably, when one citizen refuses to take arms someone else, who cannot be exempted on conscientious grounds, needs to do it.[48] A claim of conscience that impose a fiscal burden on the rest of society when accommodated is also burden-shifting. Nonetheless, Leiter still opens the door only for those legal exemptions which are not burden-shifting.

Leiter adopts the deflationist view by fear that the expansionist strategy will lead to a proliferation of demands for exemptions. He notably asserts that a universal regime of exemptions of conscience will be "tantamount to constitutionalizing a right to civil disobedience."[49] For instance, he worries that if there is nothing special about the Sikh's religious belief in the obligation to always carry a kirpan and if we recognize an obligation to exempt Sikhs, in some contexts, from laws forbidding individuals to carry knifes, then we also must provide an exemption, in similar contexts, to the "lone eccentric, who for reasons known only to him, feels a categorical compulsion, which he deeply identifies as a matter of personal integrity, to always have a knife nearby."[50]

48 Ibid., 99.

49 B. Leiter, *Why Tolerate Religion?*, 94.

50 Ibid., 93. Leiter also worries about the practical difficulties associated with evaluating the sincerity of exemptions claims and he believes that all burden-shifting exemptions are morally problematic. I discuss the burden-shifting objection below. However, I will not address the difficulty of assessing the sincerity of conscientious beliefs. For illumining discussions of this matter, see K. Greenawalt, *Religion and the Constitution*, 109-123; Daniel Weinstock, "Beyond Objective and Subjective: Assessing the Legitimacy of Religious Claims to Accommodation," *Les ateliers de l'éthique* 6 (2011): 155-175; Avigail Eisenberg, *Reasons of Identity. A Normative Guide to the Political and Legal*

Leiter's view is unattractive for egalitarian reasons. It is very dubious that it is always unfair to grant an exemption for a burden-shifting practice. For instance, imagine that it is clearly established that the provision of halal, kosher, and vegan menus in closed public institutions (hospitals, schools, prisons and the army) results in an increased work load for the working staff of those institutions and is slightly more costly than only providing menus which do not accommodate the dietary practices of individuals. It seems disproportionate, in this case, to burden the conscience of individuals who sincerely believe that they have the obligation to follow a certain diet just so that each taxpayer can save a few pennies. This burden is disproportionate since the accommodation of dietary conscientious requirements in those closed public institutions regards a matter that is central to several individuals' moral identity and because such accommodation is, in some cases (in schools and hospitals, at least), a tool to promote equality of opportunity and of access to public services. Leiter never explains on which conception of justice and of the fair distribution of the burdens any benefits of cooperation he relies on to identify an unfair burden in all cases of burden-shifting exemptions. He simply views all shifts in the currently existing pattern of distribution of burdens produced by exemptions to the law as being unfair. He thus seems to believe that currently existing social institutions provide an appropriate baseline from which all claims of inequalities can be normatively assessed. However, there is no reason to believe that laws and institutions which have historically been shaped by cultural and religious majorities provide an impartial

Assessment of Identity Claims (Oxford: Oxford University Press, 2009), Chap. 5.

baseline allowing us to identify which burdens are unfair. Leiter thus commits the mistake of taking the status quo as an impartial standpoint enabling him to identify all shifts of burden as unfair.[51]

Dworkin's egalitarian theory of religious freedom also faces the dilemma between fully embracing the demands of equality and avoiding the pitfalls of the proliferation of exemptions. Dworkin adopts a deflationist position with regard to exemptionism in order to counter the threat of proliferation. He embraces the rationale and outcome of the *Smith* decision of the U.S. Supreme Court, which significantly lowered the protection given to religious convictions. Indeed, *Smith* asserted that government was under no obligation to prove that it had a compelling and urgent interest in order to justify limitations to the free exercise of religion. Religious practices can be restricted by a law pursuing a neutral purpose and does not aim at discriminating a group or at limiting religious freedom.

Dworkin captures this view by saying that the right to religious freedom is not a special right to a particular liberty. A special right offers a very strong protection to individual liberty as it forbids government to abridge it unless it has a compelling justification, that is, unless there is an emergency. Freedom of speech is, according to Dworkin, such a special liberty since it should only be restricted in the face of clear and imminent danger.[52] By contrast, as a subcategory of the right to ethical independence, the right to religious freedom is a general

[51] Cécile Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008): 82.
[52] Dworkin, *Religion withou God*, 131. *Cf.* R. Dworkin, *Justice for Hedgehogs*, 369.

right. General rights offer a much weaker protection to individual liberty. Indeed, a general right only protects individuals against those infringements to their liberty that are not justified by neutral considerations. To use Dworkin's words:

> [e]thical independence means that government must never restrict freedom just because it assumes that one way for people to live their lives—one idea about what lives are most worth living just in themselves—is intrinsically better than another, not because its consequences are better but because people who live that way are better people.[53]
>
> If we deny a special right to free exercise of religious practice, and rely only on the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, nondiscriminatory laws that do not display less than equal concerns for them.[54]

I qualify Dworkin's account of exemptionism as a deflationist one partly because it only protects ethical convictions regarding foundational matters from perfectionist and majoritarian attempts to restricts individual liberty and asserts that governments are under no obligation to grant exemptions from neutrally justified laws. But most importantly, his view that religious freedom is a general right, as opposed to a special one, is a consequence of his endorsement that religion is not special. For Dworkin, religious and secular personal ethical commitments deserve similar legal protection.[55] Moreover, he notes that "once we break the connection between religious conviction and orthodox theism, we have no firm

[53] Dworkin, *Religion*, 130

[54] Ibid., 135-136. *Cf.* Dworkin, *Justice for Hedgehogs*, 369, 377; Dworkin, *Is Democracy Possible Here?*, 71.

[55] Dworkin, *Religion without God*, 110-116.

way of excluding even the wildest ethical eccentricity from the category of a protected faith."[56] The inclusion of all, even the most eccentric, ethical convictions is unproblematic if the kind of protection granted to foundational commitments is that of a general right. However, if the protection offered to foundational commitments takes the stronger form of a special right, which can only be abridged when there is a compelling and urgent interest, then a legislatively paralyzing proliferation of exemptions to laws pursuing rationally and neutrally justified objectives is, according to Dworkin, unavoidable: "[i]f the Native American Church is entitled to an exemption from drug-control laws, then Huxley's followers would be entitled to an exemption, and skeptical hippies would be entitled to denounce the entire drug-control regime as a religious establishment."[57]

Dworkin's egalitarian theory of religious freedom is problematic on egalitarian grounds because the inclusion of secular convictions into the category of those beliefs worthy of legal protection only comes at the price of diluting such protection to the point where it denies certain exemptions needed for egalitarian purposes. The general right to ethical independence only limits the reasons offered by governments to curtail individual liberty. As such, it does not protect individuals from indirect discrimination, which proceeds from the unintended and unforeseen effect of laws which pursue valid and neutrally justified aims.[58] Yet, many demands for exemptions are

[56] Ibid., 124.
[57] Ibid., 135.
[58] Direct discrimination results from an explicit or deliberate intention to discriminate, whereas indirect discrimination results from the unintended and unforeseen effects of certain laws and policies. Pierre

demands to rectify indirect discrimination. For instance, laws requiring a helmet for motorcycle riders and construction workers as well as laws prohibiting the wearing of knives in classrooms do not explicitly aim at discriminating against the Sikhs. They aim at promoting safety and security. However, they can have, indirectly, the effect of undermining Sikhs' opportunities to live in accordance with the demands of their conscience *and* to access certain workplaces, to engage into certain recreational activities, or to obtain basic instruction.[59]

One may object that I am being unfair to Dworkin as he still manages some place for exemptions designed to rectify indirect discrimination. Indeed, he claims that the general right to ethical independence forbids legislatures to justify laws in a way that "covertly" assumes that some ethical commitments are less valuable than others by ignoring the special importance those commitments have to individuals embracing them.[60] This, according to Dworkin, requires governments that prohibit or burden certain practices regarded as "sacred" by a group to provide an exemption "[i]f an exception can be managed with no significant damage to the policy at play."[61] However, it seems that Dworkin claims, only those exemptions which do not affect the pursuit by the state of neutrally justified objectives should be granted. In this view, the demands of individual conscience should always give way to civic obligations; as Dworkin puts forth: "[t]hat priority of non-

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Bosset, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable* (Québec: Commission des droits de la personne et des droits de la jeunesse du Québec, 2007), 3.

[59] J. Quong, "Cultural Exemptions," 62.

[60] Dworkin, *Religion without God*, 136.

[61] Ibid. 136.

[directly] discriminatory collective government over private religious exercise seems inevitable and right."[62] Not very much unlike Leiter's dismissal of all burden-shifting exemptions, Dworkin's subordination of individual conscience to the demands of citizenship runs the risk of imposing disproportional restrictions of individual liberty in foundational matters since in this framework, even the prospect of a slight loss in terms of the state's capacity to further legitimate collective goals (such as, for instance, the aims to levy taxes to finance roads and aid the poor, forbid drugs to protect the community from the social costs of addiction, and protect forests because forests are in fact wonderful)[63] is enough to justify restrictions to the fundamental right to freedom of conscience and religion.[64]

V

Individual Conscience and the Proliferation of Exemptions

It is true that the inclusion of secular convictions of conscience, non-religious ethical commitments and non-conventional religious beliefs in the category of beliefs entitled to legal protection opens the door to a vast array of

[62] Ibid. 137.

[63] Ibid., 130-131.

[64] It is not uninteresting to note that Dworkin seems to have departed from earlier accounts of rights (and especially of the right to ethical independence) where he defined rights in relation to their special weight against collective goals such that only goals of special urgency and importance could override a right. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press), 92; *Justice for Hedgehogs*, 369.

exemptions. Thus, the expansionist approach to exemptions in a postsecular society may lead to the accommodation of all sorts of weird and eccentric beliefs.[65] However, in itself, the mere fact that some beliefs and practices appear to be eccentric, ridiculous, weird or even blatantly irrational to a majority of citizens is not sufficient to establish that there is something morally problematic in granting constitutional protection to those beliefs. Quite to the contrary, it is precisely one desiderata of a theory of religious freedom to provide protection to unpopular beliefs from the majority's propensity to impose its views and to not take minority opinions seriously.

What is worrying with the threat of proliferation is not proliferation in itself, it is the prospect of a legislatively paralyzing proliferation arising out of the accumulation of several exemptions. If governments are to grant exemptions, they must be consistent and must therefore grant similar exemptions to similarly situated groups and this may go on until we reach the point where the government's ability to pursue legitimate objectives is severely undermined by the multiplication of measures for accommodating individuals' conscience. Thus, although the initial exemption creating a precedent for subsequent ones may not, taken individually, seriously impair the state's capacity to pursue a legitimate legislative objective, the addition of similar exemptions may do so. For instance, if allowing only the members of the Native American Church to consume peyote for ritualistic purposes does not in itself

[65] For instance, Barry highlights that in the U.S. and in the U.K., Witchcraft has been at times viewed as a religion entitled to similar protection than, say, the Anglican or the Catholic Churches. B. Barry, *Culture and Equality*, 52-53.

defeats the purpose of drug prohibition laws, the generalized practice of granting exemptions to drug laws could, presumably, severely burden the state's capacity to prohibit drugs when it is expanded to cover other groups that have conscientious commitments, religious or not, which are similar to those of the Native American Church. The legitimate worry associated with the threat of proliferation is not that exemptionism forces to accommodate eccentric practices, it is that by recognizing the demands of individuals' private conscience we will undermine legitimate state authority and government's capacity to enact any kind of regulation designed to further neutral and valuable aims.[66]

[66] For instance, in *Smith*, the Court was worried that the practice of exemptionism amounted to "a system in which each conscience is a law unto itself" and that it would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, *see, e.g., Gillette v. United States,* 401 U. S. 437 (1971), to the payment of taxes, *see, e.g., United States v. Lee*, [106 U.S. 196 (1882)]; to health and safety regulation such as manslaughter and child neglect laws, *see, e.g., Funkhouser v. State,* 763 P.2d 695 (Okla.Crim.App.1988), compulsory vaccination laws, *see, e.g., Cude v. State,* 237 Ark. 927, 377 S.W.2d 816 (1964), drug laws, *see, e.g., Olsen v. Drug Enforcement Administration,* 279 U.S.App.D.C. 1, 878 F.2d 1458 (1989), and traffic laws, *see Cox v. New Hampshire,* 312 U. S. 569 (1941); to social welfare legislation such as minimum wage laws, *see Susan and Tony Alamo Foundation v. Secretary of Labor,* 471 U. S. 290 (1985), child labor laws, *see Prince v. Massachusetts,* 321 U. S. 158 (1944), animal cruelty laws, *see, e.g., Church of the Lukumi Babalu Aye Inc. v. City of Hialeah,* 723 F.Supp. 1467 (S.D.Fla.1989), *cf. State v. Massey,* 229 N.C. 734, 51 S.E.2d 179, *appeal dism'd,* 336 U.S. 942 (1949), environmental protection laws, *see United States v. Little,* 638 F. Supp. 337 (Mont.1986), and laws providing for equality of opportunity for the races, *see, e.g., Bob Jones University v. United States,* 461 U. S. 574, 461 U. S. 603-604 (1983)." *Employment Division, v. Smith* at 494 U. S. 888-889.

I want to conclude by highlighting a few aspects of conscientious convictions in order to suggest that fears of proliferation are perhaps exaggerated and do not clearly warrant adopting the deflationist strategy. Those practices are designed to protect an important fundamental freedom as well as to foster equality of opportunity and fair terms of integration for minority groups. We may thus want to pause before giving in to allegations of a slippery slope towards legislative paralysis.

First, although it is legitimate to worry that an expansionist approach to legal exemptions will lead to an unwelcome proliferation, we must not forget the importance and value of freedom of conscience and religion. People do suffer a morally significant burden when they are unable to act in accordance with the demands of their conscience, religious or not. Convictions of conscience are indeed intimately linked to individuals' identity as moral agents and sense of self-respect. When people are forced to act against these convictions, they experience a loss of personal integrity, a feeling of self-alienation, a sense that their own actions violate the moral principles defining who they are.[67] It would therefore be problematic to impose such a burden of conscience to citizens simply on the ground that we absolutely want to avoid committing ourselves to grant exemptions to hypothetical exemptions claimants, such as Leiter's lone and eccentric individual who feels a categorical compulsion to always wear a knife, in the advent that such hypothetical

[67] Paul Bou-Habib, "A Theory of Religious Accommodation," *Journal of Applied Philosophy*, 23 (2006): 109-126; J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 76-77; M. Nussbaum, *Liberty of Conscience*, 19-20, 53-5.

claimants come to be real persons. I would here suggest that the problem of proliferation should only be viewed as serious when we can point to actually existing groups or individuals (or to groups which can reasonably be expected to exist in a foreseeable future) who are similarly situated than the group or individual who sets the precedent for a certain type of exemption to the law.

Secondly, the phenomenon of individualization of beliefs in modern and postsecular societies does not necessarily mean that more and more individuals come to embrace totalizing and comprehensive worldviews which require them to systematically follow an orthodox and rigid way of life. Quite to the contrary, as Maclure and Taylor remark, in modern societies, individuals' moral identity is often structured around many poles (professional life, family, social engagement, etc.). People are thus much more likely to enjoy a certain margin of manoeuvring in arbitrating between foundational values and commitments. If this is right, then several individuals in those societies embrace a much more fluid and eclectic set of values than those who attempt to strictly follow an orthodox conception of religion.[68] These individuals, who can be expected to form the bulk of the population, are less likely to view their values as unconditional obligations and thus less likely to ask for exemptions.

Finally, even in the case of those individuals who embrace a more totalizing and orthodox conception, the prospects of finding a compromise which can both enable citizens to comply with their conscientious duties and allow the state to further its neutrally justified objectives is greater than what proponents of deflationist approaches to

[68] J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 94.

exemptionism seem to suggest. An expansionist view of exemptionism and freedom of conscience does not require the kind of complete and unquestioned deference to the demands of individual conscience that would lead to legislative paralysis. Both laws and religious practices have a degree a flexibility which often makes it possible for public authorities to achieve their ends with less restrictive policies and provides them with a wiggle room to regulate individuals' practices in ways consistent with respecting conscientious convictions.

First, public authorities can make efforts to imagine different ways to pursue the same legitimate goal and select the one which least restricts free exercise of religion. There is nothing sacred, special or unique which links a public goal and the particular measure adopted by a government to achieve this goal. There is no constitutive link between a policy and the goal it serves; there is just a link of instrumental rationality: policies are means to pursue certain collective goals.

Moreover, religious practices also have a certain degree of flexibility which gives the state some room to regulate these practices in ways which do not limit too harshly freedom of conscience. Religious practices often have many dimensions and can be reinterpreted in many ways. Some of these dimensions are essential to the believers' deep understanding of their religious obligations; others are more contingent and unrelated to their sense of integrity. Not all aspects of a given religious practice are essential to fulfill a religious prescription. It might be the case that the state is able to further an end that apparently inevitably conflicts with someone's religious freedom simply by asking her to change aspects of her religious practice which

are not essential to the fulfillment of a religious obligation. For instance, this is how the *Multani* case was decided by the Supreme Court of Canada.[69] The case involved a conflict between the Board of a public school which demanded to a Sikh student to stop wearing his kirpan at school. The student refused on the ground of his sincere belief that wearing this religious symbol is a central obligation of Sikhism. The Board claimed that its demand was justified since it aimed at preserving security and safety at school, the kirpan being a ceremonial dagger that could be used as a weapon by the bearer or by another student stealing the object. The Court authorised the student to wear the kirpan at school, but required that it be placed in a sealed case and worn underneath the clothes. This involved asking Sikhs to reinterpret their practices and to drop certain of their components. The original practice was to wear the kirpan in an unsealed case, outside the clothes. But, after deliberating with the court, it appeared to the Sikh student and his family that he could both fulfill his obligation to wear a kirpan and meet the schools demands regarding security by changing some aspects of this practice.

This example shows that both the means by which governments pursue valid collective goals and the practices of citizens based on conscientious convictions are flexible enough to make sense of a duty to seek accommodations understood as mutual adjustments reached after deliberation. The idea that the conflicting authorities of individual conscience and the state require us to choose between unquestioned and unrestricted deference to individual conscience and systematic subordination of

[69] *Multani v. Commision scolaire Marguerite-Bourgeoys.*

conscience to the demands of citizenship poses a false dilemma.

In sum, fears of proliferation leading egalitarians to embrace the deflationist view on exemptionism are exaggerated. First, it would be ill advised to curtail such a fundamental freedom as the freedom of conscience to avoid some clearly undesirable but hypothetical cases of accommodation. Second, the individualization of beliefs in postsecular societies is much more likely to lead most individuals to adopt fluid and adaptable value commitments. Third, both the law and individuals' religious and conscientious practices have a certain degree of flexibility which, in some cases, allows for reconciliation between the demands of conscience and the demands of citizenship via a reciprocal modification of initially conflicting practices. Egalitarian theorists of religious freedom should be careful not to jump too quickly to the conclusion that only the deflationist strategy to exemptionism is viable in postsecular societies.[70]

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[70] I presented earlier versions of this paper at the 2013 Manchester Political Theory Workshop and at the Religion and Political Theory workshop at University College London in September 2013. I benefited from valuable comments from Valérie Amiraux, Aurélia Bardon, Cristobal Bellolio, Cécile Laborde, Lois Lee, Domenico Melidoro, Ronan McCrea, Roland Pierik and Andrew Shorten. Moreover, the research project leading to this publication was funded by the Fond Québécois de Recherche Société et Culture.

If you need to cite this article, please use the following format:

Boucher, François, “Exemptions to the Laws, Freedom of Religion and Freedom of Conscience in Postsecular Societies,” *Philosophy and Public Issues (New Series)*, Vol. 3, No. 2 (2013), 159-200, edited by S. Maffettone, G. Pellegrino and M. Bocchiola