

**Belief-Based Exemptions:  
Are Religious Beliefs Special?**

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## ABSTRACT

Religious beliefs are often singled out for special treatment in secular liberal societies. Yet if a legal exemption is granted for a belief with a religious foundation, the question arises whether a similar, but non-religious belief must also be granted an exemption. This thesis examines the comparative status of religious and non-religious exemption claims. The aim is to determine whether or not the present tendency to favour the petitions of religious claimants over their secular counterparts is morally justifiable. Three distinct sets of arguments which are commonly used to validate the practice of awarding religious exemptions are analysed. The first chapter focuses upon psychological harm approaches, which concern the role of religious beliefs in the lives of their holders. The second chapter examines the substantive content of religious beliefs. Finally, the third chapter considers the place of these beliefs within secular liberal democracies. Each set of arguments gives rise to a strong justification for awarding religious exemptions. However, the arguments each fail to provide a convincing moral case for drawing a distinction favouring religious beliefs over analogous non-religious beliefs. This thesis contends that belief-based exemptions ought therefore to be awarded equally to all claimants who meet the moral criteria for special treatment. This conclusion applies regardless of whether the relevant belief is founded in religion or not.

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## INTRODUCTION

Beliefs that are grounded in religion are often singled out for special treatment in secular liberal societies. Conscientious objection to warfare provides the paradigmatic example.<sup>1</sup> Many liberal societies have long histories of awarding exemptions from the military draft to Quakers and members of other religions who believe that they must not engage in warfare.<sup>2</sup> Yet awarding exemptions to a religious objector gives rise to the question of whether the same exemption ought to be extended to a pacifist with a similar but non-religious belief in the unconscionability of war. The focus of this thesis is the comparative status of exemption claims based upon religious and non-religious beliefs. It examines whether there is any reason to favour claims made by religious believers over those of their secular counterparts.

Exemptions for Quakers are premised upon a substantive conception of equality.<sup>3</sup> A blanket application of state laws will sometimes have a disproportionately negative impact upon some people due to their particular beliefs. Targeted exemptions are a means of allowing for this difference and alleviating the

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<sup>1</sup> Much of the literature on the topic of religious and non-religious exemptions utilises this example. This point is noted in Andrew Koppleman, "Is It Fair to Give Religion Special Treatment?," *University of Illinois Law Review* (2006): 572 and Kent Greenawalt, "Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy," *William and Mary Law Review* 48(2006-2007): 1605.

<sup>2</sup> For the New Zealand Government's response to conscientious objection during the first and particularly second world wars, see Nancy M. Taylor, *The New Zealand People at War: The Home Front*, vol. 1 (Wellington: Historical Publications Branch, Department of Internal Affairs, Government Printer, 1986), 244-85. For a brief survey of notable US cases on conscientious objection see Richard O. Frame, "Belief in a Nonmaterial Reality - a Proposed First Amendment Definition of Religion," *University of Illinois Law Review* 1992, no. 3 (1992): 824-31.

<sup>3</sup> Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford; New York: Oxford University Press, 2005), 90; Lawrence Sager, "The Moral Economy of Religious Freedom," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 16-25.

additional burden such believers face.<sup>4</sup> For example, compulsory conscription into military service will be more burdensome for a Quaker than for someone who holds no objection to warfare. Exemptions recognise this fact by alleviating the particular burden that the Quaker would suffer if forced to contravene her<sup>5</sup> religious belief against warfare.

The policy of awarding exemptions *at all* to *anyone* could be and certainly often is, objected to in principle. The wholesale refutation of the exemption project is typically premised upon an alternative conception of equality. Usually referred to as “formal equality,” this approach recommends generalised legislation, which is applied to all members of society in the same manner without exception.<sup>6</sup> One prominent advocate of this approach, Brian Barry, contends that exemptions are not required by justice because arguments in favour of excluding some members of society from generally applicable laws are either strong enough to demonstrate that the law itself is not warranted for *anyone* or they fail completely and nobody ought to receive an exemption.<sup>7</sup>

Barry’s analysis addresses an important question that deserves a moral response. It raises the question whether the rule-and-exemption approach is a fairer alternative to universally applicable legislation or not. But this is only one of at least two

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<sup>4</sup> Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke & New York: Palgrave Macmillan, 2006), 248-49; Anthony Bradney, *Law and Faith in a Sceptical Age* (Oxon: Routledge-Cavendish, 2009), 34.

<sup>5</sup> Unless the context demonstrates otherwise, my use of feminine pronouns throughout most of this thesis is not intended to exclude application of the discussion to male religious believers and other men – indeed, I recognise that this particular example is likely to pertain to men more frequently than it does to women. I have simply chosen to adopt feminine pronouns in the absence of any gender-neutral pronouns in English and to avoid awkward pairings of ‘he or she’ and ‘him or her’ or constantly alternating referents between the genders.

<sup>6</sup> Douglas Laycock, “Formal, Substantive, and Disaggregated Neutrality toward Religion,” *DePaul Law Review* 39(1989-1990): 999-1001. For a comparison with formal neutrality, see 1003-06.

<sup>7</sup> Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001), 37.

important moral questions which arise from the existing tendency to respond to social diversity through the use of exemptions. The second question concerns the proper scope of beliefs to which exemptions ought to be applied, if the strategy is adopted. As long as the practice of awarding exemptions remains an existing political reality this question deserves examination. It is at this point that my investigation begins.

The problem, as Barry points out, is that “if we consider virtually any law, we shall find that it is much more burdensome to some people than to others.”<sup>8</sup> Compulsory conscription will be more arduous for people who hate exercise, sufferers of chronic homesickness, those who wish to devote the bulk of their time to alternative passions and interests and indeed, for non-religious persons who hold principled objections to warfare. Thus while exemptions can be upheld as an application of equality, the argument requires us to explain why some differences deserve special “equalising” provisions, such as exemptions, while most others do not.

The extreme diversity that prevails across liberal societies today makes this a highly salient issue for examination. Modern societies must grapple with particularly great religious pluralism as both new immigrants and newly emerging religions increasingly coexist with more well-established local religions.<sup>9</sup> The matter is further complicated by a rise in non-institutional spirituality. In increasingly individualistic liberal societies, progressively larger numbers of people are formulating their own personal religious belief-sets using selected components from a range of religions.<sup>10</sup> Of course, these elements of modern religiosity should

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<sup>8</sup> Ibid., 34.

<sup>9</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 5; Ivan C. Iban, "Religious Tolerance and Freedom in Continental Europe," *Ratio Juris* 10, no. 1 (1997): 98-101.

<sup>10</sup> Kelly Besecke, "Seeing Invisible Religion: Religion as a Societal Conversation About Transcendent Meaning," *Sociological Theory* 23, no. 2 (2005); Carolyn Evans, "Introduction," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 8.

not be taken to suggest that diversity of religious thought is a new phenomenon. Beliefs generally understood to be religious have always evidenced considerable variation between different religions, different sects and even between individual believers of the same religious community. This is also true of beliefs that appear to be shared across diverse geographical and sectional boundaries. Conscientious objection to military service again provides a good example. Within Christian sects alone there is significant variation in the origins, history, scope and consequences (earthly and divine) of religious beliefs that oppose military service.<sup>11</sup> The diversity becomes even more apparent when one considers that pacifism is also a feature of some Indian, Chinese and North American religions.<sup>12</sup>

Social diversity is not limited to religion. Liberal societies are home to members of many different cultural groups. Individuals also diverge widely in their strongly held philosophical and political viewpoints. Today the United Nations (UN) calls upon all countries to recognise that the right to abstain from involvement in warfare is held by *all* conscientious objectors, whether their moral objections are founded in religion or not.<sup>13</sup> This suggests that most countries now agree that a pacifist is no differently placed than someone whose analogous belief is religious in

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<sup>11</sup> A 1955 US article notes that there are as many as “125 types of religious conscientious objectors to war who have furnished the courts with objector problems” (J. B. Tietz, "Jehovah's Witnesses: Conscientious Objectors," *Southern California Law Review* 28(1954-1955): 123). For an informative illustration of the diversity of the belief within Christianity see Peter Brock's description of conscientious objection to warfare as practised over a long history and in diverse locations by Anabaptist Mennonites, Quakers and non-sectarian Christian Pacifists (Peter Brock, *The Roots of War Resistance: Pacifism from the Early Church to Tolstoy* (Nyack, NY: Fellowship of Reconciliation, 1981)). The diversity does indeed cover each of the elements I listed in the text above.

<sup>12</sup> Brock, *The Roots of War Resistance*, 9.

<sup>13</sup> In its most recent substantive resolution on the matter, the UN recognises that conscientious objection to warfare “derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives” (United Nations Commission on Human Rights, "Conscientious Objection to Military Service - Commission on Human Rights Resolution 1998/77," preamble, available online at <http://www.unhchr.ch/Huridoca/Huridoca.nsf/0/5bc5759a53f36ab380256671004b643a?Opendocument> (accessed 21 January 2010)).

nature.<sup>14</sup> But the general question of whether religious believers have a greater claim to exemptions than others remains a hotly contested issue that is relevant far beyond the case of pacifism.

Case law and scholarship abounds with examples of petitions for exemptions from general regulations.<sup>15</sup> The New Zealand Jewish community recently demanded exemptions to humane slaughter legislation, which they felt violated their rights to freedom of religion and thereby threatened their very right to live in New Zealand.<sup>16</sup> Numerous cases deal with parents' objections to the contents of the school curriculum or to the uniforms their children are required to wear. Medical practitioners object to performing certain procedures. Antidiscrimination laws trouble employers and providers of education, hospitality and other services who maintain conflicting beliefs about homosexuality or the proper relations between

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<sup>14</sup> Not *all* countries appear to have reached this conclusion. Actual compliance with the UN resolution across member states is highly varied. The most extensive of the UN's recent reports on this matter indicates that in some countries "only some grounds for refusal, such as religious motives, are deemed acceptable" (United Nations Economic and Social Council, "The Question of Conscientious Objection to Military Service: Report of the Secretary-General Prepared Pursuant to Commission Resolution 1995/83," para 50, available online at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/a7d0cccd1226af02802566f6004ea36a?Opendocument> (accessed 25 January 2010)).

<sup>15</sup> A raft of examples are given in Yossi Nehushtan, "Secular and Religious Conscientious Exemptions: Between Tolerance and Equality," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 246; Koppleman, "Is It Fair to Give Religion Special Treatment?," 572; Ahdar and Leigh, *Religious Freedom in the Liberal State*, 3-4.

<sup>16</sup> The animal welfare legislation, requiring animals to be stunned before being killed effectively outlawed the Jewish practice of Shechita (kosher killing). The New Zealand Government initially refused petitions for an exemption but reversed its decision several months later, just days before the matter was due to be litigated. See, Amanda Fisher, "Jewish Community Upset at Ban on Kosher Killing," *The Dominion Post* 9 June 2010, available online at <http://www.stuff.co.nz/national/3788986/Jewish-community-upset-at-ban-on-kosher-killing> (accessed 27 November 2010); World Jewish Congress, "New Zealand Jews Win Right to Continue with Kosher Slaughter of Poultry," <http://www.worldjewishcongress.org/en/news/9726> (accessed 27 November 2010); "Shechita: Kosher Slaughter - a Jewish Religious Ritual Needed to Provide Kosher Food ", <http://www.kosherslaughter.co.nz/koshermeat/> (accessed 27 November 2010).

people of different genders and races. Others seek exemptions from legislation prohibiting certain substances.

Today, the question of pacifism appears to have been settled in favour of treating religious and non-religious beliefs alike.<sup>17</sup> But no such consensus has formed regarding the treatment of religious and non-religious beliefs in other cases. In fact, it presently remains a common supposition that religious beliefs fall into the category of characteristics that deserve accommodation, while non-religious beliefs fall outside that category. It is common for legislation expressly to favour religious beliefs over similar moral, philosophical and cultural beliefs that are not founded in religion.<sup>18</sup> Yossi Nehushtan contends that it is a “regrettable fact [that] claims for religious conscientious exemptions are usually more likely to be accepted than claims for secular conscientious exemptions.”<sup>19</sup> Whether the priority given to religious claims is indeed a regrettable tendency or not depends upon whether or not such prioritisation is morally justifiable. This makes it important to ask whether the present role of religious faith in our society is “set by the nature of the case” or merely the result of “prevailing political circumstances” and unquestioned assumptions.<sup>20</sup>

Several theorists observe that the statement that “religion is both distinct and distinctly important” was once simply assumed to be true.<sup>21</sup> The suggestion is that

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<sup>17</sup> Refer to notes 13-14 above.

<sup>18</sup> Koppleman, “Is It Fair to Give Religion Special Treatment?,” 572. Nancy Rosenblum refers to a US Supreme Court judge who became concerned about what he perceived as “an avalanche of religious opt-outs from civil obligations” (Nancy L. Rosenblum, “Introduction: Pluralism, Integralism, and Political Theories of Religious Accommodation,” in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, 2000), 13).

<sup>19</sup> Nehushtan, “Secular and Religious Conscientious Exemptions,” 248.

<sup>20</sup> Peter Jones, “The Ideal of the Neutral State,” in *Liberal Neutrality*, ed. Robert E. Goodin and Andrew Reeve (London and New York: Routledge, 1989), 14.

<sup>21</sup> Daniel Conkle, “The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future,” *Indiana Law Journal* 71(2000): 2.

the special place afforded to religion for exemption purposes may be the echoes of explicitly Christian argumentation in the earlier years of many liberal states' histories. Indeed, Steven Smith argues that it is only on this basis that the religious freedom policies of the United States (US) can be understood.<sup>22</sup> Religious freedom rests, he argues, upon two theological premises – that true religion must be freely undertaken and that it is the exclusive provider of uniquely important social and individual benefits such as morality and salvation.<sup>23</sup>

But any assumption that religious values are uniquely important sits uncomfortably with modern secular liberalism. Those who object to legislation for non-religious reasons ask why a distinction is drawn between their case and that of a religious claimant with an otherwise apparently analogous claim. These people deserve an answer and not one which rests upon theological foundations that they (and many others) do not accept.<sup>24</sup> This thesis argues that existing case law and other scholarship is unable to provide a convincing case for favouring religious beliefs. In fact, even a cursory analysis of the literature reveals considerable confusion as to what aspect or aspects of religion prompt legislators and adjudicators to award exemptions to religious believers.<sup>25</sup>

If people lack understanding as to why some citizens are being treated differently than others, and if an investigation turns up no clear justification, it further gives the appearance that preferential treatment is involved. This can become a matter of

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<sup>22</sup> Steven Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," *University of Pennsylvania Law Review* 140(1991-1992): 149-50.

<sup>23</sup> *Ibid.*, 154. See also Conkle, "The Path of American Religious Liberty," 3.

<sup>24</sup> Daniel Conkle writes that religion's importance "has been placed in serious question" and the task of answering this question must be met if religious believers are not to have their cases ignored under policies of "formal equality" (Conkle, "The Path of American Religious Liberty," 2, 36).

<sup>25</sup> William Marshall observes that there is little agreement as to the underlying values of the "Religion Clauses" of the First Amendment of the Constitution which governs US jurisprudence on this issue (William Marshall, "Truth and the Religion Clauses," *DePaul Law Review* 43(1993-1994): 243).

social tension. In the current international and domestic political climate of secular liberal states this issue is increasing salient. Religion is now very much “back on the public agenda” in a number of states in which commentators had previously thought it was in decline.<sup>26</sup> This “reappearance” of religion in the public eye is occurring in a political and social arena that has been profoundly influenced by the terrorist attacks of September 11, 2001.<sup>27</sup> Within such a context the potential for escalating hostility towards certain religious believers is high. Thus, it is vital to ensure that where religious beliefs are singled out by decision makers, this is done for reasons that can be clearly articulated.

At this point, it is necessary to make a few comments on the parameters of my study. First, some might consider that the obvious answer to the question is a pragmatic one – religion is often special, or thought to be so by believers, and it is a reasonably workable category for exemptions in application. But given the diversity of religious beliefs, I have my doubts about how easily manageable the category of religion is in reality. Brian Barry shares my doubts about the workability of the concept of religion.<sup>28</sup> He advocates a pragmatic approach of a more limited sort. Barry thinks that the moral concerns stemming from the current prevalence of exemptions can simply be overlooked. Because exemptions are not required by justice, we should refuse to extend them to new groups, but ought to nevertheless retain existing exemptions in the specific instances in which they have already been awarded.<sup>29</sup> Thus Sikhs might continue wearing turbans instead of motorbike helmets, but we should not draw analogies from this case in support of other religious (or wider) exemptions.

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<sup>26</sup> Evans, "Introduction," 1-2.

<sup>27</sup> *Ibid.*, 1; Ahdar and Leigh, *Religious Freedom in the Liberal State*, 1-3.

<sup>28</sup> For an example of the difficulties associated with extending existing religious exemptions to other groups which qualify as ‘religious,’ see the example set out in Barry, *Culture and Equality*, 51-53.

<sup>29</sup> *Ibid.*, 51.

But the moral issues that arise from endorsing the existing favouritism of religious beliefs deserve far more serious examination. As William Marshall observes, if our reasons for allowing religious exemptions are “not based upon an understanding of the values involved [they are] likely to be perceived as shallow, inconsistent and nonpersuasive.”<sup>30</sup> They will then be unable to address the need I have identified to provide justifications for differential treatment that all citizens can accept. I therefore consider that even if a pragmatic case for religious exemptions exists, there is still an important need for the moral examination which I undertake in this thesis.

A second limitation to my study is that I focus on only one of several policies which often single out religion. Special tax breaks and hate speech laws are two other examples.<sup>31</sup> I have chosen to focus on exemptions because they are the most common mechanism for accommodating religious claims.<sup>32</sup> This may be, as Barry contends, because exemptions involve less cost to others in society and less effort for decision-makers.<sup>33</sup> But regardless of the reason, there seems to be an

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<sup>30</sup> Marshall, "Truth and the Religion Clauses," 243. See also, Martha C. Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (New York: Basic Books, c2008), 165-67.

<sup>31</sup> In the US, a 2006 analysis by the New York Times found that in since 1989 over 200 “special arrangements, protections or exemptions for religious groups or their adherents were tucked into Congressional legislation.” The article describes the differential treatment of religious organisations as corporate bodies. For example, churches are often treated differently for zoning laws and nurseries run by religious organisations are exempt from a range of licensing requirements and state inspections with which other nurseries must comply (Diana B. Henriques, "In God's Name: As Exemptions Grow, Religion Outweighs Regulation," *New York Times* 8 October 2006, available online at <http://www.nytimes.com/2006/10/08/business/08religious.html> (last accessed 27 September 2010)). See also the Racial and Religious Hatred Act 2006 (UK).

<sup>32</sup> This observation is made by Nehushtan, "Secular and Religious Conscientious Exemptions," 246. See also Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006), 81.

<sup>33</sup> Barry, *Culture and Equality*, 39. See also Christian Joppke, "The Retreat of Multiculturalism in the Liberal State: Theory and Policy," *The British Journal of Sociology* 55, no. 2 (2004): 238. Also, Nancy Rosenblum argues that “the classic self-protectionist separationist aim of exemptions” is

“assumption” in much scholarly commentary that “religious freedom and religious exemptions are tied together in a binary relationship.”<sup>34</sup>

It will be noted that I have made several references to “secular liberal states” and indeed it is this broad range of countries to which the analysis is intended to apply. Of course, within this category there are many very different countries and particular social and political circumstances will always colour the application of the theory when applied to variant local contexts.<sup>35</sup> Because the bulk of the literature on this topic is derived from the US and United Kingdom (UK), I draw many of my examples from these countries as well as from my own, New Zealand. However, my central claims about the comparative status of religious and non-religious beliefs will have relevance for a range of secular liberal countries.

Finally, it is necessary to expand a little upon the meaning I attribute to the concept of religious beliefs in this thesis. One of the corollaries of religious diversity is that it renders the formulation of a neutral definition of religion particularly complex.<sup>36</sup> Charles Taylor writes that religion is a phenomenon that “famously defies

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less divisive than wider claims for benefits such as public subsidies. This suggests that a range of issues arise in the latter case than do not necessarily arise in exemption cases (see, Rosenblum, “Introduction,” 17-18).

<sup>34</sup> Frederick Mark Gedicks, “An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions,” *University of Arkansas at Little Rock Law Review* 20(1997-1998): 572.

<sup>35</sup> Susan Mendus, “Religion and Education: More on God V John Rawls,” 15, unpublished article, available online at, <http://www.york.ac.uk/depts/poli/staff/profiles/slm.htm> (accessed 18 December 2009).

<sup>36</sup> For additional discussions of the contested nature of the term in US law, see Jesse Choper, “Defining “Religion” in the First Amendment,” *University of Illinois Law Review* (1982): 579; Steven Gey, “Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment,” *University of Pittsburgh Law Review* 52(1990-1991): 78; Frame, “Belief in a Nonmaterial Reality.” Others to note the extreme complications of formulating a definition include Evans, “Introduction,” 7-8; M. Peterson et al., *Reason and Religious Belief: An Introduction to the Philosophy of Religion*, 3rd ed. (New York: Oxford University Press, 2003), 6; Victoria S. Harrison, “The Pragmatics of Defining Religion in a Multi-Cultural World,” *International Journal for Philosophy of Religion* 59, no. 3 (2006): 133-49.

definition.”<sup>37</sup> Psychologists Hood et al observe that “[t]he best efforts of anthropologists to define “religion” are frustrated at every turn.”<sup>38</sup> Indeed, this fact of religious pluralism provides one of the major challenges to the claim that religious beliefs, as a set category of beliefs, are more special than others. If it is so difficult to determine what religion is, how can we be so sure that religious conscientious objectors do have a stronger case to their non-religious counterparts?<sup>39</sup>

Many legal theorists, sociologists and other scholars have taken on the formidable challenge of formulating a definition of religion.<sup>40</sup> In my analysis, I have chosen not to adopt any single definition of the term. Instead, it will suffice for the reader to have in mind a general intuitive understanding of what religion means.<sup>41</sup> My reason for taking this approach is that choosing a specific formulation risks arbitrarily and unintentionally excluding some religions. Still worse, it may give the appearance that I am framing the question in a particular way from the very start in order to smooth the path for my argument.<sup>42</sup>

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<sup>37</sup> Charles Taylor, *A Secular Age* (Cambridge, Mass: Belknap Press of Harvard University Press, 2007), 15.

<sup>38</sup> Ralph W. Jr. Hood, Peter C. Hill, and Bernard Spilka, *The Psychology of Religion: An Empirical Approach*, 4th ed. (New York, London: The Guilford Press, 2009), 7.

<sup>39</sup> Evans, "Introduction," 11.

<sup>40</sup> Legal theorist Stanley Ingber provides a representative list of articles grappling with the issue and notes in summary that any agreement on the term in his field “has proven highly elusive” (Stanley Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses," *Stanford Law Review* 41(1988-1989): 233, 233n3.

<sup>41</sup> I take up James Beckford’s recommendation to “abandon the search for, and the assumption that there are, generic qualities of religion and, instead, [...] analyse the various situations in which religious meaning or significance is constructed, attributed or challenged” (James A. Beckford, *Social Theory and Religion* (Cambridge: Cambridge University Press, 2003), 16).

<sup>42</sup> Timothy Macklem writes, “a semantic inquiry into the meaning of religion cannot yield a single right answer without the assistance of moral argument, for a concept such as religion has many meanings and can be put to many purposes, each of which may make a different meaning central to the concept. It follows that a semantic inquiry into the meaning of religion in a guarantee of freedom of religion, even if democratically authorised, would simply beg the

My arguments engage with a variety of elements that are sometimes associated with behaviour to which the term 'religion' tends to be applied. I consider religious beliefs both as sets of moral principles held by individuals and as the foundations of various practices that are associated with a wider community. Each of these frames invites a different secular analogy – the former aligning more easily with non-religious philosophy and personal conscience and the latter with non-religious culture, ethnicity and association.<sup>43</sup> Whether beliefs fall into the category of “religious” or “non-religious” in each scenario will be determined according to the understandings of those involved. Usually even those who struggle to define the term for general purposes have no difficulty sincerely responding to the question of whether a particular belief they hold is or is not religious in nature.

My decision to proceed without defining the concept at the centre of my study is facilitated by the justification-centred approach I bring to my argument. I focus upon elucidating the particular attribute or attributes of a belief which justify awarding an exemption to its holder. Thus my argument turns on the *justification* for exemptions and not the *definitions* given to categories of behaviour that have been presupposed to be eligible. In this respect, my work differs from the bulk of the literature that I have used, particularly in legal theory, where the importance of defining the term is mandated by its inclusion in relevant constitutional and legislative documents. Much jurisprudence concerning religious exemptions in the US actually conflates the question of how to define religion with that of how to determine what is special about it for the purposes of religious accommodation.

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moral question of what religion should mean there” (Timothy Macklem, “Reason and Religion,” in *Faith in Law: Essays in Legal Theory*, ed. Peter Oliver, Sionaidh Douglas-Scott, and Victor Tadros (Oxford: Hart Publishing, 2000), 73n7). Similarly, Mark Tushnet writes that “specific definitions of religion fail to capture the rich variety of conceptions of religion that people actually held and hold, and contemporary institutional arrangements for the transmission of moral values are described at a level of specificity chosen, it seems, only because the specification produces the results one desires” (Mark Tushnet, “Religion and Theories of Constitutional Interpretation,” *Loyola Law Review* 33(1987-1988): 237).

<sup>43</sup> Evans, “Introduction,” 8.

For example, Rex Ahdar and Ian Leigh (who consider the task of defining religion to be “paramount”) set out three categories of common judicial approaches to the task. The first two categories of definition, which they refer to as “subjective-functional” and “substantive-content,” closely correspond to the arguments for awarding religious exemptions that I consider in the first two chapters of this thesis.<sup>44</sup> Where our approaches differ is that for Ahdar and Leigh, if an approach is found logically to encompass avowedly non-religious beliefs, that indicates a problem with the *approach*. By contrast, I argue that if the argument is otherwise a sound basis for an exemption, then the fact that it also applies to non-religious beliefs merely reveals that the attempt to distinguish religion is unjustified and exemptions should apply to all beliefs exhibiting the relevant characteristics.

My argument is developed through three chapters, each of which centres upon one set of popular approaches to the question. These have been selected in order to cover the full ambit of exemption-justifying rationales that are prominent in the literature. I seek to identify the particular aspect or aspects of religion that would lead us to defer to religious beliefs more than we might to non-religious beliefs. Thus the discussion will necessarily lead us to consider whether a particular subset of more narrowly defined religious beliefs exhibiting specific attributes ought to be singled out for exemptions. In each chapter I begin by examining the arguments that are put forth in favour of religious exemptions and then determine which beliefs would logically be captured by the argument.

Each chapter looks at the issue from a distinct angle. In the first chapter, I examine arguments that are known variously either as “functional” or “identity”-based arguments, but which I refer to as “psychological harm” approaches. These arguments focus upon the role which beliefs play in the lives of their holders and assert that religion has such a special function that forcing people to transgress their religious beliefs or accept their marginalisation causes some form of psychological harm. In the second chapter, I examine approaches that are known as

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<sup>44</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 111, 115-22.

“substantive” or “content-based” arguments. Here I engage with the content of religious beliefs in greater depth and consider whether there is something in their substance that makes them distinctly special for exemption purposes. Finally, in the third chapter, I consider the political and constitutional role of a variety of religious beliefs in secular societies. This chapter turns the issue on its head somewhat and asks whether the entire framework of secularism is unfair to believers in a manner that religious exemptions can remedy.

In each chapter I find a reason to grant exemptions to religious believers. Firstly, psychological harm approaches provide a number of reasons to believe that religion is often vitally important to the identity of believers and establish the very real concern that failing to accommodate such beliefs could entail significant psychological distress. Secondly, considering the content of religious beliefs gives us a reason to afford particular attention to those that touch on “weighty” moral issues. Thirdly, the effects of democratic bias against religious minorities provide additional strength to some claims for religious exemptions.

Thus, there are a number of compelling reasons to grant exemptions enabling people to practise religious beliefs that otherwise conflict with generalised legislation. But, ultimately none of these arguments achieve what is required in order to justify the tendency to prioritise religious claims over others. The most convincing arguments for exemptions logically encompass a wide range of different beliefs. Many beliefs of central significance to the self-constitution of their holders are not religious. Thus the psychological harm approaches logically apply to these beliefs also. Likewise many beliefs concerned with important moral issues derive from individual conscience of a non-religious nature. Finally, prejudice in political debate inhibits many members of marginalised groups, not just members of religious groups. It is important to be clear that none of these observations means that the case for awarding religious exemptions is weakened. Rather, what this study reveals is that where exemptions are extended to religionists, non-

religious believers who equally meet the qualifying criteria are equally deserving candidates for the same exemptions.

## CHAPTER ONE: PSYCHOLOGICAL HARM

The justification for religious exemptions that I consider in this chapter is premised on the idea that religious beliefs are central to the identity of the believer and strongly constitutive of her fundamental sense of self. For this reason, forcing a person to contravene her religious beliefs can be expected to generate significant psychological harm. Accommodating religious beliefs through policies such as exemptions may provide a means to avoid such an eventuality.

Psychological harm approaches form a subset of cost arguments.<sup>1</sup> Exemptions are due where the costs of legal compliance (whether financial or otherwise) are especially high.<sup>2</sup> The obvious question which a simple cost argument leaves us with is how one determines precisely which costs are sufficient to qualify for an exemption. The psychological harm approach provides one such answer. Costs of obeying a burdensome law range from the trivial to the extreme.<sup>3</sup> Psychological harm arising from compliance is quite reasonably located at the latter end of the scale. If some beliefs can be shown to entail such harm, while others do not, that

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<sup>1</sup> Because 'psychological harm' is emphasised in the approaches here, I have chosen to use that term as my primary referent. The labels 'identity argument' and 'promoting self-identity' are also frequently used. See, for example, Peter Jones, "Rushdie, Race and Religion," *Political Studies* 38(1990): 689; William Marshall, "Truth and the Religion Clauses," *DePaul Law Review* 43(1993-1994): 247. The arguments I examine in this chapter also appear in slightly different forms under other names. For example, Ahdar and Leigh discuss something akin to psychological harm approaches under the category of 'various personal autonomy arguments' implying a connection between identity and respect for individual choices (Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford; New York: Oxford University Press, 2005), 57-64). I will consider this and a variety of different manifestations of psychological harm arguments during the course of the discussion in this chapter.

<sup>2</sup> Sonu Bedi, "Debate: What Is So Special About Religion? The Dilemma of the Religious Exemption," *The Journal of Political Philosophy* 15(2007): 243.

<sup>3</sup> Someone who has just had her hair styled might be upset at having to wear a helmet when riding her motorbike, while someone who does not enjoy exercise will find military conscription challenging and so forth. See *ibid.*, 243-44; Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001), 34.

gives us a reason to display greater concern about the former belief. It is simply a matter of determining which beliefs cause psychological harm and which do not.

Daniel Conkle claims that “[r]eligious beliefs, by their very nature, form a central part of a person’s belief structure, his inner self. They define a person’s very being – his sense of who he is...” Therefore, Conkle argues that challenges to these beliefs “are likely to cause harm; they may amount to an assault on the person’s most fundamental sense of being, inflicting a type of psychological injury, a form of mental anguish.”<sup>4</sup> Michael E. Smith states that the US Supreme Court has since the 1960s emphasised its concern that “[i]ntrusion into parts of our psyche, especially the realm of religious belief, may be too painful and destructive of our psychological well-being. We must be spared certain trials of conscience.”<sup>5</sup> According to Steven Smith, arguments for religious exemptions often go one step further due to their explicit or implicit assumption that religion is not only central to identity, but that it is the *most* central element in personal identity.<sup>6</sup> This view is

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<sup>4</sup> Daniel Conkle, "Toward a General Theory of the Establishment Clause," *Northwestern University Law Review* 82(1987-1988): 1164-65. Conkle’s analysis says nothing about psychological harm in relation to *non*-religious beliefs, but he does explicate that *irreligious* beliefs (those specifically refuting religion) hold the same status as religious beliefs in his analysis (*ibid.*, 1166).

<sup>5</sup> Michael E. Smith, "The Special Place of Religion in the Constitution," *Supreme Court Review* 1983(1983): 93-94.

<sup>6</sup> The other rationales Smith refers to here include civil strife or citizen alienation. I address these arguments in chapter three (Steven Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," *University of Pennsylvania Law Review* 140(1991-1992): 220). Concern with religion’s central role in identity is particularly prevalent in US constitutional law literature concerned with the First Amendment. For discussions of the psychological harm approach in US legal scholarship, see Conkle, "Toward a General Theory of the Establishment Clause," 1164-5, 68; Smith, "The Special Place of Religion in the Constitution," 93; Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 219-20; Mark Tushnet, "Religion and Theories of Constitutional Interpretation," *Loyola Law Review* 33(1987-1988): 238-9; David B. Salmons, "Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion," *The University of Chicago Law Review* 62(1995); Jesse Choper, "Defining "Religion" in the First Amendment," *University of Illinois Law Review* (1982): 595 (Choper discusses a 'functional' argument he labels 'ultimate concerns,' but which meets my description of psychological harm arguments).

one of the two most prominently cited in the literature to justify the constitutional protection afforded to religion in the US.<sup>7</sup>

I will examine two variants of the psychological harm approach. The first, which is more prevalent in US legal scholarship on religious exemptions, focuses on the harm generated by forcing one to act against one's core identity. Harm results from the *act of transgressing* centrally important aspects of identity. One might think of this as a failure to be true to oneself. I label this strand of psychological harm argument the 'centrality approach.' The second variant, which is more the domain of the politics of identity, is primarily concerned with the harms associated with non-recognition. This approach highlights the *additional* psychological injury which results from the fact that transgression has been *demande*d by society in the first place. The argument here is that society, in creating identity-obstructive legislation, has disregarded the believer and dismissed something of central importance to her. This lack of social recognition is psychologically damaging in itself. I refer to this second strand of argument as the 'difference approach.'

My discussion develops two particular claims. First, I argue that psychological harm approaches provide a compelling case for awarding religious exemptions. Second, I demonstrate that they cannot provide a reason for distinguishing religious beliefs as more deserving of exemptions than non-religious beliefs.

### **The Centrality Approach**

#### *Psychological Harm from Transgression*

The centrality-based interpretation of psychological harm arguments claim that mental anguish derives from *acting against one's core identity*. This approach is

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<sup>7</sup> This claim is made by William Marshall. The other prominently cited rationale refers to the *content* of religious beliefs. In a footnote, Marshall also observes the importance of the US Constitution's religion clauses. But in the body of his work, he is more interested in the *moral* arguments raised in support of special religious provisions, as am I. See, William Marshall, "Religion as Ideas: Religion as Identity," *Journal of Contemporary Legal Issues* 7(1996): 391-92.

evident in Michael Smith's argument that intruding into our psyche is painful and as such, "[w]e must be spared certain trials of conscience."<sup>8</sup> He cites the concern of judges in conscientious objector cases such as *Welsh v United States* and *Gillette v United States* about "hard choices," "painful dilemmas" and consciences which would "give [their bearers] no rest" if contravened.<sup>9</sup> Similarly, Bhikhu Parekh explains that an individual's personal identity guides her beliefs as to what she should or should not do. Her sense of self-worth will suffer if she does not act in accordance with such beliefs.<sup>10</sup>

The concern with contravening one's core identity reflects what Charles Taylor refers to as the "authenticity" ideal where each individual is thought to have a central personal identity that reflects her way of being.<sup>11</sup> She must be true to this authentic way of being, or "miss the point" of her life, "miss what being human is" for her.<sup>12</sup> Yet while this argument highlights the importance of conscience, there is no immediately apparent reason to assume that acting against other aspects of one's core identity might not also breed harm in a similar manner.

According to this interpretation of the identity approach, establishing what feature of religious beliefs makes contravening them especially psychologically painful

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<sup>8</sup> Smith, "The Special Place of Religion in the Constitution," 93.

<sup>9</sup> *Ibid.*, 93. For the cases referred to, see *Welsh v United States* 398 U.S. 333 (1970), *Gillette v United States* 401 U.S. 437 (1971).

<sup>10</sup> Bhikhu Parekh, *A New Politics of Identity: Political Principles for an Interdependent World* (Houndmills, Basingstoke, Hampshire, New York: Palgrave Macmillan, 2008), 13; Kwame Appiah, *The Ethics of Identity* (Princeton, New Jersey: Princeton University Press, 2005), 99; James F. Childress, "Appeals to Conscience," *Ethics* 89, no. 4 (1979): 318; Gordon Allport, *The Individual and His Religion, a Psychological Interpretation* (New York: Macmillan Company, 1960), 86-91. I do not intend to suggest that the theorists I have cited in this note are referring to religious beliefs alone when they make these arguments about the psychological damage inherent in contradicting important beliefs.

<sup>11</sup> Charles Taylor, "The Politics of Recognition," in *Multiculturalism and "the Politics of Recognition": An Essay*, ed. Charles Taylor and Amy Gutmann (Princeton: Princeton University Press, 1992), 28. Taylor here is drawing on Lionel Trilling, *Sincerity and Authenticity* (London: Oxford University Press, 1972).

<sup>12</sup> Taylor, "The Politics of Recognition," 30.

amounts to determining whether religious beliefs are of particularly central import to personal identity.<sup>13</sup> Contravening peripheral aspects of identity will not cause me to “miss the point” of my life, but contravening core aspects of my identity might. In this regard the psychological harm approach differs from two other commonly cited rationales for religious exemptions.

Personal autonomy arguments are based on the freedom to exercise choice regarding one’s conception of the good life.<sup>14</sup> Exemptions are awarded to enable people to make these choices for themselves. But again, choices regarding what kind of life one wishes to lead inhere in a range of matters including one’s preferred diet, style of dress and occupation. As a stand-alone argument, the autonomy rationale fails to explain why religious choices are more special than non-religious choices.<sup>15</sup> But, if we determine that religious beliefs are more central to identity than non-religious beliefs, then we might have just such an explanation.<sup>16</sup> Beliefs which are central to one’s identity are more than trivial matters to their bearers and this is why contravention of such beliefs generates greater harm.

Psychological harm also differs from intensity. The intensity approach focuses on the strength of a person’s commitment to her belief. What deserves special attention is what one feels particularly deeply about.<sup>17</sup> It is intuitively appealing as

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<sup>13</sup> Jacob Levy, *The Multiculturalism of Fear* (New York: Oxford University Press, 2000), 131. See also text accompanying notes 25-27.

<sup>14</sup> Bedi, "Debate: What Is So Special About Religion?," 241-42.

<sup>15</sup> Ibid., 241-42; Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 202-03; Rex Ahdar, "The Inevitability of Law and Religion: An Introduction," in *Law and Religion*, ed. Rex Ahdar (Aldershot; Burlington USA: Ashgate, 2000), 8.

<sup>16</sup> Appiah, *The Ethics of Identity*, 99. I say only “might” because the question of whether religious beliefs are properly interpreted as choices remains an open question. I will return to this point in Chapter Two.

<sup>17</sup> Andrew Koppleman, "Is It Fair to Give Religion Special Treatment?," *University of Illinois Law Review* (2006): 584-85; Peter Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2002), 18.

it seems to be a more plausible basis for a religious claimant's true concern when she asks for an exemption. At first glance this may appear similar to the psychological harm approach, but in fact there are some notable differences in scope. A belief may be intense and trivial at the same time. On an intensity basis alone, it appears that we should award exemptions to an ardent sports fan seeking to take Friday as her day of rest so that she can watch the game. The psychological harm approach helpfully narrows our focus here and allows us to deny exemptions to a petitioner holding an intense belief of only marginal importance in her identity. Accordingly, if we can establish that her passion for football is insufficiently central to her identity, then our sports fan would not qualify for an exemption under this approach. But the question arises as to how to determine precisely which beliefs and preferences are especially central to identity. Is there any reason to assume that religious beliefs are especially significant to identity?

Clearly for some people religious beliefs are centrally important to their identities.<sup>18</sup> Introducing a text on the psychology of religion, Hood et al observe that "[r]eligion is of the utmost importance to many people, and many fascinating behaviors are performed in its name. Religion is an integral part of many aspects of our human existence."<sup>19</sup> The authors observe that in the US, where they claim ninety percent of Americans pray and even greater numbers express a belief in God, "few human concerns are taken more seriously than religion."<sup>20</sup> Anthony Bradney, speaking of British society, notes that for minority religious communities "their religion is the most important part of their sense of identity."<sup>21</sup>

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<sup>18</sup> On the importance of religion in personal identity, see also Parekh, *A New Politics of Identity*, 21, 130.

<sup>19</sup> Ralph W. Jr. Hood, Peter C. Hill, and Bernard Spilka, *The Psychology of Religion: An Empirical Approach*, 4th ed. (New York, London: The Guilford Press, 2009), 1.

<sup>20</sup> *Ibid.*, 2.

<sup>21</sup> Anthony Bradney, *Law and Faith in a Sceptical Age* (Oxon: Routledge-Cavendish, 2009), 1 (see also 8, 42). Also see, Tariq Modood, "Muslims, Incitement to Hatred and the Law," in *Liberalism, Multiculturalism and Toleration*, ed. John Horton (Houndmills, Basingstoke, Hampshire and New York: Palgrave, 1993), 147.

But religious beliefs are clearly not important for everyone.<sup>22</sup> Certainly they are singularly *unimportant* for the majority of non-believers. Surely for these non-religious individuals there are other beliefs and ascriptions that fill a similar central position in their personal identity. This raises the question of whether religious beliefs are really so exceptional in this regard that they warrant exemptions where non-religious beliefs do not. Amelie O. Rorty and David Wong criticise philosophical approaches which rest on “a simplistic conception of identity, focusing on one aspect at the exclusion of others” or “urging us to strengthen one aspect of identity relative to the others.”<sup>23</sup> The problem, they say, is that these approaches purport to merely *describe* identity, while in reality they are used to support a particular *normative* response to the social or moral issues under discussion.<sup>24</sup> Perhaps proponents of religious exemptions could be accused of constructing identity in this manner.

Rex Ahdar and Ian Leigh, two keen supporters of religious exemptions, admit that there is a problem here in using centrality arguments to explain religion’s often unique legal status. Such approaches risk the conclusion that “[r]eligion is no longer special or distinctive but is simply lumped into a category along with other things important to personal identity such as political affiliations, racial or ethnic background, profession, occupation or marital status.”<sup>25</sup> David Salmons’ argument for religious exemptions in recognition of “the fundamental role religious practice often plays in defining and, more importantly, expressing individual and group

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<sup>22</sup> Not even for all religious believers. In fact, Bradney claims that for most British Christians (the majority of survey respondents) “it is not clear that their religion even reaches the status of being a minor hobby” (Bradney, *Law and Faith in a Sceptical Age*, 8).

<sup>23</sup> Amelie Oksenberg Rorty and David Wong, “Aspects of Identity and Agency,” in *Identity, Character and Morality: Essays in Moral Psychology*, ed. Owen Flanagan and Amelie Oksenberg Rorty (Cambridge, Massachusetts; London, England: The MIT Press, 1990), 29.

<sup>24</sup> *Ibid.*, 19, 29, 30-33. See also, Kwame Appiah, “Identity, Authenticity, Survival. Multicultural Societies and Social Reproduction,” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (New Jersey and West Sussex: Princeton University Press, 1994), 150-51.

<sup>25</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 60.

conceptions of identity” runs into this same difficulty.<sup>26</sup> Salmons believes that religion’s identity-constitutive role demands greater recognition by the courts. But he explicitly refrains from basing his argument for special legal protection solely upon that factor, admitting that to do so would require him to provide arguments in favour of distinguishing between religion and “other classifications or interests, such as “southerner,” “Klan member,” or “vegetarian,” that may also play an important role in shaping identities.”<sup>27</sup>

With these observations, the psychological harm approach begins to appear unacceptably broad in scope. If we cannot determine which of a host of personal attributes can be assumed especially central to identity, then we have no reason to limit the identity approach to religious or any other particular category of beliefs. Yet applying the concept broadly appears somewhat unwieldy. However, it does not follow that psychological harm arguments are invalid. While there is no *prima facie* reason to assume that religious beliefs (or any other particular beliefs or characteristics) are uniquely central to individuals’ identities, it is too soon to conclude that there are no means to narrow the focus. The compelling nature of an approach that elucidates a link between exemptions and psychological harm, as

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<sup>26</sup> Salmons, "Toward a Fuller Understanding of Religious Exercise," 1244-45.

<sup>27</sup> *Ibid.*, 1258n62. Salmons is saved here by the US Constitution, which allows him to fall back upon the explicit protection provided by the First Amendment Free Exercise Clause. As his is a legal argument this delivers him from the burden of having to provide any further philosophical justifications to sustain his perspective. As Salmons’ examples here demonstrate, even personal attributes that are less commonly associated with politically active collectives, including social roles within various groups, physical appearance, temperament and mental or physical ability or disability could form prized aspects of identity. For example, research by University of Otago psychologists found that physical ability was ranked as the most important self-esteem domain by Otago University students. This reflects the context of New Zealand culture, where sporting prowess is considered a highly important personal attribute. See, John A. Hunter et al., "Social Identity, Self-Evaluation and in-Group Bias: The Relative Importance of Particular Domains of Self-Esteem to the in-Group," *British Journal of Social Psychology* 43(2004): 64. On one aspect of physical appearance (weight), consider the rise of “fat pride” groups. See, for example, Anna Kirkland, "Representations of Fatness and Personhood: Pro-Fat Advocacy and the Limits and Uses of Law," *Representations* 82(2003).

well as the argument's prevalence in the literature means it is worth further exploration. It might be that the approach can borrow additional arguments in order to supplement its claims and remedy this shortfall. I will now consider some of the stronger arguments derived from philosophy, psychology and political and legal theory that might be used to make a case that religious beliefs deserve special attention.

### *Establishing Central Importance to Identity*

I want to begin by examining the argument that religious beliefs are especially important to identity because they admit a lesser degree of volition than other beliefs.<sup>28</sup> This, in turn, raises the nature of believing, which is of central significance to my entire discussion. It also gives the opportunity to rebut the stronger form of the argument that characterising religious beliefs as unchosen is a *requirement* in order to award them exemptions.<sup>29</sup>

It is often claimed that individuals ought to take responsibility for the choices they make in life. By contrast, they deserve exemptions when they do *not* make choices, that is, where they involuntarily find themselves in particular circumstances as the

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<sup>28</sup> Amelie Rorty and David Wong list "the degree to which it is difficult for a person to change the trait" as one of the methods commonly listed for determining that something is particularly central to identity (Rorty and Wong, "Aspects of Identity and Agency," 20). See also Matthew Festenstein, *Negotiating Diversity: Culture, Deliberation and Trust* (Cambridge: Polity, 2005), 11-12.

<sup>29</sup> See for example, Barry, *Culture and Equality* 32-40. Barry would refute my categorisation of his argument. However, Susan Mendus makes a strong case for rejecting Barry's claim that his argument does not depend upon choice (See Susan Mendus, "Choice, Chance and Multiculturalism," in *Multiculturalism Reconsidered: Culture and Equality and Its Critics* ed. Paul Kelly (Cambridge; Malden, MA: Polity Press, 2002), 32-35. Jonathan Quong supports Mendus' position (Jonathan Quong, "Cultural Exemptions, Expensive Tastes, and Equal Opportunities," *Journal of Applied Philosophy* 23, no. 1 (2006): 62). William Marshall also argues that "the self-identity rationale emphasizes religion as a deeply-rooted, authoritative and fixed structure in the mind of the believer" (Marshall, "Truth and the Religion Clauses," 251), an interpretation with which Sonu Bedi agrees (Bedi, "Debate: What Is So Special About Religion?," 235-49).

result of mere chance.<sup>30</sup> One who meets the latter description cannot be supposed to bear the responsibility for her predicament. Justifying freedom of belief on the basis of a lack of choice is a common liberal approach. Such claims are often made regarding sexuality. The idea is that gay people deserve respectful treatment not because we should value their *choice* to be gay, but because they never made such a choice at all, they were simply born that way.<sup>31</sup> Tariq Modood argues that liberalism responds to anti-discrimination claims made by racial groups on the same basis, namely, that race is an unchosen ascription.<sup>32</sup>

But religious beliefs are often viewed in quite a different light. For example, popular arguments assert that “woman, black and gay are ascribed, unchosen identities while being a Muslim is about chosen beliefs.”<sup>33</sup> Upon such an analysis, religious believers are singularly *undeserving* of exemptions. Let us consider the distinction which Anne Phillips draws between the burden faced by a woman when a young age limit is imposed upon applicants for a particular job and that faced by the Sikh child whose school uniform bans head coverings.<sup>34</sup> Phillips notes

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<sup>30</sup> David Williams and Susan Williams argue that “[o]verwhelmingly, Americans believe that individuals should suffer consequences only for actions that they individually and freely choose to undertake and could choose not to undertake” and that this perspective has “almost attained the status of an orthodoxy” (David C. Williams and Susan H. Williams, “Volitionalism and Religious Liberty,” *Cornell Law Review* 76(1990-1991): 770-71).

<sup>31</sup> Craig Calhoun, “Social Theory and the Politics of Identity,” in *Social Theory and the Politics of Identity*, ed. Craig Calhoun (Cambridge, USA; Oxford, UK: Blackwell, 1994), 25.

<sup>32</sup> Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge, UK; Malden, MA: Polity Press, 2007), 69.

<sup>33</sup> Modood responds to this argument in Tariq Modood, “Muslims, Racial Equality and Secularism,” in *Multiculturalism and Moral Conflict*, ed. Maria Dimona-Cookson and Peter M.R. Stirk (USA; Canada: Routledge, 2010), 121.

<sup>34</sup> See Anne Phillips, “‘Really’ Equal: Opportunities and Autonomy,” *The Journal of Political Philosophy* 14, no. 1 (2006): 26-28. In her discussion regarding expanded notions of equality of opportunity, Phillips compares the cases of *Price v Civil Service Commission* [1978] 1 All ER and *Mandla v Dowell Lee* [1983] 2 AC 548. In the former, an age limit of twenty-eight for applicants into a particular job was held to discriminate against women because their childcare requirements were likely to make compliance more difficult for women than for men. *Mandla* concerned a Sikh child who had been excluded from school for failure to comply with uniform

that the child can alleviate the burden he faces if he simply refuses to endorse the religious traditions which constrain him. By contrast, young women applying for jobs face gender-related burdens of a more practical nature. Refusing to endorse particular beliefs will not alleviate the difficulties inherent in, for example, dealing with the expense of childcare.<sup>35</sup>

Many will argue that the Sikh child cannot simply ignore his beliefs in this manner. This child holds his beliefs by chance. He has, after all, been born into a family of a particular religion. He has been raised to believe that he must wear a turban and cannot realistically be expected to be in control of his belief.<sup>36</sup> This conception of the Sikh's predicament fits with the "standard picture" of belief in philosophy.<sup>37</sup> John Heal describes acquiring a belief as being analogous to catching a cold – it is a non-voluntary process.<sup>38</sup> Bernard Williams explains that because "beliefs aim at truth" one cannot decide what one believes.<sup>39</sup> It simply makes no logical sense to suppose

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requirements, which did not allow him to wear long hair or a turban. In that case, *Price* was considered to be the relevant precedent.

<sup>35</sup> *Ibid.*, 26-27. This also seems to be Barry's approach. That is "Barry does seem to think that these originally unchosen attachments only *continue* to have any value if people voluntarily choose to endorse them" (John Horton, "Liberalism and Multiculturalism: Once More Unto the Breach," in *Multiculturalism, Identity and Rights*, ed. Bruce Haddock and Peter Sutch (London; NY: Routledge, 2003), 34-35). While Barry does specifically state that it "makes no sense to say that we can decide what to *believe*," (my emphasis), his argument does rely upon the extent to which one can *choose* whether or not to *act* upon that belief (Barry, *Culture and Equality*, 36, 32-40.)

<sup>36</sup> "No one *chooses* to be born into a Muslim family," observes Modood, "Muslims, Racial Equality and Secularism," 121 (my emphasis).

<sup>37</sup> John Heal, "Belief," in *A Companion to Epistemology*, ed. Jonathan Dancy and Ernest Sosa (Oxford; Cambridge, Mass.: Blackwell Reference, 2000), 47.

<sup>38</sup> *Ibid.*, 47.

<sup>39</sup> Bernard Williams, "Deciding to Believe," in *Problems of the Self: Philosophical Papers 1956-1972* (Cambridge: Cambridge University Press, 1973), 148. Other examples of the argument that beliefs are not subject to choice are found in John Bishop, *Believing by Faith: An Essay in the Epistemology and Ethics of Religious Belief* (Oxford: Oxford University Press, 2007), 30 and Susan Mendus, "The Tigers of Wrath and the Horses of Instruction," in *Liberalism, Multiculturalism and Toleration*, ed. John Horton (Houndmills, Basingstoke, Hampshire and New York: Palgrave, 1993), 204.

that one merely *selects* something that she then considers to be the truth. With this understanding of what it is to hold a belief, it seems that we cannot hold the Sikh responsible for thinking he must wear a turban and consequently, his petition for an exemption is strengthened.

But the Sikh's predicament may be characterised in quite a different manner. That is, one closer to that which Phillips seems to be suggesting. Beliefs can be considered to be to some extent the product of choice (and therefore responsibility) if we take into account two further factors which serve to complicate the standard account of non-voluntary belief acquisition. These factors do not contest the view that the eventual condition of believing is unchosen, but they identify two associated stages which provide individuals with some degree of indirect control over their beliefs.<sup>40</sup> Heal explains that "I may be able to bring it about that I hold a certain belief [...] just as I may bring it about that I catch a cold."<sup>41</sup> First, we can control many aspects of our surrounding circumstances which tend to give rise to and sustain some beliefs but not others.<sup>42</sup> We can, for example, choose to attend church services in an attempt to promote in ourselves a belief in that church's teachings. This might explain at least in part Sonu Bedi's observation that, "as an empirical matter individuals do convert [and] leave particular faiths."<sup>43</sup> The second locus of control governs the extent to which we exercise or apply our beliefs in reasoning and behaviour.<sup>44</sup> While there is "an habitual flow" between holding a belief and "taking it to be true," in some instances individuals can voluntarily stem

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<sup>40</sup> Bishop, *Believing by Faith*.

<sup>41</sup> Heal, "Belief," 47.

<sup>42</sup> Bishop, *Believing by Faith*, 31; Carl L. Bankston III, "Rationality, Choice and the Religious Economy: The Problem of Belief," *Review of Religious Research* 42, no. 4 (2002): 317; Paul Bou-Habib, "Locke, Sincerity and the Rationality of Persecution," *Political Studies* 51(2003): 615-16.

<sup>43</sup> Bedi, "Debate: What Is So Special About Religion?," 236. See also Bankston III, "Rationality, Choice and the Religious Economy," 313; James V. Spickard, "Rethinking Religious Social Action: What Is "Rational" About Rational-Choice Theory?," *Sociology of Religion* 59, no. 2 (1998): 103.

<sup>44</sup> Bishop, *Believing by Faith*, 37-41.

that flow.<sup>45</sup> For example, an individual might have little control over believing that war is wrong but, in theory, she could very well choose not to apply her belief if conscripted.

Further, electing not to apply a belief in action may ultimately cause the individual to cease holding the belief altogether. It is clear that there is a strong pull to “take” as true, beliefs which are “held” as true. That is, one is drawn to act consistently with what one believes. However, the reverse also applies. Cognitive dissonance theory shows that often where one chooses, or is persuaded, compelled or forced, not to “take” a belief as true in application, one may ultimately stop “holding” it to be true altogether. For example, Elizabeth Harmer-Dionne presents a case study showing that Mormons lost their belief in polygamy because it became too costly under state law.<sup>46</sup> Because continuing to act contrary to their beliefs was “painful and difficult”, the Mormons eventually came to modify their belief so as to bring it into harmony with the actions they are legally obliged to take.<sup>47</sup> A similar process may have been involved in the fluctuation of pacifist thought in Quaker communities.<sup>48</sup>

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<sup>45</sup> Ibid., 41.

<sup>46</sup> Interestingly, Harmer-Dionne observes that some costs and challenges can serve to *encourage* religious belief, a point echoed in Steve Bruce, “Religion and Rational Choice: A Critique of Economic Explanations of Religious Behaviour,” *Sociology of Religion* 54, no. 2 (1993): 196, 201. However she argues “at a certain critical juncture, the opposition becomes too great” (Elizabeth Harmer-Dionne, “Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction,” *Stanford Law Review* 50, no. 4 (1998): 1309-10). On cognitive dissonance, see also Hood, Hill, and Spilka, *The Psychology of Religion*, 220; Stephen T. Davis, “Pascal on Self-Caused Belief,” *Religious Studies* 27, no. 1 (1991): 31n7 and Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006), 61.

<sup>47</sup> Harmer-Dionne, “Once a Peculiar People,” 1315. For more on Mormons’ salvational belief in polygamy see chapter two, note 6 and accompanying text.

<sup>48</sup> Peter Brock explains a belief in pacifism disappeared for a time in France and Germany because of the burdens of compulsory conscription. More generally, the pacifist case demonstrates that beliefs can fluctuate in response to a variety of social factors. Interestingly, resistance to warfare lost its vital importance for Quakers in Britain and America during the

These are important points to recognise. As John Bishop argues, this indirect role of volition in believing “meets the control condition for responsibility.”<sup>49</sup> Beliefs require endorsement – they become relevant only when the believer not only “holds” them to be true, but actively chooses to “take” them as true in her reasoning.<sup>50</sup> This helps us to understand our inclination, as Peter Jones puts it, to “hold people responsible for what they believe, even though it would make no sense to hold them similarly responsible for their gender or ethnic origins.”<sup>51</sup> Thus, for example, we might condemn an individual for her racist views insofar as she openly acts on them or fails to make an effort to alter her prejudicial way of thinking. As Bhikhu Parekh notes, “[i]dentity involves choice in the sense that we deliberate and decide whether to define ourselves as, and seek to become, this or that kind of person.”<sup>52</sup> In the case of religion, Parekh accepts that belief “involves judgment, choice and decision, and hence reason and personal responsibility.”<sup>53</sup>

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1800s for quite the opposite reason to that which lead to its deterioration in France and Germany – without compulsory conscription, Quakers no longer had a policy to resist directly. Brock also contends that Mennonite resistance in France disappeared for a time but in this case, the change was mostly due to acculturation to militarism, rather than social pressure (Peter Brock, *The Roots of War Resistance: Pacifism from the Early Church to Tolstoy* (Nyack, NY: Fellowship of Reconciliation, 1981), 58, 31).

<sup>49</sup> Bishop, *Believing by Faith*, 38.

<sup>50</sup> Phillips, "'Really' Equal," 27-28. This also seems to be Barry's point. It is also, perhaps, the thinking behind US decisions such as *Reynolds v United States* 98 U.S. 145 (1878) which drew a similar distinction between holding a belief and applying it in practice, claiming that only action is illegal and the believer remains free to hold the original belief upon which it was based (see, Harmer-Dionne, "Once a Peculiar People," 1301-03).

<sup>51</sup> Peter Jones, "Beliefs and Identities," in *Toleration, Identity and Difference*, ed. John Horton and Susan Mendus (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 1999), 70. Bradney makes the same point when he notes that “hard choices are still choices. In this, religion differs from race” (Bradney, *Law and Faith in a Sceptical Age*, 93).

<sup>52</sup> Parekh argues that psychological harm approaches do not just seek to redistribute benefits. Rather, they respond to a wider variety of social harms in their different manifestations (Parekh, *A New Politics of Identity*, 11).

<sup>53</sup> *Ibid.*, 334.

But to all of the above, there remains an important caveat. While one can increase or decrease the probability of holding a particular belief by manipulating her surrounding circumstances, her best efforts might nevertheless fail. Despite some degree of indirect control over belief, it is ultimately impossible to will oneself to believe something. Some sociologists argue that beliefs become 'reified' over time so that individuals no longer perceive them to have been chosen and simultaneously become less well disposed to acquiring new beliefs.<sup>54</sup> This might explain why in many instances people fail to bring about beliefs which they have attempted to acquire.<sup>55</sup>

One of the strengths of psychological harm approaches is that they warn us against unduly emphasizing the level of volition inherent in believing and remind us of the limitations involved therein. It seems quite possible that psychological harm might result from contravening even beliefs that admit some degree of choice, if they are a matter of strong enough attachment to the individual who holds them. That is to say, the presence of the limited level of volition I have described is unlikely to make beliefs less painful to contravene.<sup>56</sup> If, for some reason, the belief is central enough to the individual's core sense of identity, it might not matter whether that individual has some theoretical physical ability to contravene the belief. The supposed 'choice' which the Sikh faces here is one between complying with his identity-constitutive belief and contravening it, which may cause him some psychological damage. It is therefore both difficult to see how this can be considered a choice in any significant sense and possible to identify why the constraints faced might deserve to be alleviated through exemptions.

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<sup>54</sup> Bruce, "Religion and Rational Choice," 198-99, 204; Bankston III, "Rationality, Choice and the Religious Economy," 320.

<sup>55</sup> Stephen Davis gives an account of a student (the son of a Christian minister) who genuinely desired to believe in his parents' religion, but could do nothing to shake his scepticism (see Davis, "Pascal on Self-Caused Belief," 27).

<sup>56</sup> Parekh, *A New Politics of Identity*, 44.

There is also an additional reason for believing the distinction between the Sikh and the woman to be illusory. Upon a closer examination, what the cases of the Sikh child and the woman have in common is that they are about differences between social norms and their professed beliefs.<sup>57</sup> Raising children is considered a choice in today's society. Women might *tend* to have children and to do so at a certain time, but a woman can equally choose to delay starting her family, not to have children at all, to share child-minding duties more equitably with another parent or to simply accept the burden of her choices on her career. Viewed in this manner, the apparent difference between the case of the woman and that of the Sikh begins to look less obvious. In fact, many of the problems that people face as a result of other categories of identity ultimately stem from a desire to act in accordance with the socially prescribed norms of others who fall into that identity category. None of this is to say that the burdens faced by the woman are not real. Rather, the point is that the Sikh is no less constrained.<sup>58</sup> Both seek the alleviation of barriers which are put in place by a society that is culturally biased towards those in positions different to their own.

Finally, let us return to the question with which I began this discussion. Does lack of choice provide a reason for supposing that a belief is likely to be more centrally important to one's identity? The above paragraphs certainly give reason to suggest that it might, but any conclusions here should not be overstated. It does not follow from the mere fact that something is difficult to change that it is therefore

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<sup>57</sup> Jonathan Quong argues that it is important to consider the extent to which society impedes an individual's opportunity to *combine* different aspects of her identity, for example her chosen profession and her core beliefs (Quong, "Cultural Exemptions, Expensive Tastes, and Equal Opportunities," 64).

<sup>58</sup> Appiah, *The Ethics of Identity*, 94-95. Appiah observes that the Sikh is disadvantaged because most others do not believe what his community believes. This point is also implicit in Tariq Modood's observation that, not only does a Muslim not choose to be born into a religious family, but no one chooses to be born into a community in which being or appearing to be a Muslim puts one at a disadvantage (Modood, "Muslims, Racial Equality and Secularism," 121).

important.<sup>59</sup> In many cases it might be, but not always. Recall that the psychology of believing I have outlined applies to *all* beliefs on all manner of topics, however trivial. Further, as Peter Jones observes, “beliefs which people acquire or revise during adulthood may be no less important for their identities...even if we were to allow that people’s beliefs could be chosen...it would not follow that those chosen identities should command less by way of concern and respect from us.”<sup>60</sup> A lack of volition may well be important, but taken alone it is not a determining factor.

What other arguments might be used to make the case that religious beliefs are especially important to individuals? One possible response is to cite the view that religion provides a set of overarching principles which guide the believer in all areas of her life. Peterson et al observe that for a sincere religious believer, “her beliefs are “fundamental” in the sense that they provide the basic, overarching guidance for the way she lives her life; they establish her directions, her goals, and her reason for living.”<sup>61</sup> Similarly, Bhikhu Parekh notes that for religious people, “religion is the centre of their life and the source of their guiding principles. They see other identities in terms of it and determine their significance and norms accordingly.”<sup>62</sup> The reason that religion is different is because it has something to

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<sup>59</sup> Hilde Lindemann Nelson notes two different kinds of change which identities regularly undergo: catastrophic change (for example, through religious conversion or the birth of a child) and gradual change (through aging, education or travel). See Hilde Lindemann Nelson, *Damaged Identities, Narrative Repair* (Ithaca and London: Cornell University Press, 2001), 87. Also see, Festenstein, *Negotiating Diversity*, 27 (“Yet the premiss that what is fixed and unchanging about a person is necessarily of particular importance seems doubtful (consider, say, shoe size)”).

<sup>60</sup> Peter Jones, “Beliefs and Identities,” 70-71.

<sup>61</sup> M. Peterson et al., *Reason and Religious Belief: An Introduction to the Philosophy of Religion*, 3rd ed. (New York: Oxford University Press, 2003), 47. See also, Conkle, “Toward a General Theory of the Establishment Clause,” 1164.

<sup>62</sup> Parekh, *A New Politics of Identity*, 21. Matthew Festenstein makes a similar point, noting that one method that is used to assess the significance of that characteristic to personal identity is “observing the extent to which other traits depend on it: that is, the range of dispositions, habits, beliefs, desires, emotional responses, attitudes” that are affected by a particular personal characteristic; he also notes that dominance over other personal characteristics might be a

say about all aspects of life in a manner in which identities such as vegetarianism, pacifism or a passion for viewing football do not. As a belief-*system*, religion purports to be applicable to situations that lie beyond the scope of isolated non-religious moral beliefs and insofar as it is a *moral* belief-system of significant depth, religion professes to guide highly important matters, including beliefs and behavioural norms associated with other aspects of identity.<sup>63</sup>

Of course, religion is unlikely to provide the guiding life principles for all believers.<sup>64</sup> But let us for the moment take the set of believers to which this description *does* apply and consider whether the psychological harm approach can be used to construct a case in favour of exemptions for such people. First, we might ask whether people *ought* to treat some aspects of their identity as overriding other aspects. Parekh himself provides the argument. He holds that different aspects of an individual's personal identity are relevant to different occasions. As such, it is improper to apply a religious worldview in such a manner that it overrides another aspect of identity that is more appropriate to the circumstances at hand. For example, he argues that a Christian teacher in a state school is first and foremost a *teacher* in that context. As a Christian, she may be entitled to certain accommodations such as time for prayer, but as a teacher she should not disapprove of non-religious students, teach religious content or report on adulterous colleagues. That would be an inappropriate subordination of her role as

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relevant consideration (Festenstein, *Negotiating Diversity*, 11-12). Festenstein is here drawing on the arguments set out in Rorty and Wong, "Aspects of Identity and Agency," 20. See also Jurgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14, no. 1 (2006): 8.

<sup>63</sup> See Parekh, *A New Politics of Identity*, 130.

<sup>64</sup> Steven Smith notes that even for sincere and devoted religious believers (and we have already noted that not all believers qualify as such – see note 22 above) many will fall short of realising a commitment to their religion in the overarching sense which this argument assumes. Instead, their religious commitment and the idea that religion is especially important "should be understood as an *aspirational* statement" (Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 221).

a teacher to her role as a Christian.<sup>65</sup> Thus in some situations it is improper to claim that religious beliefs form an overarching belief system to which other aspects of identity must defer. If it is wrong to apply religious beliefs as overarching guiding principles in this manner, then surely this cannot provide our reason for finding religious beliefs especially deserving of exemptions. To do so would involve directly facilitating behaviour which was morally inappropriate.

Certainly, however, this concern does not apply to all religious beliefs in all situations. Where there is no direct incompatibility between religious and other aspects of identity, religious people are quite justified in interpreting any situation which they face primarily through a religious lens. If religious people tend to act in this manner, then that fact might provide evidence to support the contention that religious identities are especially important for them.

At this point it is worth considering whether or not empirical research supports the moral argument here. In the first instance, there appear to be at least some reasons for doubt. Salwa Ismail argues that it is important to place Islam within its social context, rather than simply privileging it over class, nation or gender in constituting the identity of Muslim individuals, as many scholars do.<sup>66</sup> To illustrate her view she outlines a number of case studies, including one in which religious edicts pertaining to divorce were interpreted in entirely opposing terms by upper and lower class Muslims.<sup>67</sup> Ismail finds that even where the individuals in her studies used religion to determine what conduct was appropriate, their interpretations of religious dictates in turn were guided by other social factors.<sup>68</sup>

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<sup>65</sup> Parekh, *A New Politics of Identity*, 21-23. Tariq Ramadam makes the same point – “One must resist the temptation to reduce one’s identity to a single dimension that takes priority over every other” – in Tariq Ramadan, *What I Believe* (Oxford, New York: Oxford University Press, 2010), 37.

<sup>66</sup> Salwa Ismail, "Being Muslim: Islam, Islamism and Identity Politics," *Government and Opposition* 39, no. 4 (2004): 615, 617.

<sup>67</sup> *Ibid.*, 620.

<sup>68</sup> *Ibid.*, 620, 616-17.

That is, the content of their individual religious beliefs in particular instances (for example, regarding divorce) were shaped in part by other aspects of their identities such as class. This suggests that it is overly simplistic to generalise that religious beliefs tend to override other important aspects of identity, even if many religious people conscientiously believe that this is the case for them. Tariq Ramadan argues that “[t]here is no faith or religion without culture.”<sup>69</sup> It seems that just as religious ideas shape the way in which people view other aspects of identity, the reverse may often be equally true.

This critique nevertheless misses the mark as a rebuttal of the overarching principles interpretation of religious belief. Targeting the intricate reality of religious interpretation is less important than considering how people *feel* about their beliefs. In reality, no matter what complex factors colour their religious interpretations, the point is that individuals in these cases felt that they were applying their overriding religious beliefs, not their overriding class concerns.<sup>70</sup> Religion continued to be the source of their guiding principles.

But an effort to distinguish religion invites us to press a little further here. We can easily name some overarching belief systems of a non-religious nature with which individuals might associate strongly. Socialism, for example, provides a moral belief-system and its ideals can guide many areas of a socialist’s life.<sup>71</sup> Bernice Lott notes that “[s]ome children brought up by left-wing parents have referred to

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<sup>69</sup> Ramadan, *What I Believe*, 43.

<sup>70</sup> Ismail explains that “...as frames of reference for individual and social relations, these interpretations [of religious law] are conditioned by other social practices and situational ethics,” making it clear that the in that (and indeed, the other cases cited) individuals felt that they were applying their religious beliefs to the problem at hand (Ismail, “Being Muslim,” 620).

<sup>71</sup> There are of course notable differences between socialism and religious belief-systems – most prominently the authoritative structures behind the beliefs. This point will be raised in Chapter Two, where transcendentalism is addressed. For the moment, it is fair to conclude that religions and philosophical ideologies do not differ in the extent to which they may form overarching systems of guiding moral principles.

themselves as “red-diaper babies” and consider their family identity to be defined by politics, rather than the more traditional categories of religion or ethnicity.<sup>72</sup>

One difference with religion here is that religious beliefs often apply to a numerous aspects of everyday life – regulating clothing, consumption of food and drink and intimate interpersonal relationships amongst other things. For many religious individuals this brings their beliefs constantly and practicably into the centre of their daily realities. Individuals who are consistently living through their beliefs in this manner may be assumed to consider them more centrally important to their identities than those who subscribe to less extensive belief-systems. Matthew Festenstein notes that the “extent to which [an aspect of personal identity] ramifies across distinctive spheres, such as work and leisure, public and private spheres, and across different types of relationships” may be cited to support the view that the relevant personal characteristic is especially important to an individual’s central self.<sup>73</sup>

This is an important point to observe, as it serves as a basis for distinguishing religious moral codes from non-religious belief-sets such as socialism. But this observation also serves to highlight the similarities between religious beliefs and cultural beliefs.<sup>74</sup> Communitarians point out that all individuals are deeply embedded within their cultures.<sup>75</sup> Social norms and ideas within ethnic and other cultural groups constrain and facilitate behaviour across a wide range of daily practices, both in ways to which individuals direct conscious attention and others of which they remain largely unaware. It is therefore difficult to maintain the claim

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<sup>72</sup> Bernice Lott, *Multiculturalism and Diversity: A Social Psychological Perspective* (West Sussex, UK; Malden, MA: Wiley-Blackwell, 2010), 111.

<sup>73</sup> Festenstein, *Negotiating Diversity*, 11-12. Festenstein is paraphrasing the argument set out in Rorty and Wong, “Aspects of Identity and Agency,” 20.

<sup>74</sup> “Culture is a medium through which we live our lives, a dimension of our subjectivity as social agents. It shapes and forms the myriad details of our beliefs, attitudes, expectations and behaviour,” says Horton, “Liberalism and Multiculturalism: Once More Unto the Breach,” 32-33.

<sup>75</sup> Festenstein, *Negotiating Diversity*, 9.

that religious beliefs are unique in the range of everyday practices that they impact upon. Again, the frequent difficulties discerning the boundaries between religion and culture are informative here. Brian Barry argues that a Protestant reluctance to “force tender consciences” means that there is often more sympathy for religious claims than cultural claims. In the US, this is reinforced by constitutional clauses entrenching religious freedom. These two factors make exemption claims based upon religion more likely to succeed, thereby “encourag[ing] the packaging of custom as religion.”<sup>76</sup>

Another dimension that governs the entire frame through which we live our lives is gender. Our gender impacts upon how we dress and speak, what leisure activities we pursue and even what we eat.<sup>77</sup> Insofar as my analysis is concerned with beliefs, we might say that for a woman these beliefs *derive from* an aspect of her identity (her gender), whereas for religious people, they *constitute* their identity, in other words, they are central *requirements* of it. For example, it may be that being a Christian at least implies a belief in Jesus Christ. By contrast, being a woman does not necessarily say anything about childraising, hosting dinner parties or wearing dresses.<sup>78</sup> What is attractive about this distinction is that it accords with the view that a woman does not stop being a woman no matter what she believes about any aspect of her life. However, religion is much more obviously and more centrally about *belief*. If a religious person does not act in accordance with her central religious beliefs, she may lose her religious identity.

At first glance, this argument may favour affording greater attention to religious beliefs. If we consider the potential for psychological harm, we can surely agree that such harm is likely to be greater when a person’s core identity is effectively destroyed through the machinery of a law. However, it is also possible to

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<sup>76</sup> Barry, *Culture and Equality*, 33.

<sup>77</sup> I do not mean to suggest that it has the same impact for everybody. But for many people it will have an impact upon a number of the everyday aspects of the lives I have listed.

<sup>78</sup> In fact, some might want to push this further and argue that there are no particular beliefs which are necessary in order to satisfy an ethnic identity ascription either.

oversimplify this argument. We have said that being a Christian implies a belief in Jesus Christ. But is there anything much more that being a Christian *necessarily* implies? For some, their Christian identity, including their belief in Jesus Christ might be sustained by prayer, church attendance, taking Sunday as a day of rest, and complying with Jesus' pacifist stance, but this is not true of all Christians. Some Muslim women may feel that a headscarf is necessary to their religious identity but others, including some who wear headscarves, disagree.<sup>79</sup> While there may be no equivalent core belief that is associated with gender or cultural identity, it is highly likely that for many individuals within these groups, certain beliefs and actions do serve to sustain their central identities. For some individual women, having children may be central to their secure sense of womanhood, even though many other women whether or not they have children do not feel the same way.<sup>80</sup> For the former group, while they may not feel that they cease to be women if they do not have children, they may feel considerably less valuable as women in this situation due to their beliefs about raising children.<sup>81</sup>

It seems therefore that beliefs do play a vital role at the centre of many aspects of identity for many individuals. This includes identities other than the philosophical and religious identities within which the centrality of beliefs is rather more obvious. Theorists commonly note the belief-generating function of a wide variety of identity attributes as well as the correlation between maintaining an identity and pursuing action in compliance with it.<sup>82</sup> What this means is that all these central

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<sup>79</sup> For a detailed discussion on veiling in all its diversity, see Fadwa El Guindi, *Veil: Modesty, Privacy and Resistance* (Oxford, UK; New York, NY: Berg, 1999). Also see Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton and Oxford: Princeton University Press, 2002), 94-100.

<sup>80</sup> Nancy Chodorow, "Preface to the Second Edition," in *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley and Los Angeles: University of California Press, 1999), ix, xiii.

<sup>81</sup> For some, the same observation could probably be made about seemingly more trivial matters such as the ability to dress in a "feminine" manner.

<sup>82</sup> Rorty and Wong, "Aspects of Identity and Agency," 26; Nelson, *Damaged Identities, Narrative Repair*, 95.

personal ascriptions, have an equally compelling case for greater deference by the legislature. Where existing laws are biased against their deeply important beliefs, psychological harm approaches provide a case for exemptions to be created in order to remedy the situation.

It might be argued that religious belief is different because it is a belief *in* something. Some philosophers, following the work of H.H. Price, make this distinction.<sup>83</sup> While the non-religious conscientious objector to war believes *that* war is wrong, the Quaker believes, first and foremost, *in* God. Belief *in* God involves not only the belief *that* God exists but according to Price's thesis, it also necessarily includes an "evaluative" or "affective" element, "[s]omething like esteeming or trusting," or a certain "warmth" or "pro-attitude" towards the God in which one believes.<sup>84</sup> John Heal notes that due to the additional evaluative element this type of belief may be "in general, less susceptible to alteration in the face of unfavorable evidence."<sup>85</sup> An emotive bond forms between the believer and her belief which makes her particularly resistant to any rational arguments presented in an attempt to alter her belief. Thus, if a belief in God "may survive epistemic buffeting" to a greater degree than belief *that* something is true, then an individual's attempt to change such a belief may be even less possible and acting inconsistently with it might be even more difficult.<sup>86</sup> Further, the "warmth" associated with the belief, suggests that it may be of greater importance to the individual holding it.<sup>87</sup> Thus Price's thesis may provide a compelling reason for

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<sup>83</sup> See, H. H. Price, "Belief 'in' and Belief 'That'," *Religious Studies* 1, no. 1 (1965): 5-27; Heal, "Belief in and Belief That," 49; Price's thesis is also cited favourably in Louis P. Pojman, "Belief and Will," *Religious Studies* 14, no. 1 (1978): 4.

<sup>84</sup> Price, "Belief 'in' and Belief 'That'," 12, 25-27.

<sup>85</sup> Heal, "Belief in and Belief That," 49.

<sup>86</sup> *Ibid.*, 49.

<sup>87</sup> Conkle, "Toward a General Theory of the Establishment Clause," 1164.

taking seriously beliefs which comprise an evaluative, trust-like component. This idea is similar to that referred to by psychologists as “attachment theory.”<sup>88</sup>

Psychologists use the term “attachment theory” to refer to the extreme comfort which the presence of God or another divine authority affords to religious believers. A divine authority might become “an attachment figure, who serves alternatively as a haven and as a secure base from whom separation would cause considerable distress.”<sup>89</sup> Gordon Kaufman claims as a theologian that God provides “an absolutely adequate attachment-figure” because God does not suffer from human fallibility.<sup>90</sup> Human beings might seek comfort merely in the knowledge that they are watched over by a loving God who is unfailingly with them.<sup>91</sup> Moreover, while attachment is important at all times, it appears to increase at times of great stress.<sup>92</sup> Gordon Allport reports from his psychological studies that in times of particular distress “[s]ometimes a human bond will suffice, more often it will not.”<sup>93</sup> If religion is of special importance during difficult times then obstructing a religious adherent from engaging fully with her religious beliefs could cause particular

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<sup>88</sup> Initially introduced by John Bowlby in relation to the bond which forms between infants and their primary caregivers, more recently psychologists including Lee Kirkpatrick, have applied the thesis to the relationship religious adherents maintain with theistic beings. See generally, Lee A. Kirkpatrick, “An Attachment-Theory Approach to the Psychology of Religion,” in *The Psychology of Religion: Theoretical Approaches*, ed. Bernard Spilka and Daniel N. McIntosh (Boulder, Colorado; Oxford, UK: Westview Press, 1997), 114-33; Hood, Hill, and Spilka, *The Psychology of Religion*, 101-03; Gordon D. Kaufman, *The Theological Imagination: Constructing the Concept of God* (Philadelphia, Pennsylvania: Westminster John Knox Press, 1981), 58-79.

<sup>89</sup> Kirkpatrick, “An Attachment-Theory Approach to the Psychology of Religion,” 117.

<sup>90</sup> Kaufman, *The Theological Imagination*, 67, see also 60.

<sup>91</sup> Kirkpatrick, “An Attachment-Theory Approach to the Psychology of Religion,” 121.

<sup>92</sup> Amelie Rorty and David Wong cite the dominance of a trait in “situations that require coping with stress or conflict” as one method that is used to identify a certain personal characteristic as centrally important to identity (Rorty and Wong, “Aspects of Identity and Agency,” 20). See also Festenstein, *Negotiating Diversity*, 11-12.

<sup>93</sup> Allport, *The Individual and His Religion*, 51; Kirkpatrick, “An Attachment-Theory Approach to the Psychology of Religion,” 118.

trauma.<sup>94</sup> This observation might be particularly important for members of religious minorities and immigrant communities who often struggle to accustom themselves with, or suffer overt hostility from, their new society. Denying the exemptions that these people need to express their commitment to the divine figure(s) to which they turn to cope with this stressful situation seems particularly cruel.<sup>95</sup>

However, the range of beliefs to which these arguments would logically apply is again too expansive. One might accept Kaufman's contention that a divine being forms the "ultimate" infallible attachment. But crucially making such a limitation in order to single out the importance of religion operates at the cost of excluding nontheistic religions such as Buddhism and Taoism, which do not centre upon any such divine being.<sup>96</sup> But is there any reason to focus only on those who believe in God anyway? Those who do not believe in a divine authority figure, as well as those who believe but are not strongly attached, may depend upon other attachment figures to provide the same comfort in their lives. As Kirkpatrick

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<sup>94</sup> See Kirkpatrick, "An Attachment-Theory Approach to the Psychology of Religion," 118-20.

<sup>95</sup> A brief note as to the scope of this argument is worth making. It seems that it would only provide a reason to support exemptions for those *core beliefs that sustain the relationship* with the relevant attachment figure and would *not* apply to any beliefs that were not involved in that process. I do not want to overemphasise this point as I think that both theoretically and practically the difficulties inherent in formulating this distinction are immense.

<sup>96</sup> It seems that many psychologists would make a further limitation here. They insist that the attachment depends upon conceptions of a "Benevolent Deity," one who is "'comforting," "loving" and "protective.'" Consequently, a significant number of religious traditions and individual religious beliefs, such as those involving more malevolent deities will fail to be captured by the attachment theory (Kirkpatrick, "An Attachment-Theory Approach to the Psychology of Religion," 123). For this reason, the theory has been widely accused of containing an inherent Western bias (Hood, Hill, and Spilka, *The Psychology of Religion*, 102). I find it entirely possible to conceive of somebody forming a strong attachment to a malevolent deity, in much the same way as some do to abusive parents. Indeed, the literature notes that there is a correlation between the two (Kirkpatrick, "An Attachment-Theory Approach to the Psychology of Religion," 129). But the critique still stands insofar as it is difficult to see why exemptions would be awarded to reinforce that particular type of attachment. This is especially true if the exemptions are justified for their role in alleviating psychological harm. In any case, the point becomes irrelevant because I consider the logical ambit of the arguments to be wider anyway.

observes, there are many things to which one might turn for security and religion is but one possibility.<sup>97</sup> For some individuals, ideas and theories might provide them with a strong degree of comfort. One can imagine someone taking comfort in her sense of doing what is morally right when she opposes enlistment in the military or protests against the felling of a forest of trees.

Similarly, in discussing the concept of evaluative “beliefs in,” Price notes an “enormously various” range of things in which one might believe in an affective manner including people, objects, institutions, procedures, theories and moral ideals.<sup>98</sup> Thus a non-religious belief *that* war is wrong may constitute a “belief in” a moral ideal and can be rephrased as a “belief *in* the immorality of war” or a “belief *in* pacifism.” This may be just as affective and binding as a religious “belief in” a God who forbids warfare. What these various “beliefs in” hold in common is a certain resilience to rational or evidential challenge due to the degree of warmth, trust, esteem or general attachment that is associated with the belief.<sup>99</sup>

Religious beliefs are clearly not alone in exhibiting an emotive bond. However, highlighting this affective element does in general provide a powerful reason to suppose that beliefs of this nature are important. Emotion may form a greater degree of attachment between the individual and her beliefs in some instances than is generated by mere rational acceptance of a particular contention. Breaking this connection may therefore be more psychologically damaging than in the case of beliefs to which one does not have such an emotional bond.

In this section, I have found a number of reasons for supposing religion to be especially central to identity and therefore several compelling reasons for us to

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<sup>97</sup> Kirkpatrick, "An Attachment-Theory Approach to the Psychology of Religion," 121.

<sup>98</sup> Price, "Belief 'in' and Belief 'That'," 5-9, 12-13, 15.

<sup>99</sup> Holding more strongly to a belief than is warranted by the rational arguments in its favour cannot be viewed as a habit that is peculiar to religious believers. For example, one can imagine someone reading compelling scientific arguments proclaiming that drinking chicken soup will neither cure, nor relieve the symptoms of a cold, yet continuing to prescribe her ailing family members with the supposed remedy all the same.

worry about trampling on religious beliefs. However, I have also found equally compelling reasons to hold the same concern in relation to a variety of other beliefs and identity attributes. With these conclusions in mind, I now turn to consider the difference-based psychological harm approach.

### **The Difference Approach**

#### *Psychological Harm from Social Rejection*

The second variation of the psychological harm argument supplements an additional concern onto that which has already been discussed. It contends that harm is caused by *society's rejection* of a centrally important aspect of a person's identity. Beliefs are central to identities, and therefore, if we value one's identity, we must not seek to undermine the beliefs that sustain it.<sup>100</sup> This is separate from the extreme compliance burden discussed thus far. Here an additional element is at stake, namely the need to have one's identity publicly accepted and not "marginalized, excluded and disregarded."<sup>101</sup> Thus, the argument is that one suffers not only by being untrue to one's central identity in isolation, but also because the transgression has been demanded by others in disregard of that central identity.

This difference approach flows from an emphasis upon the social construction of identity. Charles Taylor argues that individuals construct and maintain their identities through dialogue with others in society.<sup>102</sup> Tariq Ramadan observes that "one defines one's identity by reaction, by differentiation, in opposition to what

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<sup>100</sup> This formulation of the argument is set out in Jones, "Beliefs and Identities," 66-67.

<sup>101</sup> Jonathan Seglow, "Theorizing Recognition," in *Multiculturalism, Identity and Rights*, ed. Bruce Haddock and Peter Sutch (London and New York: Routledge, 2003), 83.

<sup>102</sup> Taylor, "The Politics of Recognition," 32-37. See also Parekh, *A New Politics of Identity*, 49; Modood, *Multiculturalism*, 37; Calhoun, "Social Theory and the Politics of Identity," 20; Nelson, *Damaged Identities, Narrative Repair*, xi, 74-82.

one is not, or even against others.”<sup>103</sup> The messages that an individual receives from those around her will impact upon the manner in which she defines herself. A secure sense of personal identity is vitally important for psychological well-being.<sup>104</sup> However, such a secure sense of self is constantly under pressure from the society within which it is constructed. Just as our psychological well-being is advanced when others positively affirm who we are, it can be damaged when they ignore or misrecognise us.<sup>105</sup> In Taylor’s words, this “can be a crippling form of oppression, imprisoning someone in a false, distorted, reduced mode of being.”<sup>106</sup>

The arguments set out here are particularly prevalent in the literature on the politics of identity and associated political movements.<sup>107</sup> Claimants seek to reclaim their social worth and assert their equal legitimacy *within society*. In this context, the argument for exemptions arises for two reasons. First, when religious groups and their members perceive that their beliefs are being ignored in the creation and enforcement of the rules and regulations of society, it may generate the feeling that their religious identity is being judged to be inferior to the dominant religion or to a secular identity.<sup>108</sup> Avigail Eisenberg explains that the health of one’s identity largely depends upon the fair treatment of differences by societal institutions that

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<sup>103</sup> Ramadan, *What I Believe*, 35; Kathryn Woodward, *Identity and Difference* (London: Sage in association with the Open University, 1997), 35.

<sup>104</sup> Parekh, *A New Politics of Identity*, 49; Jones, "Beliefs and Identities," 71 (“having a secure sense of identity and receiving the respect of others for that identity is often reckoned essential to people’s self-esteem and their general psychological well-being”).

<sup>105</sup> Festenstein, *Negotiating Diversity*, 55.

<sup>106</sup> Taylor, "The Politics of Recognition," 25.

<sup>107</sup> See generally *ibid.* For a good summary of the politics of recognition see Festenstein, *Negotiating Diversity*, 52-60. See also Mary Bernstein, "Identity Politics," *Annual Review of Sociology* 31(2005): 47-74.

<sup>108</sup> Parekh argues that two main groups contest social systems of identity, “those whose identities are not recognised – that is, accepted as legitimate and respected by it; and those whose identities are recognized but marginalized or inferiorized” (Parekh, *A New Politics of Identity*, 16-17).

“is predicated, in part, on whether institutions are sensitive to differences.”<sup>109</sup> As identity theorists describe, failure to display such sensitivity may negatively affect people’s self-confidence and self-worth, causing psychological harm.<sup>110</sup> While groups which are subjected to generalised hostility probably require significant changes in order to gain a sense of due social recognition, exemptions may be viewed as a first step in the process of reform.<sup>111</sup>

Advocates of the politics of identity do not typically limit the application of this approach to religious beliefs alone.<sup>112</sup> However, a religion-centred argument has featured in some US jurisprudence, where it is referred to as the “non-alienation” rationale.<sup>113</sup> According to this rationale, failing to allow religious freedom threatens causing alienation, offence and ultimately “quiet withdrawal” of upset citizens from their political community due to “their sense of second-class status.”<sup>114</sup>

There are different ways in which arguments centring on difference and marginalisation can be related to the exemptions issue. Consider the position

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<sup>109</sup> Avigail Eisenberg, "Identity and Liberal Politics: The Problem of Minorities within Minorities," in *Minorities within Minorities: Equality, Rights and Diversity*, ed. Avigail Eisenberg and Jeff Spinner-Halev (Cambridge: Cambridge University Press, 2005), 257.

<sup>110</sup> Parekh, *A New Politics of Identity*, 49; Modood, *Multiculturalism*, 37; Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale University Press, 1989), 26. Nelson, *Damaged Identities, Narrative Repair*, xii; Taylor, "The Politics of Recognition," 32-37.

<sup>111</sup> Parekh, *A New Politics of Identity*, 31-32. An example of other policies is group-specific representation rights, as advocated by Iris Marion Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," *Ethics* 99, no. 2 (1989).

<sup>112</sup> This is highly apparent in the literature – gender, ethnicity and sexual orientation are amongst the aspects of identity which are discussed. See, for example, Bernstein, "Identity Politics," 47-74.

<sup>113</sup> Marshall, "Truth and the Religion Clauses," 249; Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 210-18. Smith lists cases in which this rationale has been asserted in notes 246-48. He argues that this approach is a recent response to the failings of the older civil strife argument, which concerned the potential for religious warfare, but here the “feared evil has been scaled down.”

<sup>114</sup> Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 210.

outlined by Daniel Conkle. He claims that if someone “suggest[s] that the person’s existing beliefs are deeply flawed and not entitled to respect, they therefore are suggesting that the person himself is deeply flawed and not entitled to respect.”<sup>115</sup> When particular beliefs are central to the identity of their holder, challenges to the validity of those beliefs can amount to an “assault on the person’s most fundamental sense of being.”<sup>116</sup> But does the simple failure to provide religious exemptions for a particular belief actually constitute an attack upon the constrained beliefs? If so, does this attack on beliefs constitute an attack upon the identity of the individual holding those beliefs so that she is warranted in feeling personal rejection?

A note regarding the usual pattern of belief-constraining legislation might cause us to hesitate before answering either question in the affirmative. Some legislation – of which headscarf bans provide a high profile example – are directly aimed at particular religious beliefs.<sup>117</sup> But most clashes between religious beliefs and legislation are not of that nature. School uniform legislation is aimed at restraining all manner of attire that students would otherwise wear in order to express their identities. Prohibition of marijuana says nothing about any particular group of users – it is aimed at curbing drug use in society at large. Both of these cases are typical of much legislation which impacts upon religious believers *incidentally* and is not specifically created in order to attack any one set of beliefs nor the believers holding them.

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<sup>115</sup> Conkle, "Toward a General Theory of the Establishment Clause," 1165, 1168.

<sup>116</sup> *Ibid.*, 1165-66.

<sup>117</sup> At times concern with matters such as national security is cited as the rationale and non-religious headgear such as balaclavas may also be covered by such bans. However legislation outlawing headscarves is usually interpreted as directly targeting Islamic headdress (see, CNN Wire Staff, "French Burqa Ban Clears Last Legal Obstacle," available online at CNN Online, <http://edition.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/?hpt=T2> (last accessed 18 December 2010)). Ahdar and Leigh observe that “France’s ban on the wearing of the *hijab* by schoolgirls is a reaction to the perceived threat posed by Islam in that nation” (Ahdar and Leigh, *Religious Freedom in the Liberal State*, 5).

We might suppose that in this latter range of cases, the believer's difficulty with the rule at hand is simply an unfortunate by-product of a general piece of legislation that cannot be said to infer any hostility on the part of society. Conkle, however, thinks that "[t]he community has shown a lack of regard for the individual by adopting policies that conflict with his most fundamental beliefs" and that this "may be viewed as an assault not merely on the person's beliefs, but on the person himself."<sup>118</sup> According to this view, the failure to accommodate religious beliefs amounts to treating the beliefs as unimportant and irrelevant. Social rejection or marginalisation of the believer is inherent in the refusal of the state or other rule-making body to recognise and respond to the dilemma with which it is providing her. The indirect nature of a law's negative impact does not necessarily mitigate against this feeling of rejection and therefore fails to alleviate the occurrence of psychological harm.

But let us consider the cogency of this argument a little further. Peter Jones identifies a certain tension between taking beliefs seriously and subscribing to the view that whenever a belief is considered to be of a lesser degree of importance than competing interests the individual holding the belief is being subjected to personal attack.<sup>119</sup> Although it is not difficult to understand that an individual may feel offended to be told that his or her beliefs are not sufficiently important to be facilitated by society, consider the manner in which beliefs are generally treated in social discourse. Beliefs, insofar as they are socially relevant, are subjected to debate and critique, with their validity, relevance and strength all tested. Jones argues that subjecting beliefs to this kind of debate shows that they are being taken

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<sup>118</sup> Conkle, "Toward a General Theory of the Establishment Clause," 1168. Paul Kelly and Susan Mendus agree that attacking a person's centrally important beliefs marginalises that person's identity and denies that person their due respect as an individual. See, Paul Kelly, "Liberalism, Secularism and the Challenge of Religion - Is There a Crisis?," in *Cultural Politics in a Global Age: Uncertainty, Solidarity and Innovation*, ed. David Held and Henrietta L. Moore (Oxford: Oneworld Publications, 2008), 127-28 and Mendus, "The Tigers of Wrath and the Horses of Instruction," 204 (Mendus here is writing about blasphemy).

<sup>119</sup> Jones, "Beliefs and Identities," 77-83.

seriously *as beliefs*, that is, as claims about the world, rather than mere private imaginings. Respecting the believer requires that beliefs be taken seriously in this manner.<sup>120</sup>

Peterson et al make a similar point. They insist that “evaluating persons’ truth-claims and morally relating to persons are separate issues.”<sup>121</sup> It is possible to disagree with what another holds true including on matters of religion without disrespecting that person. As Matthew Festenstein writes, “it is not obvious that respect for a person is necessarily displayed in deferring to whatever her cultural identity is taken to imply or require, rather than in criticizing or rejecting it.”<sup>122</sup> Indeed, in modern society this seems to be a reality that one must accept. Society debates competing beliefs and based on its discussion, some beliefs will win the day and others will be marginalised. The state cannot act consistently with the demands made by all members of society on the basis of their various conflicting beliefs. As Smith notes, the government “endorses free enterprise but not socialism, war against Iraq rather than continuation of non-military sanctions or pacifism, policies of natural resource development over certain kinds of environmentalist policies.” Clearly it is not only the religious whose beliefs fail to be recognised by society.<sup>123</sup> There is the potential for a great many people, not just the religious, to feel alienated or offended. While states clearly can, and often do, allow for some “exceptions to the rule,” the failure to do so does *not in and of itself alone* constitute an attack on one’s beliefs or identity. Thus an argument predicated on this basis needs to look a little further to explain why any particular set of socially disfavoured beliefs ought to be awarded exemptions on a difference-based

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<sup>120</sup> Ibid., 83. Indeed, a number of religious theorists very much agree with this argument, as will be shown in chapter three.

<sup>121</sup> Peterson et al., *Reason and Religious Belief*, 269, see also 75.

<sup>122</sup> Festenstein, *Negotiating Diversity*, 33. Further support for this view is found in Yossi Nehushtan, “Secular and Religious Conscientious Exemptions: Between Tolerance and Equality,” in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 265-66.

<sup>123</sup> Smith, “The Rise and Fall of Religious Freedom in Constitutional Discourse,” 211.

psychological harm rationale. Two routes are available by which we might do this.<sup>124</sup>

### *Establishing Social Rejection*

First, we could provide reasons why a religious believer – for example, a Jehovah’s Witness who objects to military service – suffers greater offence when her beliefs are rebutted than another with non-religious but equally strong moral beliefs. Smith argues that to maintain the position that religious believers suffer more in such situations is to raise “significant plausibility questions.”<sup>125</sup> He doubts that it is clear that “citizens who are communists, pacifists, or fervent environmentalists feel less alienated” than those who oppose state messages related to their religious beliefs.<sup>126</sup> I am not sure that I agree that it is entirely *implausible* to conclude that a religious believer might sometimes suffer more than another, but it seems to take us back to our earlier difficulties regarding how to determine the centrality of particular beliefs to identity. What follows from that discussion is that making a general proclamation one way or the other would be difficult without a significant degree of conjecture.

Second, we can instead focus on prevailing social conditions. From this perspective, measuring the effect of each individual law on a given set of believers is unnecessary. Rather, religious exemptions provide a cure, or at least a partial cure, for more *generalised* forms of hostility and rejection that religious believers might feel is levelled at them by society. If in general these citizens perceive that society is sending them negative messages about themselves on the basis of their religious affiliation, then this may magnify the impact of each instance in which their beliefs are perceived to be disregarded. Thus, it might be argued that requiring a Jehovah’s Witness to enlist would not necessarily be more offensive or alienating

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<sup>124</sup> At least, I will only consider two here. I also think there is a third argument, but I leave that to be discussed in Chapter Three.

<sup>125</sup> Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 211.

<sup>126</sup> *Ibid.*, 211.

than refuting a pacifist's case against war *but for* the existence of other social barriers regularly faced by the former group in many societies. Within this context the harms inflicted by laws that prohibit an individual from acting in accordance with her religious beliefs may be greater than simply frustrating her conscience. The additional effect of the prohibition in this case is to reinforce further the negative views of her identity which the individual sees projected by society. Real harm results because it can lead to "crippling self-images" that then wound self-respect.<sup>127</sup> This, essentially, is the basis for Taylor's concern with non-recognition and mis-recognition of identity in society.<sup>128</sup> If religious groups suffer from such misrecognition and awarding exemptions is a means of lessening its degree, then surely this provides a compelling argument in favour of religious exemptions.

At this point it is also worth noting that the extent to which a certain aspect of identity prompts the inclusion or exclusion of an individual in society might also be cited as evidence that the characteristic is centrally important to identity.<sup>129</sup> If social recognition is important to identity formation, then it makes sense that the personal attributes that mark an individual out as different from those around her may assume a greater importance to that person's self-perception.<sup>130</sup> Where an individual feels that an aspect of her identity is disrespected or the subject of social hostility that aspect of her identity may increase in personal relevance. Lott states that "[a] racist, sexist, anti-Semitic, or heterosexist event or series of events, in one's

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<sup>127</sup> Parekh, *A New Politics of Identity*, 49; Karst, *Belonging to America*, 26.

<sup>128</sup> Taylor, "The Politics of Recognition," 25.

<sup>129</sup> Hilde Lindemann Nelson argues that our identities are comprised not only of what we find important in ourselves, but also that to an extent "our identities are constituted by the content of *other* people's narratives – the features of our lives and ourselves that *they* care most about" in Nelson, *Damaged Identities, Narrative Repair*, 81. The same point is made by Amelie Rorty and David Wong and endorsed by Matthew Festenstein. See Rorty and Wong, "Aspects of Identity and Agency," 20 and Festenstein, *Negotiating Diversity*, 11-12.

<sup>130</sup> Jones, "Beliefs and Identities," 66 ("The very significance of 'identity' is itself contingent upon social circumstances. People will be more conscious of, and more concerned about their 'identities' if they are aware of and have contact with others who seem significantly different from themselves than if they appear to be members of a largely undifferentiated population").

neighborhood or workplace or city may turn a relatively dormant or low-strength identity into one with far greater salience.”<sup>131</sup> Thus focusing upon difference presents an additional argument to those already canvassed in the centrality section above. The fact that a particular identity attribute differentiates one from those around her may make it important to her identity. As an important aspect of identity, it may then be painful to contravene, as the centrality approach explains. However, accepting the progression from difference to centrality is not crucial to the argument here. Instead, the focus is on the more direct linkage between difference and psychological harm through marginalisation.

Jehovah’s Witnesses sometimes find themselves unpopular due to their opposition to blood transfusions. Mormons’ belief in polygamy has also had a similar effect on that group. Scientologists find themselves the subject of numerous jokes. These groups have at times been subjected to the criticism that they are alien cults or brainwashing institutions. Nor by any means does this list exhaust the number of unpopular religions in Western societies today.<sup>132</sup> Perhaps the most salient contemporary example is the increasingly prevalent hostility towards Muslim citizens in Western states.<sup>133</sup> Refusing to grant exemptions that would be necessary to enable these groups and others in a similar position to practice their central beliefs could well be interpreted as some kind of state endorsement of social hostility.<sup>134</sup>

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<sup>131</sup> Lott, *Multiculturalism and Diversity*, 115.

<sup>132</sup> Thomas Robbins, "Combating "Cults" and "Brainwashing" in the United States and Western Europe: A Comment on Richardson and Introvigne's Report," *Journal for the Scientific Study of Religion* 40, no. 2 (2001): 173; Hood, Hill, and Spilka, *The Psychology of Religion*, 259-64.

<sup>133</sup> Parekh, *A New Politics of Identity*, 100-25. Charles Taylor, *A Secular Age* (Cambridge, Mass: Belknap Press of Harvard University Press, 2007), 454, 770; Bradney, *Law and Faith in a Sceptical Age*, 76-80.

<sup>134</sup> Karst observes that “[t]he harms of exclusion unquestionably happen to people one by one, but those individual harms result from the subordination of groups. When the instrument for excluding a group is the law, the hurt is magnified, for the law is seen to embody the community’s values” (Karst, *Belonging to America*, 4).

The argument might be extended further. Deliberately or not, society sends subtle messages to all its members about what is considered 'normal' and what is not. Even religious individuals who do not suffer the overt hostility faced by Muslims, may find the inferiority or 'oddness' of their beliefs constantly implied through a series of individually minor incidences. In the US, for example, the accumulated effect of school prayers, public displays of Christmas decorations, Christian public holidays and appeals to God by prominent public figures may combine to imply the inferiority of any non-Christian religious perspective. Kenneth Karst cites the story of a Jewish child who objected to the wording of the school prayer and felt that it left no room for considering any other beliefs as normal.<sup>135</sup> From the child's testimony, it appears that compliance with his conscience was important to him but the questions of exclusion and belonging were more immediately pressing.

Of course, many aspects of identity can be judged by society. If alleviation of psychological harm resulting from marginalisation is the core concern, then further argumentation is necessary to explain why marginalisation of religious beliefs ought to be the particular focus. As most theorists of identity politics recognise, many other groups in society also experience hostility and an even greater number would meet the lesser standard of being outside the bounds of conventional socially prescribed "normalcy."<sup>136</sup> Non-religious conscientious objectors within a society that celebrates militarism are surely one example.<sup>137</sup> Lott cites a number of studies concluding that single people face significant social discrimination, marginalisation and stigma.<sup>138</sup> Perhaps they might call for exemptions to rules and practices that impede or further stigmatise their way of life. Recently the rise of "fat

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<sup>135</sup> Ibid., 102.

<sup>136</sup> In pressing this point, my argument is directed at those who would use the non-alienation rationale as a means to justify special treatment to believers under the US Constitution.

<sup>137</sup> Especially for men. For a discussion on militarism, masculinity and militaristic state symbols, see J.A. Mangan, "Duty Unto Death: English Masculinity and Militarism in the Age of the New Imperialism," in *Tribal Identities: Nationalism, Europe, Sport*, ed. J.A. Mangan (London and Oregon: Frank Cass Publishers, 1996), 10-38.

<sup>138</sup> Lott, *Multiculturalism and Diversity*, 110-11.

pride” groups has been reported in response to increasing social hostility towards the overweight. These groups seek to alleviate the stigma associated with the body size of their members and additionally take legal action calling for the alleviation of discriminatory practices and the affording of necessary accommodations.<sup>139</sup> Large people may, for example, require special accommodations on public transport to accommodate their size. The point of these examples is to show that, like centrality arguments, difference-based psychological harm arguments also have extremely expansive potential. If our concern is with the alleviation of psychological harm stemming from discrimination and sources of discrimination abound, then there is no immediately apparent reason to focus on any one personal identity attribute including any particular set of beliefs over any other.<sup>140</sup>

The two following chapters will investigate possible methods of limiting the focus of psychological harm approaches. But there is one other method for doing so that I will examine now. It is worth considering whether there is anything about beliefs shared by religious communities that makes failure to award exemptions to them as a group is especially harmful. One reason to think so is that social and individual aspects of identity are sustained in slightly different manners. Maykal Verkuyten and Ali Aslan Yildiz argue that “[s]ocial identities are not like private beliefs or convictions that, in principle, can be sustained without expression and

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<sup>139</sup> Kirkland, "Representations of Fatness and Personhood," 25-26.

<sup>140</sup> There are, perhaps, even wider implications. The reality is that all sorts of things can impact upon individuals' conceptions of themselves. Every time we apply for a job or a scholarship, join a new sports team, go on a date, or give a public presentation, we subject ourselves to the possibility of negative feedback based upon very personal aspects of our identity. We do not expect each and every potential impediment to our self-image to be removed from our life path. There must be some kind of minimum of offence which we expect individuals to sustain. If religious believers have a special case for the alleviation of stigma through exemptions, it needs to be clearly elucidated. I am not convinced that any of the arguments in this chapter succeed in drawing out this argument.

recognition.”<sup>141</sup> That is to say that for shared aspects of identity, recognition by society is of greater importance to the retention of identity than it is for beliefs which an individual has arrived at alone. To explain this, I begin with Parekh’s notion that collective identity “generates a sense of common belonging.”<sup>142</sup> Salmons then observes that this common bond is sustained through “self-identifying expression” amongst group members.<sup>143</sup> Whereas interference with a personal belief held by an individual may frustrate that belief, interfering in collectively held beliefs will also damage her bond to an identity-supporting group. Further, it may threaten the identity of the group as a whole. Laws that prohibit expressions of common religious identity through the wearing of headscarves, polygamous marriages, or rituals involving sacramental wine or the ritualistic smoking of peyote might then be of particular concern.

According to this account, two things distinguish religious beliefs from individually held beliefs. First, from the point of view of the *individual*, religious expression serves to strengthen the bond between her and the identity-constitutive religious group of which she is a member. Second, from the *group’s* perspective, allowing religious expression supports the collective interest in the survival of the community. Karst argues that “[r]eligions the world over – along with nations and other purveyors of faith – use ritual to etch beliefs into the individual psyche.”<sup>144</sup>

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<sup>141</sup> Maykel Verkuyten and Ali Aslan Yildiz, "Religious Identity Consolidation and Mobilization among Turkish Dutch Muslims," *European Journal of Social Psychology* 40, no. 3: 444. On the particular importance of group membership, see also Jones, "Beliefs and Identities," 66.

<sup>142</sup> Parekh, *A New Politics of Identity*, 50.

<sup>143</sup> Salmons, "Toward a Fuller Understanding of Religious Exercise," 1245. Salmons’ argument is inspired by identity speech and sexual orientation arguments which comprise the dual claims that sexual orientation plays a fundamental role in constituting identity and that it is important to allow individuals to engage in the behaviour necessary to publicly express their membership in identity-constitutive groups.

<sup>144</sup> Karst, *Belonging to America*, 21.

This is a reflection of sociologist Emile Durkheim's argument that rituals and symbols serve to reproduce social relations.<sup>145</sup>

These concerns may give us reason to be particularly concerned with beliefs held by communities including, but clearly not restricted to, religious communities.<sup>146</sup> However, this does not necessarily mean that non-collectively held beliefs fail to meet the benchmark for exemption eligibility. Overemphasising the group dimension would exclude not only non-religious belief-holders, but also a sector of non-aligned religious or spiritual believers. This would prevent increasing numbers of non-institutional believers from gaining access to exemptions.<sup>147</sup> In a sense, one can foresee even greater psychological harm arising from the marginalisation of these individuals. After all, these people do not have a community of like-minded believers to which they can turn for support when they feel threatened.

## Conclusion

A focus on psychological harm makes a distinct contribution to our understanding of the predicament a religious believer faces when she meets laws that conflict with her beliefs. The mental anguish that may be associated with enforced contravention of centrally important elements of identity or marginalisation due to that identity

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<sup>145</sup> Woodward, *Identity and Difference*, 29-30 (discusses Durkheim's argument in *The Elementary Forms of Religious Life*). Psychologists Hood et al observe that "[r]itual is often regarded as both the core and origin of religion" and note that arguments suggesting that ritual is the *most important characteristic* of living religious identity (Hood, Hill, and Spilka, *The Psychology of Religion*, 71-72).

<sup>146</sup> Appiah makes some interesting observations in relation to arguments about the survival of the group (what he refers to as "the preservationist ethic") in Appiah, *The Ethics of Identity*, 114-54. A number of other theorists also cite concern with using difference-based arguments to afford exemptions to groups, for example Benhabib, *The Claims of Culture*, 51-53; Eisenberg, "Identity and Liberal Politics," 249-70. Their concerns relate to giving groups undue authority over the individuals within them.

<sup>147</sup> Kelly Besecke, "Seeing Invisible Religion: Religion as a Societal Conversation About Transcendent Meaning," *Sociological Theory* 23, no. 2 (2005): 180. See text accompanying note 10 of the introduction.

supplement other approaches to exemptions that focus on redistribution alone. It is possible to identify a range of reasons to explain why religious beliefs are especially important for the identity of many individuals. These include the extent to which the beliefs guide an individual's life across a range of daily activities, the degree of emotive attachment an individual associates with her belief and the degree to which others judge the individual on the relevant attribute. These factors all provide reasons to take a religious believer's claim to an exemption on a psychological harm basis very seriously.

However, while this approach may justify belief-based exemptions, it fails to take the further step necessary to explain why religious believers are often the favoured applicants. Neither the centrality nor differenced-based variants identifies anything uniquely special about religion alone. Rather, the arguments could equally be applied to beliefs and practices derived from or associated with one of a range of important personal characteristics, including gender, ethnicity, appearance, physical or mental ability and philosophical and political alliances.

The central idea that I take from this chapter is that psychological harm provides a sound framework from which to consider the issue of exemptions. But in a quest to find something that explains the preferences for religious beliefs over others, it is clear that I need to look further. A deeper analysis of the substantive content of what religious people believe might provide a basis for outlining religionists' special claim to exemptions. It is to these issues that I now turn in chapter two.

## CHAPTER TWO: SUBSTANTIVE CONTENT

The arguments considered in this chapter focus upon the substance of religious beliefs in order to establish a case for religious exemptions. The psychological harm approaches considered in the previous chapter focused predominantly upon the *function* of religious beliefs in the lives of their holders. In that regard, it was possible to determine several reasons for awarding religious exemptions, but it was immensely difficult to set religious beliefs apart from many other beliefs that perform a similar function in the lives of non-religious individuals. Content-based approaches are better equipped to make such a distinction and are commonly utilised in order to advance such a case.

This chapter will focus upon three content-based arguments. The first two arguments are based upon transcendental content. Firstly, I consider the extratemporal consequences approach, which is concerned with the range of rewards and punishments that are said to await religious believers upon death, depending upon their adherence to religious norms during their lives. Secondly, I consider the divine authority approach, which focuses upon the duty-based relationship that forms between a believer and a transcendent source of authority. Thirdly, I consider the moral content of religious beliefs.

After elucidating the strongest form of each of the three approaches, two key issues are considered in regards to each. First, I determine which particular beliefs fall under the ambit of each approach. Next, I examine whether a moral case can be made for awarding exemptions to the qualifying beliefs. I argue that to be effective each approach needs to operate through the psychological harm framework already set out. The first two arguments are capable of distinguishing a very small set of religious beliefs from non-religious beliefs. But drawing a line between religion and non-religion in these approaches comes at the cost of singling out the *wrong* beliefs for exemptions and excluding others (both religious and non-religious) that are more deserving of attention. Nevertheless, focusing on the

content of beliefs is helpful. In the final section, I show that a more convincing rationale for awarding belief-based exemptions can be framed by focusing on the moral weight of certain beliefs. Such an argument is not specific to religious beliefs alone, but would include most religious beliefs within its ambit, alongside secular moral beliefs.

### **Extratemporal Consequences**

The extratemporal consequences approach is premised on the idea that the substantive content of religious beliefs makes contravention more terrible than for any otherwise comparable nonreligious beliefs. While a nonbeliever might face a variety of earthly consequences, including psychological turmoil, a religious believer must contemplate the consequences of her actions not only in this life but also beyond.<sup>1</sup> At the most extreme, she may face the prospect of burning forever in a fiery hell or suffering eternally in a horrific torture chamber.<sup>2</sup> Susan Mendus

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<sup>1</sup> For outlines of the extratemporal consequences approach as applied to religious exemptions, see Jesse Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (Chicago: University of Chicago Press, 1995); Jesse Choper, "Defining "Religion" in the First Amendment," *University of Illinois Law Review* (1982): 597-601; Frederick Mark Gedicks, "An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions," *University of Arkansas at Little Rock Law Review* 20(1997-1998): 562-63; Elizabeth Harmer-Dionne, "Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction," *Stanford Law Review* 50, no. 4 (1998): 1340-43; Stanley Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses," *Stanford Law Review* 41(1988-1989): 274-77; Richard O. Frame, "Belief in a Nonmaterial Reality - a Proposed First Amendment Definition of Religion," *University of Illinois Law Review* 1992, no. 3 (1992): 834; John H. Garvey, "An Anti-Liberal Argument for Religious Freedom," *Journal for Contemporary Legal Issues* 7(1996): 286-87; Susan Mendus, "Should Religion Be Special?," 10-12, unpublished article, available online at, <http://www.york.ac.uk/depts/poli/staff/profiles/slm.htm> (accessed 18 December 2009).

<sup>2</sup> For example, according to Islam, one who is condemned to hell is first sealed into the grave to feel her corpse being eaten by worms. At the same time she must gaze through a window into the hell which she awaits. This "is consistently described with allusions to fire and boiling water." See, Christopher M. Moreman, *Beyond the Threshold: Afterlife Beliefs and Experiences in World Religions* (Lanham: Rowman & Littlefield Publishers, Inc. , 2008), 86, 83.

writes that “for many believers, the cost of error, or failure, is eternal damnation.”<sup>3</sup> Jesse Choper is similarly concerned that religious people who contravene their beliefs “put their souls in jeopardy for eternity.”<sup>4</sup> Further, for some religions, the threat of punishment goes hand in hand with the promise of benefits for good behaviour.<sup>5</sup> Complying with some state laws that contravene religious beliefs may result in the forfeiture of significant extratemporal advantages.

One historical example of a belief associated with both the threat of damnation and the promise of salvation was the Mormon belief in polygamy. Prior to state legislation in the US impeding the practice, men who married several women had the potential to achieve divinity, while their wives could attain salvation. Meanwhile, those who did not participate in the practice faced the threat of damnation.<sup>6</sup>

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<sup>3</sup> Mendus, "Should Religion Be Special?," 10.

<sup>4</sup> Choper, "Defining "Religion" in the First Amendment," 598.

<sup>5</sup> For example, paradise in Islam “is described as lush gardens with flowing streams and cool breezes. The blessed can indulge in all manner of feasting and are wedded to lovely virgins,” additionally the good “are also granted the vastly more important reward of spending eternity in the presence of God” (Moreman, *Beyond the Threshold*, 83, 85.) Hindu thought includes a similar depiction of an afterlife realm known as the “World of the Fathers,” where “those who perform the requisite rituals are promised the sensuous rewards of women, food, and drink in the comfort of a lush, breezy landscape” (ibid., 101.) Even more opulent is the “World of the Gods” and ultimately the prospect of release from the cycle of rebirth (ibid., 104.)

<sup>6</sup> See, Harmer-Dionne, "Once a Peculiar People," 1319-20. John Garvey also cites Mormon polygamy in reference to forcing people to “choose between violating the law and risking damnation” (Garvey, "An Anti-Liberal Argument for Religious Freedom," 286). I recognise the complexity of Mormon doctrine in relation to this issue and that such an interpretation of the doctrine is controversial. For example, in George D. Chryssides, *Exploring New Religions* (London, New York: Cassell, 1999), 117, the practice is dismissed in a brief paragraph. However, Harmer-Dionne and Garvey’s understandings are supported by several other sources. See, for example, B. Carmon Hardy, *Solemn Covenant: The Mormon Polygamous Passage* (Urbana: University of Illinois Press, 1992), 9-11 and especially 147; Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: The University of North Carolina Press, 2002), 92, 96, 107; Marthca C. Nussbaum, *Liberty of Conscience: In Defence of America’s Tradition of Religious Equality* (New York: Basic Books, c2008), 184-98.

There are two immediate advantages to the extratemporal consequences approach. In common with psychological harm approaches, it provides a reason to explain why religious beliefs deserve exemptions. Its additional attraction is that it identifies a reason why the need is more urgent here than it is for non-religious beliefs. Religious believers may face severe consequences in the afterlife that are not contemplated when non-religious beliefs are contravened.

One question which immediately arises is whether justifying exemptions upon this rationale requires the state to endorse the truth of the relevant beliefs. A requirement that the state be concerned that its citizens will suffer eternal damnation is particularly problematic for a secular, liberal state that has a plurality of religions.<sup>7</sup> Each religious perspective contains its own set of beliefs mandating certain acts, many of which are said to result in extratemporal sanctions of particular kinds. Sometimes beliefs held by different individuals or groups are mutually exclusive.<sup>8</sup> For example, Islam prescribes the worship of one true God and the belief that Muhammad was his prophet. From this belief certain ritual obligations follow including prayer, fasting and reciting the two central tenets of Islam.<sup>9</sup> Islam explicitly rejects the role ascribed to Jesus in Christianity and the notion of the trinity, which is a core belief of many Christians. Thus, the very same prayers which Muslims must perform to avoid damnation would potentially lead to that fate in the view of some Christians and the same is true in the reverse scenario. If the state were required to accept as a matter of *truth* that certain divine punishments follow from, for example, a failure to attend Friday prayers at a Mosque, it would need to determine that the Muslim perspective is true. As we are

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<sup>7</sup> Refer to chapter three for a complete discussion of this point.

<sup>8</sup> See, Steven Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," *University of Pennsylvania Law Review* 140(1991-1992): 191-92, quoting Antony Flew, *The Presumption of Atheism and Other Philosophical Essays on God, Freedom, and Immortality* (New York: Barnes & Noble, 1976), 66-68.

<sup>9</sup> For an introduction to the central tenets of Islam and the "five pillars" of ritual activity, see Andrew Rippin, *Muslims: Their Religious Beliefs and Practices*, 3rd ed. (London, New York: Routledge, 2005), 103-17.

dealing with conflicting mutually exclusive beliefs it would consequently be committed to the position that other religious and non-religious beliefs are false.<sup>10</sup> The problems with asking the state to make this judgment in a religiously diverse society should be immediately apparent. In fact, many proponents of religious exemptions explicitly argue that the state is ill-equipped to make judgments of this nature.<sup>11</sup> Chapter three will provide a more complete defence of the religion-state divide. Here it is sufficient to note that due to the conflicting nature of such beliefs, I accept Andrew Koppleman's assertion that "the state must not declare religious truth."<sup>12</sup> It follows that the state cannot accept claims to exemptions that rest upon state declarations of religious truth.<sup>13</sup> As Anthony Bradney argues, "[e]ven when it makes special provision for believers, the law never recognises the claims of those believers in their own terms."<sup>14</sup> However, it is important to recognise that the extratemporal consequences approach does not demand that the state do so. Instead, two primary alternatives can be considered.

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<sup>10</sup> Note Timothy Macklem's argument that "any reliance upon religious doctrine, conventional or unconventional, as the source of the justification of religious freedom is misguided [...], for even the most tolerant of religions does not and cannot take other accounts of morality to be as true as its own" (Timothy Macklem, "Reason and Religion," in *Faith in Law: Essays in Legal Theory*, ed. Peter Oliver, Sionaidh Douglas-Scott, and Victor Tadros (Oxford: Hart Publishing, 2000), 82).

<sup>11</sup> On state incompetence to determine religious truth, see Andrew Koppleman, "Is It Fair to Give Religion Special Treatment?," *University of Illinois Law Review* (2006): 590-91. Michael McConnell is amongst prominent religious exemption proponents who argue that religious and temporal affairs form separate jurisdictions (see Michael W. McConnell, "The Problem of Singling out Religion," *DePaul Law Review* 50(2000-2001): 29). See also Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 182-88 (arguing that what he terms the 'prohibitory interpretation' mandating the exclusion of religious content from arguments has become prevalent in US jurisprudence on the free exercise of religion).

<sup>12</sup> Koppleman, "Is It Fair to Give Religion Special Treatment?," 592. Koppleman's claim here pertains to divine commands more generally, which are the subject of the following section.

<sup>13</sup> *Ibid.*

<sup>14</sup> Anthony Bradney, *Law and Faith in a Sceptical Age* (Oxon: Routledge-Cavendish, 2009), 31.

First, the state could adopt a position of “state agnosticism.”<sup>15</sup> Michael McConnell argues that while the secular state cannot, with any certainty, decide that a religious belief is not true, it must not reject the possibility that it is.<sup>16</sup> This argument can be applied to the extratemporal consequences approach. Because the state is unable to make a judgment as to whether or not extratemporal consequences will result from the behaviour for which a believer seeks an exemption, it must proceed upon the assumption that they will. That is, it must assume that the belief is true. Doing so clearly tells in favour of awarding an exemption. *If true*, damnation to a fiery hell for all eternity would undoubtedly be a horrific consequence of any earthly action. Not only religious believers, but also atheists and agnostics would no doubt agree with such a statement.

Nevertheless, it is worthwhile considering Steven Smith’s challenge, namely, “why should the burden of persuasion be assigned this way?”<sup>17</sup> Smith points out that the agnostic argument could run equally in two directions. Whilst the state may indeed decide to treat religious beliefs as special because they *may* be true, it is not at all clear why the state should not rely upon the fact that they may *not* be. Smith argues that the latter approach, which places the burden upon the believers, “seems more plausible, at least for a genuinely agnostic state.”<sup>18</sup> He points out that where one

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<sup>15</sup> Smith, “The Rise and Fall of Religious Freedom in Constitutional Discourse,” 188. Again, Smith is referring to divine command arguments more generally here, but the argument necessarily applies to any spiritual content-based arguments.

<sup>16</sup> McConnell sets out his agnostic approach in relation to the divine authority rationale, but the argument can be applied to the extratemporal consequences approach also. McConnell’s original argument is that “religious claims – if true – are prior to and of greater dignity than the claims of the state. If there is a God, His authority necessarily transcends the authority of nations; that, in part is what we mean by “God”” (Michael W. McConnell, “Accommodation of Religion,” *The Supreme Court Review* (1985): 15). McConnell also claims that such a view is likely to be shared by a majority of atheists and agnostics (McConnell, “The Problem of Singling out Religion,” 30). One of the weaknesses with McConnell’s argument here is that it depends upon a particular conception of God which not all religions (and not all non-religious persons) will share.

<sup>17</sup> Smith, “The Rise and Fall of Religious Freedom in Constitutional Discourse,” 188.

<sup>18</sup> *Ibid.*, 189.

claims an entitlement to special treatment she will ordinarily shoulder the burden of proof.<sup>19</sup> If a state is to remain truly agnostic, then Smith sees no reason to reverse this standard practice. He states that “[i]t would be odd for a lobbyist to argue that the legislature must adopt a particular program unless the program’s opponents can prove it undesirable.”<sup>20</sup>

It might be argued that consideration of the relative certainty of the consequences adds some strength to Smith’s position. Whatever the supposed extratemporal consequences that the religious believer faces, from the point of view of the state, these outcomes remain entirely uncertain. Meanwhile, far more certain costs are involved if generalised laws are not complied with. In some situations these costs will have an effect upon others. Allowing for the ritual slaughter of animals appeases those who eat only kosher meat, but at the cost of great upset to animal welfare campaigners and significant trauma to the animals involved.<sup>21</sup> One might ask why concern with these demonstrable earthly consequences ought to be sidelined in favour of the party claiming religious consequences that cannot be proven.<sup>22</sup>

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<sup>19</sup> Ibid., 189-90.

<sup>20</sup> Ibid., 190.

<sup>21</sup> Brian Barry uses this as an example for demonstrating that exemptions are not mandated by equality (although there may be a pragmatic case for exemptions in some situations). For Barry’s discussion, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001), 40-46.

<sup>22</sup> Of course, it is also true that sometimes the state too is working on a contingency plan. *Just in case* a particular motorbike rider has an accident, it asks all riders to wear helmets each time they ride their bikes. *Just in case* there is a construction work accident, it requires all workers to wear protective headgear, whenever they are at the construction site. *Just in case* a person is of malicious intent, it requires that daggers never be carried by citizens in public. These are all state responses to ultimately uncertain future threats. However, there is an important difference. While it is unclear whether a particular motorcyclist will ever be involved in an accident (let alone on any one particular outing) we do know that this is a real possibility – such accidents do occur. By contrast, we do not know whether the consequences a religious claimant is concerned with ever do occur, or whether the entire claim is nothing more than a nightmare in her imagination. The distinction drawn here rests upon common socially accepted methods of

However, if one considers what is at stake for the believer, attributing the full burden of proof to her in accordance with Smith's legalistic approach may seem rather harsh. The state and other rule-making organisations frequently ask individuals to risk potentially damning behaviour for reasons no more urgent than ensuring its staff or school students are uniformly attired. Such rules and regulations may be aimed at ensuring that the clothing worn is suitable for the tasks to be carried out. Uniforms may be designed to help build a sense of morale amongst those wearing them – for example, instilling some pride amongst pupils in their school. Uniforms may also ensure that a certain group of people, such as the police or nurses, is readily identifiable to others. While these are all important considerations, they pale into insignificance when compared to the threat of spending eternity in a fiery hell. No matter its relative uncertainty, eternal damnation is clearly an outcome that is several orders of magnitude more pressing than the desire for uniformity.

The question arises whether it is reasonable to award exemptions *just in case* a person's religious beliefs turn out to be true. While we cannot judge the truth or falsity of beliefs regarding what happens to a person after death, we can be certain that the consequences faced by the claimant, if she is correct, are truly horrific. Smith contends that it is this line of thought which explains McConnell's apparently faulty allocation of the burden of proof, favouring exemptions. McConnell's argument, according to Smith, contains echoes of Pascal's Wager.<sup>23</sup> For Pascal, without proof as to whether or not God exists, it is prudent and rational to wager that he does. If one correctly wagers in favour of God's existence, she receives the significant benefit of eternal salvation, while little loss results if she is incorrect. On the other hand, should she correctly wager that God does not exist, her bet will yield little in the way of benefits, while exposing her to the danger of

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determining facts in a secular state. Alternative religious epistemologies that reject the validity of this distinction will be discussed in chapter three, pages 120-122.

<sup>23</sup> Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 189-90.

catastrophic consequences if she is wrong.<sup>24</sup> McConnell suggests that, for the sake of its citizens, the state would be well advised to accept Pascal's logic.<sup>25</sup> There is a significantly greater detriment associated with incorrectly wagering that a person's belief in extratemporal sanctions is wrong than there is in proceeding upon the basis that her belief is untrue. McConnell can therefore argue that we should act on the assumption that the religious claimant's beliefs may be true and not, as Smith argues, that they may not be.

State neutrality is nevertheless limited. It is necessary to acknowledge that the state *does* make certain moral judgments.<sup>26</sup> For example, killing is judged to be wrong even in the name of religion, regardless of the extratemporal consequences that may be at stake.<sup>27</sup> On other issues particular states have allowed exemptions for beliefs that they find reprehensible. Homophobic and sexist beliefs held by some religious organisations are often accommodated with exemptions to generalised non-discrimination laws.<sup>28</sup> It seems implausible to suggest that the state allows

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<sup>24</sup> Ibid., 190-93.

<sup>25</sup> Smith explains that in McConnell's argument "[t]he liberal state is in the position of Pascal's chooser" (ibid., 191). Smith's interpretation draws from Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, no. 7 (1990): 1516 and McConnell, "Accommodation of Religion," 15.

<sup>26</sup> Denise Meyerson, "Why Religion Belongs in the Private Sphere, Not the Public Sphere," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 58.

<sup>27</sup> Koppleman points out that it is unquestioned that the state must be able to dismiss the beliefs of an individual who claims to have killed because God bid him to. He cites the case of Dan Lafferty who murdered two people as a result of a religious revelation (Koppleman, "Is It Fair to Give Religion Special Treatment?," 585n71). India outlaws the practice of *Sati* (widow-burning) which some believe to be a means to ensuring the salvation of the deceased husband, or ensuring he reaches the domain of the Gods (see, V.N. Datta, *Sati: A Historical, Social and Philosophical Enquiry into the Hindu Rite of Widow Burning* (London: Sangman, 1988), 11, 205).

<sup>28</sup> On religious exemptions and gender equality, see Hege Skjeie, "Religious Exemptions to Equality," *Critical Review of International Social and Political Philosophy* 10, no. 4 (2007): 471-90. The boundaries of discrimination-enabling religious exemptions are also discussed in Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: BasicBooks, 1993), 153-55.

exemptions in these cases because it fears that claimants who believe they will go to hell for associating with people of diverse sexual orientations may be correct after all. In this case, the state may still award exemptions for reasons unrelated to the possible truth of the beliefs at hand. Alternatively, it might take a stance and *not* allow exemptions. But can refusing exemptions be reconciled with a position of state agnosticism?

Examining Pascal's argument a little further reveals some flaws in his line of reasoning and therefore weakens its applicability for our purposes.<sup>29</sup> Antony Flew argues that "there is no limit to the total of theoretically possible, mutually exclusive, Hell-threatening cosmic systems" so that by wagering in favour of one God, one risks falling afoul of a great many others.<sup>30</sup> This makes it impossible for an individual to simply wager in favour of God, but what of the state? While a secular liberal state cannot wager as to the truth of any particular "Hell-threatening cosmic system," it is worth considering whether it could allow its citizens to do so. The state could then wager, not on the truth of a particular religious doctrine, but rather on the fact that its religiously-minded citizens have themselves reached the correct conclusions regarding religious matters.

But while the state's reticence here may seem appropriate, it does not support a case for religious exemptions. In religiously pluralist societies, each situation in which someone requests an exemption would involve more than a simple wager between the state's desired legislative course of action on the one hand and the single religious perspective of its citizens on the other. Instead, regarding each issue for which someone requests an exemption, the state's position may conflict with a multitude of fractured and possibly mutually exclusive religious perspectives. The state cannot wager that some of its citizens have found the truth

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<sup>29</sup> Flew, *The Presumption of Atheism and Other Philosophical Essays on God, Freedom, and Immortality*, 66-68, cited in Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 191-92.

<sup>30</sup> Flew, *The Presumption of Atheism and Other Philosophical Essays on God, Freedom, and Immortality*, 67.

without implying that certain other citizens are incorrect about religious matters. Nor does the state have any basis upon which to judge the afterlife concerns of mainstream religions as any more plausible than those of new religious movements or independent spiritual claims. It makes very little sense to argue that the state should act as though each and every one of these perspectives *could* ultimately be correct.<sup>31</sup> The state cannot concern itself one way or the other with the fate (or *possible* fate) of individuals in the afterlife. It simply does not know. Smith's argument thus demonstrates that neither a case *for* nor a case *against* exemptions follows from the state's incompetence here.

This is not necessarily problematic for the extratemporal consequences approach. Instead, it simply brings us to the strongest interpretation of the argument. The second alternative interpretation is stronger because it sidesteps the issue of any state endorsement of religious beliefs, focusing instead upon the individual's *perception* of what is true.<sup>32</sup> David Edwards argues that there has always been an incongruity in the manner in which the law handles religious truth. "The law does not and could not uphold the truth of doctrines or the holiness of substantive beliefs," but crucially, what it *can* do is "endeavour to protect the feelings of believers."<sup>33</sup> Mark Gedicks outlines what this means in regards to extratemporal consequences:

Disobeying God subjects believers to divine punishment in the life hereafter; nonbelievers do not fear such punishments because they do not believe in an extra-temporal existence beyond this life. When

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<sup>31</sup> Especially as this would mean that a large number of its other citizens would then be doomed.

<sup>32</sup> Kent Greenawalt, "Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy," *William and Mary Law Review* 48(2006-2007): 1631.

<sup>33</sup> Edwards makes this comment in the context of a discussion about blasphemy laws in the UK in David Edwards, "The History of Blasphemy and the Rushdie Affair," in *Liberalism, Multiculturalism and Toleration*, ed. John Horton (Houndmills, Basingstoke, Hampshire and New York: Palgrave, 1993), 169.

government action forces believers to disobey the commands of their God, they suffer a psychological harm to which nonbelievers are not subject.<sup>34</sup>

This approach recognises that religious believers suffer because they believe they will meet negative consequences if they fail to comply with religious obligations. Even if a religious person commits what she considers a grievous sin and yet ends up in heaven nevertheless, it does not follow that she has suffered no harm. She may suffer significantly from her fears regarding the fate that she believes ultimately awaits her. This renders utterly irrelevant any objections based upon the state's inability to be certain about the truth of claimed extratemporal consequences. An individual will suffer psychological harm if she believes in extratemporal punishments irrespective of what position the state is able to take on the matter.

We can now see that the above discussion has led us neatly back to the framework set out in chapter one, with our concern once again focused on the mental health of exemption-seeking applicants. The argument therefore rests on a prior concern with avoiding situations in which individuals could suffer some form of psychological trauma as a result of state laws. Recognising that the extratemporal consequences approach must operate through the mechanism of psychological harm has crucial implications for the following analysis of the approach.

At this point it becomes clear that one of the primary challenges associated with the psychological harm framework arises once more. We must again seek to calculate the extent of psychological harm suffered by claimants to exemptions. Further, those who wish to distinguish religious beliefs as the most deserving category of beliefs for exemption purposes must compare the psychological harm associated with perceived religious consequences with that generated by perceived earthly consequences.

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<sup>34</sup> Gedicks, "An Unfirm Foundation," 562.

Jesse Choper attempts to explain why the threat of religious extratemporal consequences does indeed generate greater psychological harm than non-religious consequences. He takes as his example the question of conscientious objection to military service. Choper compares the case of a non-religious claimant who holds "conscientious scruples against killing" to that of a religious claimant whose objection is "rooted in a deep-seated faith that if he voluntarily kills another human being, this will influence or indeed determine his destiny after death. In the extreme, he may believe that if he does so, his immortal soul will be damned for eternity."<sup>35</sup> Choper accepts that both claimants "will experience severe psychic turmoil if required to kill." However, he claims that "intuition and experience affirm that the degree of internal trauma on earth for those who have put their souls in jeopardy for eternity can be expected to be markedly greater than for those who have only violated a moral scruple."<sup>36</sup>

But the diversity of beliefs regarding extratemporal consequences calls into question just how many believers will fit Choper's description. The extratemporal consequences approach only applies to religions that contain beliefs in an afterlife, rebirth or an immortal soul. Choper himself admits that this is somewhat of a limitation when he indicates that "[m]any major religions in their "primitive" stages have been far more concerned with the relationship between the living and the world around them than with the fate of the dead."<sup>37</sup> Perhaps Choper concedes too much here. It is difficult to see why *greater* concern with this world than with that to come invalidates his argument. As long as relevant afterlife beliefs exist, it does not necessarily matter if ethical beliefs concerning day-to-day living are of more concern. Choper's approach certainly would *not* apply to any religious traditions that were *entirely* unconcerned with people's fate after death in any manner at all. But this is a fairly inconsequential limitation, as it is remarkably

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<sup>35</sup> Choper, "Defining "Religion" in the First Amendment," 597.

<sup>36</sup> *Ibid.*, 597.

<sup>37</sup> *Ibid.*, 601-02.

difficult to identify any such religious traditions. However, a number of significantly more restrictive aspects of the approach can be noted.

Stanley Ingber argues that the extratemporal consequences approach only applies where the afterlife is connected to punishments for earthly actions. With this observation he identifies a boundary to the scope of Choper's argument, although it is not necessarily as restrictive as he suggests. Ingber contends that it is overwhelmingly Western religions that connect the afterlife with punishment for acts committed on earth.<sup>38</sup> There is some validity to this point and Choper readily allows that some religions are concerned with the afterlife only insofar as they seek to appease the spirits of departed relatives and prevent their return to this world. Chinese religion, he notes, "involves strong duties, but does not usually connect them with consequences to follow death."<sup>39</sup> However, Ingber's accusation of a Western bias is weakened when one considers the central belief of karma and rebirth in Hinduism, which derives from Asia. According to Hindu belief, "a person's destiny is formed by his or her actions, so that each action we perform will

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<sup>38</sup> Ingber, "Religion or Ideology," 276.

<sup>39</sup> Choper, "Defining "Religion" in the First Amendment," 602. Choper does not identify any one particular Chinese religion here. However, his argument is supported by religious studies scholar Christopher Moreman, discussing a number of Chinese religions. Moreman observes that the "worship of ancestors represents the cornerstone of popular religion in China to this day." (Moreman, *Beyond the Threshold*, 140.(see also 141-147)). The fate of the dead is determined by living descendants continuing to make offerings. In return, deceased ancestors are responsible for their living descendants. If not properly taken care of, it is possible that the dead might seek revenge. However, such consequences do not accord with the extratemporal consequences argument. That is because one's fate after death is determined by those still living, rather than by oneself whilst still on earth. Further, the revenge which may be met for failure to uphold a commitment to the deceased is met by the living during their present lifetime. Hinduism also contains very similar beliefs in which the earthly consequences are met by those who fail to make offerings to the deceased. Such consequences may be severe, including inflicting disease or natural disaster upon the living (See *ibid.*, 100, 04 & 11). While there may be a case to adapt the extratemporal consequences argument to incorporate such potentially catastrophic consequences, the behaviour which is required of the living (namely, making offerings) is not such as to require legal exemptions. See also M. Peterson et al., *Reason and Religious Belief: An Introduction to the Philosophy of Religion*, 3rd ed. (New York: Oxford University Press, 2003), 196-98.

have an effect on us in the future.”<sup>40</sup> These are more than mere vague notions. Those who transgress are met with the threat of “punitive rebirths.”<sup>41</sup> For example, one who consumes meat will be reborn as a violent animal, while the consumption of other forbidden food will lead to a future life as a worm. Alongside this, many Hindus believe in the possibility of a temporary period in heaven, or in one of at least seven hells.<sup>42</sup> Buddhists also believe in a range of possible higher (including heavenly) and lower (including hellish) rebirths, of impermanent duration.<sup>43</sup>

Yet an important difference between Christian beliefs in extratemporal punishment and those found within Hinduism and Buddhism is worth addressing. There is a marked distinction in the duration of the punishment faced by believers of the respective religions. Whereas eternal damnation is, as the name suggests, never-ending, if one is reborn as a worm, or as a beast, punishment is finite and the cycle of rebirth continues. Likewise, a stay in heaven or hell is, for a Hindu or Buddhist, a consequence to be enjoyed or endured for a discrete period of time. The punishment is “extratemporal” in the sense that it occurs beyond the boundaries of secular notions of time, but it is not eternal. Its occurrence after death clearly distinguishes it from earthly punishments met by non-believers. However, no such distinction can be drawn regarding the duration of the punishment. Theorists of extratemporal consequences often have eternal damnation in mind when they formulate their arguments. For example, John Garvey explicates that a religious pacifist who engages in warfare faces a distinctly severe penalty for two reasons – first, she loses heavenly comfort and second, the harm caused is “more lasting (eternal, not temporary).”<sup>44</sup> But it is not necessary for proponents of the

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<sup>40</sup> Dermot Killingley, “Hinduism,” in *Major World Religions: From Their Origins to the Present*, ed. Lloyd Ridgeon (New York: RoutledgeCurzon, 2003), 33.

<sup>41</sup> *Ibid.*, 34.

<sup>42</sup> *Ibid.*, 35, see also Moreman, *Beyond the Threshold*, 106.

<sup>43</sup> Moreman, *Beyond the Threshold*, 123-24.

<sup>44</sup> Garvey, “An Anti-Liberal Argument for Religious Freedom,” 287.

extratemporal consequences approach to rely on the “eternity” of the punishment. There are two additional options here.

One possibility is to admit the very limited and essentially Christian, or at least Abrahamic, nature of the extratemporal consequences approach.<sup>45</sup> Beliefs which relate to eternal damnation may be the only ones for which exemptions can be justified. However, the argument may be too restrictive even for followers of Abrahamic religions. I noted earlier that increasing numbers of religious believers take a more individualistic approach towards interpreting their own religion.<sup>46</sup> One need not be particularly pioneering to refute traditional conceptions of hell and damnation. In fact, one philosopher of religion asserts that “it would be no exaggeration to claim that the average Christian believer finds it difficult to explain what function (if any) the doctrine of hell plays in his or her own faith.”<sup>47</sup> Thomas Talbott similarly argues that the number of Christians who believe in the most punitive of religious punishments, upon which the extratemporal consequences approach appears to be based, are few:

Now when the traditional understanding of hell as unbearable suffering, forcibly imposed as punishment for sin, is conjoined with the idea of unending duration, we get the diabolical picture of an eternal torture chamber of some kind. And few religious thinkers today, even among the most conservative, are prepared to swallow an idea as unpalatable as that. Most would concede that an eternal

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<sup>45</sup> I specifically name Christianity here because it appears to be the starting point for theorists such as Choper and Garvey who make arguments based upon extratemporal consequences. However, the ‘eternity’ aspect also sits comfortably with Islamic belief.

<sup>46</sup> See note 10 of the introduction and accompanying text. A general discussion of this issue is found in Kelly Besecke, “Seeing Invisible Religion: Religion as a Societal Conversation About Transcendent Meaning,” *Sociological Theory* 23, no. 2 (2005): 179-96.

<sup>47</sup> Wilko van Holten, “Can the Traditional View of Hell Be Defended? An Evaluation of Some Arguments for Eternal Punishment,” *Anglican Theological Review* 85, no. 3 (2003): 457.

torture chamber is utterly inconsistent with a supremely loving and supremely powerful being. But if that is true, then any theist who seeks to retain a doctrine of hell must revise the traditional doctrine in one of two ways: either by rejecting the idea of unbearable suffering or by rejecting the idea that the suffering literally endures forever.<sup>48</sup>

Thus we may have a third reason to believe that Choper's case is overstated. It seems that his description of a believer who worries about the damnation of his immortal soul for all eternity will apply to very few religious believers, even within Christianity.<sup>49</sup> For this reason, proponents of the extratemporal consequences approach are better simply to dismiss eternal duration as a necessary requirement of their argument. The focus might then remain on punishments which are met after death, but also encompass those that do not persist forever. This may allow a Christian who takes the approach of "rejecting the idea that the suffering literally endures forever"<sup>50</sup> to be afforded exemptions in some circumstances but it would also encompass conceptions of a temporary hell such as those contained within Hinduism and Buddhism.

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<sup>48</sup> Thomas Talbott, "Freedom, Damnation, and the Power to Sin with Impunity," *Religious Studies* 37(2001): 417-18. See also, Ralph W. Jr. Hood, Peter C. Hill, and Bernard Spilka, *The Psychology of Religion: An Empirical Approach*, 4th ed. (New York, London: The Guilford Press, 2009), 185-86 ("people are less inclined to believe in hell than in heaven" and citing the decreasing numbers of Catholics and especially Protestants who believe their fate in the afterlife will be determined by their earthly conduct and the "considerable reluctance to change one's ways to avoid hell"); Moreman, *Beyond the Threshold*, 69-70 and Alan Wolfe, "Civil Religion Revisited," in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, 2000), 36 (gives statistics on religious belief in the US and other countries. According to a study in 1991, 94 percent of Americans believed in God, significantly higher numbers than in the UK (70 percent) and West Germany (67 percent) but of those religious Americans, significantly fewer believed in heaven (70 percent), notably fewer again believed in hell (57 percent).

<sup>49</sup> Choper, "Defining "Religion" in the First Amendment," 597.

<sup>50</sup> Talbott, "Freedom, Damnation, and the Power to Sin with Impunity," 417-18.

Sidestepping the 'eternity' aspect usually implicit in the extratemporal consequences argument comes at the cost of losing one of the clearest methods for drawing a distinction between religious and non-religious beliefs. However, there remains another important distinction between earthly and extratemporal punishments due to the uniquely torturous nature of the latter set. Some Hindu depictions of hell, despite its temporary state, involve "[h]aving one's intestines plucked out by birds; being forced to hold hot metal balls in the mouth; being torn in half; ingesting blood, pus, and urine; having one's eyes blown out."<sup>51</sup> Buddhist conceptions of the impermanent state of hell are "essentially the same."<sup>52</sup> In a liberal state, contravening beliefs, no matter how deeply felt, cannot be expected to result in earthly torture that is in any sense comparable. Where the punishment is torture, eternity is not a requirement in order to single out religious beliefs as special. Therefore, proponents of the extratemporal consequences approach are wrong to emphasise the element of eternity inherent in some extratemporal consequences.

Of course, not all extratemporal punishments are equally horrific. Moreman observes that changes in religious beliefs have generally led, over the years, "to an increasingly personal conception of the afterlife, to the point where many modern people, of various faiths, have a choice of fates available to them."<sup>53</sup> Referring to the Hindu belief in karma and rebirth, Julius Lipner states that "[o]ne could say glibly that there are almost as many versions of the belief as there are believers."<sup>54</sup> While Lipner mentions that he has heard many Hindus say that one may be reborn as an

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<sup>51</sup> Moreman, *Beyond the Threshold*, 108.

<sup>52</sup> Moreman sets out one depiction of a Buddhist hell, described by King Nimi. Given a tour of hells, "[h]e watched as sinners were tossed onto heaps of burning ash. Others had their throats cut before being hurled into boiling water. Starving sinners were forced to sate themselves on urine and faeces while the thirsty drank pus and blood. Gossips and liars were dragged about by hooks in their tongues" (ibid., 124).

<sup>53</sup> Ibid., 254.

<sup>54</sup> Julius Lipner, *Hindus: Their Religious Beliefs and Practices*, 2nd ed. (London and New York: Routledge, 2010), 260.

animal or insect, “there are others who reject the idea that one can return in sub-human life-forms, and they interpret texts [...] symbolically, viz. being reborn, say, as a tiger, insect or hog means being reborn as humans with rapacious or backbiting or impure tendencies.”<sup>55</sup> Surely this is not such a gruesome prospect. Therefore, unless such punishment is of eternal duration it is difficult to draw a distinction between this potential punishment and other earthly anguish which non-religious believers might face.<sup>56</sup>

Other extratemporal punishments take the form of a loss of heavenly benefits. It could be argued that the loss of salvation or of the opportunity to reside in the grace of God also carries significant potential for extreme psychological trauma. This argument demands that the benefit be lost for eternity, or at least for an extremely long period of time, so that it is almost akin to eternity in the human mind. Otherwise, it is difficult to see why such a consequence is clearly more terrible than any potential earthly consequences that might be faced by non-religious believers. If one is isolated from heaven for a discrete period of time only, then this simply constitutes a lengthening of the state in which the individual presently exists on earth. Moreman claims that most Christians now view even “isolation from the grace of God” as a “temporary” punishment “for an all-loving God must forgive even the most evil among us.”<sup>57</sup>

A further limitation implied by increasingly personal conceptions of religion is that some believers, even within faith traditions that typically contain notions related to an afterlife, personally reject them. While most Hindus accept reincarnation as a fact, Moreman observes that “[s]ome modern Hindus do not concern themselves

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<sup>55</sup> Ibid., 260.

<sup>56</sup> I do recognise that this may further delay ultimate liberation from the cycle of rebirth. However, this is usually thought to be too much of a distant prospect to be of particular concern to believers as it is.

<sup>57</sup> Moreman, *Beyond the Threshold*, 70.

with ideas of the next life in the slightest.”<sup>58</sup> More generally, Moreman asserts that in a range of religions from around the world in the modern day “hellish states have been all but cast aside, with reward the main idea of future fate.”<sup>59</sup> If religious exemptions were justified according to the extratemporal consequences approach, it would be difficult to award exemptions to believers who, whilst maintaining a strong relationship with their beliefs and religious customs, do not personally believe in the prospect of sanctions in the afterlife.<sup>60</sup>

The extratemporal consequences approach also fails to account for methods of avoiding punishment. Some religious believers are of the view that transgressions will be pardoned when they result from state compulsion.<sup>61</sup> Further, many religions, including Catholicism, contain the belief that confession or repentance absolves people of their sins.<sup>62</sup> For Buddhists, one’s fate is determined by accumulated karma, not merely a single act.<sup>63</sup> In both modern Theravada and Mahayana Buddhism, one can offset demerits through a system of merit transfer, primarily achieved through making offerings to Monks.<sup>64</sup> Lipner makes the same

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<sup>58</sup> Ibid., 113. Lipner makes the same observation that, “[i]t is a common fallacy that belief in karma and rebirth is universal among Hindus (including religious Hindus). In fact, surveys have shown that, though the belief is widespread and deeply entrenched, there is a significant minority that finds the belief doubtful or unconvincing.” He elaborates that there are “strands of Hinduism in which it is believed that recompense for good or bad deeds is generally meted out in the present life” and that other Hindus “attribute a symbolic significance to the belief in karma and rebirth [...as a] potent way of symbolizing the responsibilities that one generation of human beings bears towards succeeding generations” (Lipner, *Hindus*, 272).

<sup>59</sup> Moreman, *Beyond the Threshold*, 254. More specifically, Moreman notes that even in Hinduism’s central scriptures, the *Vedas*, “the emphasis remains on rewards for the dead versus the punishments of the evil” (ibid., 102).

<sup>60</sup> Gedicks, “An Unfirm Foundation,” 562; Ellis West, “The Case against a Right to Religion-Based Exemptions,” *Notre Dame Journal of Law, Ethics and Public Policy* 4(1989-1990): 615; Frame, “Belief in a Nonmaterial Reality,” 834.

<sup>61</sup> Ingber, “Religion or Ideology,” 276.

<sup>62</sup> Ibid., 276-77.

<sup>63</sup> Moreman, *Beyond the Threshold*, 124.

<sup>64</sup> Ibid., 126-27. Victoria Kennick Urubshurow notes that in Buddhism “the motivation with which the act was committed” is one of the factors which determines the weight of karma

observation regarding many modern Hindus who “live morally mixed lives,” building merit in some areas and “failing to avoid demerit through various transgressions.”<sup>65</sup> Thus, neither hell nor punitive rebirths are seen as resulting directly from singular indiscretions. If believers have other available methods of avoiding divine punishment, whether through confession or the acquisition of merit in other areas of life, then we might question why it is the state that must take action on their behalf.<sup>66</sup>

It is important not to overstate the strength of this objection. A believer who regularly confesses sins to a priest and feels instantly absolved might quite properly shoulder the burden of her religious views. The same may be true of a Buddhist or Hindu who happily offsets a number of sins through alternative means such as making offerings. However, it must be realised that not all believers will be so comforted by potential methods of absolution. Some believers might still experience a prolonged period of extreme guilt and discomfort associated with their wrongdoing. Others may reject the potential loopholes that their religion traditionally provides.

The final difficulty with the extratemporal consequences argument derives from the large number of beliefs that are unrelated to divine retribution or reward in the afterlife, even for those who believe that such things exist.<sup>67</sup> Hood et al. state that

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which meets a particular act. She also lists four ways in which a person may “lighten the painful effects of negative karma” – namely, taking refuge in the “Three Jewels” (involving bowing down, making offerings and maintaining a deep conviction that the path to enlightenment was taught by Buddha); confessing sins; countering non-virtuous deeds with “antidotes,” or virtuous deeds; vowing to try not to repeat the sin (Victoria Kennick Urubshurow, *Introducing World Religions* (New York: Routledge, 2008), 216, 223).

<sup>65</sup> Lipner, *Hindus*, 260. However, note also that Karma may have direct consequences in the present life, whereby “[h]appiness is brought by good karma, while suffering stems from bad karma” (Moreman, *Beyond the Threshold*, 122).

<sup>66</sup> Insofar as this places an additional burden upon religious believers it may be a violation of equal treatment for religious believers. See the discussion in chapter three.

<sup>67</sup> Choper, “Defining “Religion” in the First Amendment,” 601; Ingber, “Religion or Ideology,” 277 (“others rank sins so that only some demand punishment or transcend forgiveness”).

the “threat of avoiding a major negative outcome also seldom enters into daily religious behavior.”<sup>68</sup> Many elements of a religious way of life are simply not associated with punishment. If religious exemptions were justified on an extratemporal consequences basis, it would be difficult to stretch the justification to incorporate allowances for beliefs unconnected to either redemption or extratemporal sanction.

Stanley Ingber claims that the extratemporal consequences approach to religious exemptions is “grossly underinclusive.”<sup>69</sup> And while I have shown that it is more conclusive than he claims, his conclusion remains justified. The approach only applies to acts committed by someone who believes in the possibility of extratemporal sanctions. She must believe that the particular act she would be forced to commit under state law is one that is linked to such a punishment. She must fall into a religious minority who believes either that the punishment will involve eternal suffering (for example, in the form of an eternal loss in heavenly benefits), or that it will be particularly heinous and torturous in nature. Nor can she easily use confession or the performance of alternative pious acts to avoid punishment. Because so many religious exemption claimants would not qualify under this rationale, it is likely that they would be concerned if it were to form the underlying rationale for exemptions. The approach is therefore an entirely unsound foundation upon which to base a more general case for religious exemptions.

### **Divine Authority**

Many commentators argue that religion is special because it involves duties emanating from a divine source of authority.<sup>70</sup> What is special is the divine source

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<sup>68</sup> Hood, Hill, and Spilka, *The Psychology of Religion*, 24.

<sup>69</sup> Ingber, "Religion or Ideology," 276.

<sup>70</sup> For a discussions of this approach see, for example, *ibid.*, 292; McConnell, "The Problem of Singling out Religion," 30; Michael W. McConnell, "Believers as Equal Citizens," in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy L.

of one's religious obligations, rather than any associated threat of sanction. In this sense, the argument avoids many of the limitations that plague the extratemporal consequences approach. Its apparently broader applicability across a diverse range of religions makes it immediately appear a more attractive approach.

The divine authority argument centres primarily upon *duties*. Religious individuals are in a special position because they owe duties to two conflicting jurisdictions. Earthly matters fall within the state's jurisdiction, whereas transcendental, otherworldly matters that are concerned with the sacred or the soul fall within the realm of higher, religious authority. Doe and Jeremy explain that "the State and religion function in separate realms, the one temporal and the other spiritual, each enjoying their own sovereignties."<sup>71</sup> Religious exemptions are necessary to enable individuals to maintain their "dual allegiance" to the appropriate authorities.<sup>72</sup> This line of argumentation is one of the main historical bases upon which the United States' doctrine of freedom of religion was traditionally asserted.<sup>73</sup>

The proximity of this approach to some theological arguments for religious exemptions shape the argument into quite a different approach to some of those already canvassed.<sup>74</sup> Thus, for some claimants, this approach may make more sense

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Rosenblum (Princeton: Princeton University Press, 2000), 91-92; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford; New York: Oxford University Press, 2005), 32-36, 122. See also, Norman Doe and Anthony Jeremy, "Justifications for Religious Autonomy," in *Law and Religion*, ed. Richard O'Dair and Andrew Lewis, *Current Legal Issues* (Oxford; New York: Oxford University Press, 2001), 424-25, 443.

<sup>71</sup> Doe and Jeremy, "Justifications for Religious Autonomy," 424-25.

<sup>72</sup> For a discussion, see Ahdar and Leigh, *Religious Freedom in the Liberal State*, 63.

<sup>73</sup> Doe and Jeremy, "Justifications for Religious Autonomy," 424-25; Greenawalt, "Moral and Religious Convictions as Categories for Special Treatment," 1631; McConnell, "The Problem of Singling out Religion," 28-29; Ahdar and Leigh, *Religious Freedom in the Liberal State*, 62; Daniel Conkle, "The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future," *Indiana Law Journal* 71(2000): 15.

<sup>74</sup> Ahdar and Leigh explain that "the very notion of dividing religion from the polity finds its origin in Christianity, commencing with Jesus' teaching to 'render to Caesar the things that are Caesar's', through Augustine's two cities, on to Luther's 'two kingdoms' and other similar dualisms of allegiance to authority" (Ahdar and Leigh, *Religious Freedom in the Liberal State*, 72-

than previous arguments. The tasks of maintaining dual allegiances and deferring at times to a source of authority above the state form the crux of the matter for many exemption-seeking individuals. The divine authority approach contends that religious believers ask for exemptions in order to carry out what they perceive to be fundamental obligations. For example, Michael Sandel argues that modern rationales which align religious freedom with personal autonomy fundamentally misconstrue religion. These rationales cite the Kantian notion of “respect for the dignity that consists in the capacity to choose one’s religion freely” as the justification for religious exemptions.<sup>75</sup> But, according to Sandel, “the relevant right is to exercise a duty, not make a choice.”<sup>76</sup> What is important about religious beliefs is that they generate “duties” to which individuals are “bound”.<sup>77</sup> The divine authority argument recognises these obligations.

Psychological harm arguments may be subjected to a similar critique. One might justifiably wish to question whether the primary reason religious believers claim exemptions is to express something fundamentally important to their sense of identity. Conkle contends that this misapprehends religion as a set of “obligations not to God, but to self.”<sup>78</sup> Peter Jones argues that if someone were to claim that the reason her belief in God was important was because it reflected her sense of self, it

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73), although we shall see in chapter three that many Christians criticise the division of dual spheres of authority also.

<sup>75</sup> Michael Sandel, "Religious Liberty - Freedom of Conscience or Freedom of Choice?," *Utah Law Review* (1989): 608.

<sup>76</sup> *Ibid.*, 611.

<sup>77</sup> *Ibid.*, 611. For a further critique of personal autonomy rationales see John H. Garvey, "Free Exercise and the Values of Religious Liberty," *Connecticut Law Review* 18(1985-1986): 788-92; Garvey, "An Anti-Liberal Argument for Religious Freedom," 275-80 and McConnell, "The Problem of Singling out Religion," 28-29. It might be that personal autonomy justifications arose because of the difficulty with fitting this duty-based thinking into liberalism.

<sup>78</sup> Conkle, "The Path of American Religious Liberty," 15. A similar point is made in Ingber, "Religion or Ideology," 282-85.

would surely be evident that “something has gone awry.”<sup>79</sup> The divine authority approach appears to provide an entirely different alternative here. It affirms that the underlying reason religious believers request exemptions is to enable them to carry out their religious duties, which are owed to God.<sup>80</sup>

A further attraction of this approach is that it provides a method to limit the scope of the ‘overarching belief systems’ argument discussed in chapter one. I noted that religion shared its role in providing guiding life principles with various philosophical and political belief-systems, for example, socialism, feminism and environmentalism. The divine authority approach enables the state to accommodate overarching belief-systems of a religious nature, while distinguishing them from otherwise similar philosophical and political belief-systems. Religious belief systems are the subject of divine commands; non-religious belief systems are not subject to such an authority.<sup>81</sup>

Crucially, this point also helps to distinguish between practices such as wearing a yarmulke, turban or headscarf and simply wearing a hat. If one wears her headdress as a result of a commitment to God, then the practice is immediately imbued with a heightened significance that is not felt by the secular hat-wearer. Jacob Levy explains, “[r]eligious rules and understandings make sacred the otherwise profane: a wafer and wine into the blood and body of Christ, or (an example of Michael Walzer’s) a butcher block into an altar.”<sup>82</sup> Thus something which is usually neither a matter of conscience nor deep significance for a non-religious person usually *is* a matter of conscience for a religious person. This is a

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<sup>79</sup> Peter Jones, “Beliefs and Identities,” in *Toleration, Identity and Difference*, ed. John Horton and Susan Mendus (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 1999), 83.

<sup>80</sup> Some who emphasise the duty to a divine authority might even claim that the extratemporal consequences argument is misdirected because it is concerned with aiding the *individual herself* to avoid the threat of harm, instead of focusing upon her obligations to a higher being. I think such an argument would be flawed and will set out the reasons why this is so in the final section of this chapter (see note 127 and accompanying text).

<sup>81</sup> On this point see Ingber, “Religion or Ideology,” 285-87.

<sup>82</sup> Jacob T. Levy, *The Multiculturalism of Fear* (New York: Oxford University Press, 2000), 131.

notable difference. It helps explain why a preference for hat-wearing can be described as trivial, but a preference for wearing a yarmulke cannot.<sup>83</sup>

The preceding paragraphs demonstrate that proponents of the divine authority approach interpret religion as being primarily concerned with duty to a binding authority. Thus for these theorists, focusing upon the binding nature of religious duties constitutes an advantage for this viewpoint. However, there are also a number of factors which suggest that this focus may have quite the opposite result.

When religious beliefs other than Abrahamic ones are considered, it becomes evident that the divine authority approach seriously limits the range of overarching belief systems that would qualify for exemptions. Martha Nussbaum observes in relation to Buddhism, Reform Judaism, Unitarianism, “and quite a few other religions” that some religions have “no structure of authority and no textual source.”<sup>84</sup> The individual judges matters according to her own conscience and nothing is perceived as “nonoptional.” Some religions do not centre upon the believer’s relationship with a divine authority figure of any kind. Buddhism is one example. Although some have suggested that its non-theistic character disqualifies it from categorisation as religion, “[f]ew take this as an academically viable approach.”<sup>85</sup> Taoism and Confucianism would also be excluded from exemptions if the divine authority approach were taken and these, again, are religions which

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<sup>83</sup> Sonu Bedi objects to this understanding of religious practices, such as turban-wearing. He claims that if we accept that religious beliefs can be chosen by an individual, then that individual could simply reconsider the meaning of wearing a turban and recharacterise it as something other than a religious duty. The problem with this view should be evident from my more complex examination of the role of choice in believing, set out in chapter one (Sonu Bedi, “Debate: What Is So Special About Religion? The Dilemma of the Religious Exemption,” *The Journal of Political Philosophy* 15(2007): 238-41).

<sup>84</sup> Nussbaum, *Liberty of Conscience*, 168.

<sup>85</sup> Kiyoshi Tsuchiya, “Buddhism,” in *Major World Religions: From Their Origins to the Present*, ed. Lloyd Ridgeon (New York: RoutledgeCurzon, 2003), 59.

“nobody seems to want to exclude.”<sup>86</sup> Clearly the approach is not applicable across as broad a range of diverse religions as it first seems. In some ways the approach may be even narrower than the extratemporal consequences approach, which I showed could include Buddhist beliefs. Richard Frame observes that the divine authority approach has proven unpopular precisely because of “increased awareness and appreciation of nontheistic Eastern religions.”<sup>87</sup>

But is the approach necessarily limiting in this sense? It is worth considering the possibility that the approach might be modified to include a broader conception of higher authorities, including nontheistic spiritual systems. It could then be applied, for example, to religious obligations deriving from the system of karma and rebirth. Ingber argues that a religion “can be nonanthropomorphic, nontheistic, or even have a membership of one as long as the claimed religious obligations are imposed by or under the influence of some sort of sacred force.”<sup>88</sup> Accepting a broader interpretation of the divine authority would then render Nussbaum and Frame’s objections inapplicable.

Yet the divine authority approach is also limited insofar as it overemphasises the imposed nature of religion. It exaggerates the case for individuals who feel tied by religious chains to strict commandments at the exclusion of those who maintain more flexible relationships with their religions. Even within religious communities that tend to associate beliefs with divine commands and obligations, not all believers embrace this ‘commanding’ aspect of their religion. Martha Nussbaum

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<sup>86</sup> Nussbaum, *Liberty of Conscience*, 167. Despite what Nussbaum says here, it is recognised that categorising Confucianism as a religion may be somewhat controversial. However, amongst those who support her interpretation is Moreman, *Beyond the Threshold*, 142. Further, even if Confucianism is disregarded, the point still holds in regards to Buddhism and Taoism at least.

<sup>87</sup> Frame, “Belief in a Nonmaterial Reality,” 834. A similar observation is made (refuting Ingber) in Steven Gey, “Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment,” *University of Pittsburgh Law Review* 52(1990-1991): 170-71.

<sup>88</sup> Ingber, “Religion or Ideology,” 287.

and Andrew Koppleman both remind us that religion is for many people merely a matter of habit or custom.<sup>89</sup> The divine authority approach provides no reason to give exemptions to people who interpret their religious beliefs in this manner.

Tariq Modood notes that the “sense of feeling that one must speak up as a Muslim is of course nothing necessarily to do with religiosity.”<sup>90</sup> Amongst those who would be excluded by this approach would be a Muslim woman who considers that she has a choice whether or not to wear her headscarf, but decides to do so in honour of her culture or to express her membership in the Muslim community.<sup>91</sup> The broad psychological harm arguments outlined in chapter one may provide reasons to award exemptions to this woman if her headscarf is important to her identity. However, the divine authority approach gives no such justification to a woman who does not consider herself under the dictates of divine authority. This is not necessarily problematic. It is worthwhile considering two reasons why this particular restriction of the divine authority approach might be desirable.

First, individuals who take a more habitual or cultural interpretation of their religion may be less likely to demand exemptions for religious rituals. After all, many religious practices such as fasting during Ramadān involve some personal sacrifice or, at least, inconvenience. If someone considers herself to be Muslim but does not identify with the teachings in the Qur’ān, how likely is it that she will demand to be able to wear a headscarf with her work uniform or to fast during Ramadān? Similarly, does an agnostic Jew demand only ritually slaughtered meat?

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<sup>89</sup> Koppleman, "Is It Fair to Give Religion Special Treatment?," 586; Nussbaum, *Liberty of Conscience*, 167.

<sup>90</sup> Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge, UK; Malden, MA: Polity Press, 2007), 137.

<sup>91</sup> On the diverse reasons why women wear headscarves, see Fadwa El Guindi, *Veil: Modesty, Privacy and Resistance* (Oxford, UK; New York, NY: Berg, 1999), Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton and Oxford: Princeton University Press, 2002), 94-100 and Edien Bartels, "'Wearing a Headscarf Is My Personal Choice' (Jasmina, 16 Years)," *Islam and Christian-Muslim Relations* 16, no. 1 (2005). On Ramadān as a “social rather than religious requirement” for many young people in recent times, see Rippin, *Muslims*, 264.

Does someone who views her Christian identity as mere cultural background demand that she must never work on Sunday? Of course, it is possible that these people may seek such exemptions, but we might wonder whether the agnostic with Christian heritage is actually in a different position to the father who wants the same day off work in order to watch his daughter play basketball during the weekend.

This brings us to my second point. If one wishes to wear religious attire for habitual or cultural reasons, or take particular holidays on the same basis, it is extremely difficult to accept that the person's desires are genuinely of a religious rather than a cultural nature. Instead, they appear to be akin to secular cultural claims. The distinction that the divine authority approach draws here may therefore be helpful.<sup>92</sup>

Consider now a different relationship that an individual may have with her religious beliefs. For some, faith is not a matter of certainty but is a search for the truth and a self-directed challenge to find meaning.<sup>93</sup> For these people, religion is "not rigidly tied to prefixed dogma or mores."<sup>94</sup> If religious exemptions are premised on an understanding of religion that demands that claimants feel unwaveringly compelled to live out strict obligations to a spiritual authority, then those who see their religion in a different light will have no claim to exemptions. This limitation is more concerning. A person may have divested significant time into considering her spiritual views and ultimately concluded that she cannot determine "what God wants" with absolute certainty. She therefore does not feel compelled by unbinding divine commands. However, she may nevertheless hold strong moral views regarding, for example, warfare, the killing of animals or

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<sup>92</sup> Although note that this does not entirely remove the difficulty involved in determining the boundaries of religion and culture, as discussed chapter one (see chapter one, note 76 and accompanying text).

<sup>93</sup> See, William Marshall, "Truth and the Religion Clauses," *DePaul Law Review* 43(1993-1994): 255; Bradney, *Law and Faith in a Sceptical Age*, 13-15.

<sup>94</sup> Marshall, "Truth and the Religion Clauses," 255.

certain medical practices that are influenced to a large degree by her attempts to settle upon religious truths in her life. Excluding the claimant's conscientious objections, but allowing those of someone who has unquestioningly accepted the teachings of her Pastor seems arbitrary and unfair. But this is what the divine authority approach would have us do.

We now come to the question of exactly what position the state ought to take regarding the beliefs of those of its citizens who believe they are subject to divine dictates. The state cannot simply accept an individual's claim that she is, as a matter of fact, subject to a binding religious authority that requires her to perform particular acts. The reasons are the same as those I set out regarding extratemporal consequences, and as with the prior argument, our focus is again directed towards psychological harm. What the state should defer to is *not* the higher authority under whose jurisdiction the religious believer dwells. Rather the state defers to the believer's *perception* that she is subject to such an authority, irrespective of whether her beliefs are true or false, whether she is "wise or foolish."<sup>95</sup> This rationale therefore brings us a little closer to religious understandings about the need for exemptions than the purely functional approaches assessed in chapter one. However, it is unable to accept religious beliefs in full and it ultimately rests upon the same foundation of concern for the possibility of psychological trauma.

But if we do *not* specifically endorse the possibility that a religious divine authority is real, then it is unclear what is special about this duty that does not also pertain to other non-state authorities to which an individual might appeal. Eisgruber and Sager point out that one's personal sense of morality might dictate appropriate behavioural requirements to that person in the same manner in which another's religious convictions provide such an authority.<sup>96</sup> Once potential extratemporal

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<sup>95</sup> Greenawalt, "Moral and Religious Convictions as Categories for Special Treatment," 1631.

<sup>96</sup> Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, Mass.: Harvard University Press, 2007), 103.

consequences are removed from consideration, attempting to draw a distinction here seems rather arbitrary. Ahdar and Leigh express this difficulty:

Another problem with the conflicting duty approach is that it simply asserts and does not explain why religious duties are special. What about persons who face a conflict between their sincere non-religious convictions – based upon moral or philosophical beliefs, for example – and the state’s demands? A person may have a sincere non-religious conviction that voting is wrong or that military service is immoral. Do religious people have a monopoly on conscience? It seems difficult to accede to the higher duty, compelled conscience argument without acceding to the religious grounds for it, namely, that there really is a higher authority.<sup>97</sup>

A number of other theorists also claim that religious and non-religious higher authorities cannot or ought not to be distinguished in a liberal state.<sup>98</sup> But it is

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<sup>97</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 63. I ought to make clear that Ahdar and Leigh use this observation to draw quite a different conclusion to that which I argue for. In fact, they ultimately argue that “a critical rationale for religious freedom is the state’s deference to religionists’ obedience to a higher authority” (ibid., 122). Ahdar and Leigh are able to reach this conclusion because find that the difficulty they have identified in distinguishing religious and non-religious higher authorities does not demonstrate that it is wrong to single out religion. Rather, they find that it reveals doubts about the limits of the *liberal framework* within which the issue is addressed (ibid., 64). These questions about secular liberalism are dealt with in detail in the following chapter.

<sup>98</sup> Bradney argues that “because of neutrality it follows that religious belief is treated as though it were a deep moral belief” (Bradney, *Law and Faith in a Sceptical Age*, 32). Yossi Nehushtan argues that “the exact source of higher demand is of little importance” to an examination of conscientious exemptions (Yossi Nehushtan, “Secular and Religious Conscientious Exemptions: Between Tolerance and Equality,” in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 245). Kwame Appiah is also “inclined to think” that equally conscientious reasons should be

helpful to investigate a little further some potential differences between religious and non-religious authority in order to demonstrate why religious exemption rationales should not strain to make a distinction between the two categories.

A divine source of authority might be distinguished from conscience because it is *external* to the believer, whereas the latter is *internal*. While the individual concerned may be said to be the author of her conscience and in control of its dictates, she cannot say the same of her religious beliefs, which are generated by independent sources. Ingber argues that when one believes that there is an "otherworldly" transcendent reality, one becomes subject to obligations "not of human making," and consequently, of a kind which "human beings may not undo."<sup>99</sup> Conscience refers to no such external reality. Thus it could be argued that a person's belief that God demands something is necessarily more authoritative than her belief that morality alone demands something. However, in order to sustain this distinction, the external and imposed nature of the religious belief must be emphasised. If the individual herself has notable authorship of her views, then it is difficult indeed to see the difference between conscience and religious dictates as sources of higher authority.

It is helpful to consider the origins of religious beliefs here. If an individual's belief in a divine authority stems from her own personal soul-searching and conviction then this in itself becomes a matter of conscience and, hence, a matter of internal authority. Yet according to this argument, this is the very category from which religious beliefs must be removed in order to be special. Of course, many believers may not be accurately described as conscientious soul-searchers. Many are simply born into religious families and influenced from birth by relatives, teachers and

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treated equally and that what is driving conscience does not matter (Kwame Appiah, *The Ethics of Identity* (Princeton, New Jersey: Princeton University Press, 2005), 96-99).

<sup>99</sup> Ingber, "Religion or Ideology," 286. Another aspect of Ingber's argument here is that beliefs resting on human reason or intuition are represented in the political process. This issue will arise again in chapter three. See in particular chapter three, note 175.

others in their communities to believe in a divine authority and its commands.<sup>100</sup> The beliefs of these individuals originate in the teachings of earthly authorities, such as religious leaders. However, with this observation religious beliefs do not appear to be distinct from other earthly forms of socialisation and leadership. This may include non-religious culture and is even comparable to being born into a family of pacifists or left wing political activists.<sup>101</sup> These cultural groupings may all be important but religion on this point is merely one of many social phenomena that involves external authority figures.

One might attempt to draw out a distinction here by noting that religious beliefs that are accessed through a holy text or a religious leader sometimes specifically reject the desirability of reflecting upon and personally interpreting religious doctrine. Thus, whereas non-religious individuals may be *reluctant* to re-evaluate some of their beliefs, religious believers are differently positioned because they are *prohibited* from doing so.<sup>102</sup> This is the understanding of religion that is commonly

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<sup>100</sup> Tariq Modood, "Muslims, Racial Equality and Secularism," in *Multiculturalism and Moral Conflict*, ed. Maria Dimona-Cookson and Peter M.R. Stirk (USA; Canada: Routledge, 2010), 1211-22. See also, Craig Calhoun, "Social Theory and the Politics of Identity," in *Social Theory and the Politics of Identity*, ed. Craig Calhoun (Cambridge, USA; Oxford, UK: Blackwell, 1994), 24 and Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke & New York: Palgrave Macmillan, 2006), 162. Parekh's argument is that there is a distinction between cultural identity and voluntary associational identity. He believes it is possible to fully remove oneself from the latter, but not the former. However, note that no distinction is made here between religious and non-religious culture. Instead, the point concerns those wider cultural communities into which one is born.

<sup>101</sup> There is also the possibility that religious beliefs derive from personal religious experience or divine revelation (Philip Kitcher, "Militant Modern Atheism," *Journal of Applied Philosophy* (5 October 2010), 7, available via Wiley Online Library <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5930.2010.00500.x/pdf> (accessed 6 October 2010)). A common understanding of such experiences is that they are conditioned by prior religious understandings and exposure and cannot form a foundation for belief that is *entirely* separate from the internal belief processes of the individual who has the experience. Therefore, religious experience cannot operate independently as an external source for religious belief. For a more in depth discussion of religious experience, see Peterson et al., *Reason and Religious Belief*, 15-35.

<sup>102</sup> Peterson et al., *Reason and Religious Belief*, 45-48.

endorsed by literalists and fundamentalists. Bhikhu Parekh explains literalism as the view that “the divine reason is articulated in a particular scripture, an inerrant source of fundamental truths.”<sup>103</sup> A literalist believes that “[i]t is presumptuous of him, and shows a lack of basic trust in God, to sit in judgement on, let alone question, His revealed word, and to pick and choose what he likes and approves of.”<sup>104</sup> For fundamentalists too, human customs threaten the connection between an individual and God. By contrast, “[religious] texts are inerrant.”<sup>105</sup>

This certainly represents a stricter form of authority from that implicit within the idea of ‘conscience as authority,’ as there is apparently no room for interpretation. It provides us with our first reason to distinguish some religious beliefs as distinctly authoritative in a way that nothing else is. But it does so only at a significant cost. Not only does it exclude non-religious claimants such as pacifists, it also excludes many Hindus, Buddhists, Protestant Christians and those who subscribe to a more personal form of spirituality.<sup>106</sup> These fall outside the realm of protection because they are insufficiently strict to demonstrate their clear priority over non-religious conscience. Martha Nussbaum and Richard Frame are thus correct to worry about the narrow scope of the divine authority approach.<sup>107</sup> If we are to set out divine authority arguments in such a way as to exclude non-religious moral authority, then the argument will apply to only a very limited set of religious traditions.

Thus far content-based arguments have yielded two rationales for religious exemptions – extratemporal consequences and divine authority. But, if it is to

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<sup>103</sup> Bhikhu Parekh, *A New Politics of Identity: Political Principles for an Interdependent World* (Houndmills, Basingstoke, Hampshire, New York: Palgrave Macmillan, 2008), 132.

<sup>104</sup> *Ibid.*, 132.

<sup>105</sup> *Ibid.*, 142.

<sup>106</sup> Regarding Hinduism see Lipner, *Hindus*. Regarding Protestantism, see Garvey, "An Anti-Liberal Argument for Religious Freedom," 284. Regarding spiritual believers, see Bradney, *Law and Faith in a Sceptical Age*, 12-14.

<sup>107</sup> Nussbaum, *Liberty of Conscience*, 168; Frame, "Belief in a Nonmaterial Reality," 834.

distinguish religious beliefs alone, then each of these arguments only applies to a very limited set of religious beliefs held by some believers. At this point, it is important to consider whether these limitations might in fact be appropriate. Perhaps the small category of beliefs that qualify is the most deserving of exemptions. Let us start by reviewing arguments that tend towards the *opposite* conclusion.

There is possibly some reason to be concerned about the potential negative emotional impact associated with both of the aspects of religion highlighted in this chapter thus far. Because these arguments for awarding exemptions must operate through the framework of the psychological harm approach, the impact of these beliefs on a religious adherent's mental health is open for consideration. If we can potentially create exemptions enabling religious behaviour due to a concern with potential psychological harm, then surely we can also restrict religious behaviour where the same concern justifies this. If state action or inaction is to be determined with reference to an individual's psychological condition, then it is overly simplistic to rely solely upon the harm associated with non-compliance with beliefs to the exclusion of any harm associated with compliance.

First, let us refer to the narrow set of beliefs that would gain favour under the extratemporal consequences approach. To qualify, beliefs must either be of eternal duration or be particularly terrible. Several theorists nevertheless advocate this approach. For example Choper, who acknowledges many of the boundaries of application I elucidated, favours it as criterion for determining which beliefs gain exemptions under US constitutional law.<sup>108</sup> But if we are concerned with

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<sup>108</sup> Choper, "Defining "Religion" in the First Amendment," 604. Others who endorse the extratemporal consequences approach, despite awareness of some limitations in its scope include Susan Mendus, who suggests – "tentatively" – in an unpublished paper, that it is "the vocabulary of salvation and damnation" that "is significant in responding to [...] the question 'what's special about religion?'" (Mendus, "Should Religion Be Special?," 11) and Harmer-Dionne, who advocates especially stringent examination of laws which may threaten the violation of "the salvational beliefs of a particular religion." (Harmer-Dionne, "Once a Peculiar People," 1340.) In taking this position, Harmer-Dionne explicitly refines the more expansive

preventing psychological harm, it might seem strange to protect beliefs of this nature given that these very beliefs seem to be the root of the harm. Harm is created by the heinous prospects they throw up in response to deviations from mandated behaviour. Where so many religious believers have found such strict views too hard to stomach, it is questionable that the state be complicit in protecting those that continue to terrorise others. Singling out this set of beliefs for exemptions would seem to be lending them some legitimacy.

Second, in regards to the divine authority approach, one might worry about the impact of living a life guided by strict adherence to the uncompromising religious dictates imposed by a literalist or fundamentalist conception of religion.<sup>109</sup> Parekh argues that every religion is simply too strict to enable perfect compliance. In fact, attempting utterly faultless conformity is likely to impede religionists' abilities to "function normally and lead balanced lives."<sup>110</sup> One can find some research that supports this concern. For example, psychologists Hood et al cite a study which found that "a strict religious upbringing contributes to the development of emotional disorders, depression, suicidal potential, and generally fearful response to life."<sup>111</sup> Surely if this is so, then the state ought to be *aiding* religious adherents to take a healthier approach towards their respective religions, rather than risk involvement in perpetuating negative religious understandings. Parekh insists that it is important that believers find methods for dealing with their inevitable failures

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method of determining the scope of beliefs which deserve special treatment set out in the US Supreme Court case *Sherbert v Verner* 374 U.S. 398 (1963). However, it must be noted that these theorists probably would not accept *all* of my conclusions about where the boundaries of the approach lie and they quite likely envisage a somewhat wider scope of application (one that I have argued does not distinguish the harm caused to some religious believers from that caused to some of their non-religious counterparts).

<sup>109</sup> Again, it is important to be clear that I highlight these types of religious beliefs because they are the only kind that I was able to distinguish for non-religious binding conscience.

<sup>110</sup> Parekh, *A New Politics of Identity*, 137.

<sup>111</sup> Hood, Hill, and Spilka, *The Psychology of Religion*, 456-57.

“such as blaming human nature, asking God’s forgiveness, doing charitable deeds, and praying for greater strength in future.”<sup>112</sup>

But arguments such as these rest upon empirical claims that are in reality very difficult to prove. In fact Hood et al ultimately close their survey of studies into the psychological effects of religious fundamentalism by stating that the evidence is too sparse to be conclusive.<sup>113</sup> Contentions about the psychological harm associated with some religious practices are insufficiently supported by empirical evidence to mandate refusing exemptions for those believers who fall under the ambit of the limited extratemporal consequences and divine authority approaches. There are nevertheless two pertinent reasons to be concerned with singling out these beliefs for exemptions at the exclusion of all others.

First, highlighting the most authoritative religions under the divine authority approach plays into the hands of those who use religion to control others and suppress dissent.<sup>114</sup> The pertinence of this concern is evident when one considers

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<sup>112</sup> Parekh, *A New Politics of Identity*, 137.

<sup>113</sup> Hood, Hill, and Spilka, *The Psychology of Religion*, 457.

<sup>114</sup> For all that we do *not* know about the truth of religious beliefs, there is one characteristic about the way in which we operate that we can be sure about and would do well to keep in mind. Religion is a social phenomenon. James Beckford notes that “[r]eligion does not ‘do’ anything by itself. It does not have agency” (James A. Beckford, *Social Theory and Religion* (Cambridge: Cambridge University Press, 2003), 4, see generally 2-7). Thus, religion cannot be divorced from human social structures, including power structures. Hood et al observe that “[f]undamentalist religion is often quite authoritarian in its structure, endowing its leaders with the image of having a special relationship with the deity. Control and suppression of dissent are seen as the natural prerogatives of those holding high church positions. These factors have been used to explain the anxiety, “guilt, low self-esteem, sexual inhibitions, and vivid fears of divine punishment” noted among individuals who leave these groups (Hartz & Everett, 1989, p. 209).” (Hood, Hill, and Spilka, *The Psychology of Religion*, 457.) See also Frances Ferguson, “Beliefs and Emotions (from Stanley Fish to Jeremy Bentham and John Stuart Mill),” in *Politics and the Passions, 1500-1850*, ed. Victoria Kahn, Neil Saccamano, and Daniela Coli (Princeton, N.J.: Princeton University Press, 2006), 245-48 (discussing Jeremy Bentham’s concern with religious power).

the potential for in-group essentialism.<sup>115</sup> Given I have shown that “no two believers hold exactly the same beliefs,”<sup>116</sup> granting religious exemptions to a set group because their beliefs are exceptionally strict may limit the ability of individual dissenters within that group to contradict more commonly held views, or those held by their leaders. For example, it may make matters more difficult for young Muslim women who object to their parents’ desire for them to wear headscarves or for Catholic gynaecologists who do not follow their church’s teachings regarding contraception and abortion.<sup>117</sup> We must be cognisant of the need to avoid “replacing one kind of tyranny with another” by awarding exemptions.<sup>118</sup> Concerns about a tendency towards essentialism are likely to be an enduring issue which must be borne in mind when any special provisions are awarded to groups.

A second reason for concern with highlighting only the most authoritative religions for exemption purposes is that such an argument is likely to engender little support or understanding in a free-thinking liberal society.<sup>119</sup> William Marshall argues that “depicting religion as inveterate and absolutist does not mean that it is unworthy

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<sup>115</sup> Calhoun, "Social Theory and the Politics of Identity," 26. See also, Margaret R. Somers and Gloria D. Gibson, "Reclaiming the Epistemological "Other": Narrative and the Social Constitution of Identity," in *Social Theory and the Politics of Identity*, ed. Craig Calhoun (Cambridge, USA; Oxford, UK: Blackwell, 1994), 55.

<sup>116</sup> Peterson et al., *Reason and Religious Belief*, 285.

<sup>117</sup> See, Bartels, "'Wearing a Headscarf Is My Personal Choice,'" 15-28; Beckford, *Social Theory and Religion*, 17; James F. Childress, "Appeals to Conscience," *Ethics* 89, no. 4 (1979): 325.

<sup>118</sup> This is Appiah’s concern in relation to identity politics generally, see Kwame Appiah, "Identity, Authenticity, Survival. Multicultural Societies and Social Reproduction," in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (New Jersey and West Sussex: Princeton University Press, 1994), 162-63.

<sup>119</sup> Rodney Smith argues, in a discussion of US constitutional law that broadening religious equality protections to encompass secular conscience would conflict with “arguments calling for limiting the definitional class protected” but “would likely increase support for (or at least weaken political opposition to) the statute” (Rodney K. Smith, "Converting the Religious Equality Amendment into a Statute with a Little "Conscience"," *Brigham Young University Law Review* 1996(1996): 662).

of constitutional attention. But there are substantial difficulties in maintaining a jurisprudence which primarily emphasizes this side of religion."<sup>120</sup> The divine authority approach presents religious beliefs in their most authoritarian and therefore most negative light.<sup>121</sup> Many citizens who hold strong beliefs that are subject to a significant degree of *internal* authority, but very little *external* authority will find it hard to accept that their case for exemptions fails because their beliefs are insufficiently fundamentalist.

### **Individual Conscience: Internal Authority and Moral Weight**

The final reason to reject the divine authority approach is simply that it is unnecessary to strain the argument to exclude matters of non-religious conscience. Let us consider whether the traditional divine authority argument provides a pattern for a broader approach, focusing upon all 'higher' authority generally, rather than merely singling out 'divine' or 'spiritual' higher authority of a religious nature. It is worth considering that *individual conscience* could be thought of as a type of higher authority because of the extent to which individuals feel bound to comply with the dictates of their consciences.

A binding moral conscience may, of course, be religious in nature. But this approach would provide a reason for awarding exemptions to a significantly wider set of beliefs because it equally recognises that conscience may be secular.<sup>122</sup> We have seen that attempting to distinguish religious authorities as particularly special from an agnostic standpoint only provides a rationale for awarding exemptions to the most absolutist religious beliefs and excludes many other religious beliefs. Under the individual conscience approach, the attempt to distinguish divine

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<sup>120</sup> Marshall, "Truth and the Religion Clauses," 252.

<sup>121</sup> Gey, "Why Is Religion Special?," 178; Marshall, "Truth and the Religion Clauses," 252-55.

<sup>122</sup> It thus responds to the concerns of Eisgruber and Sager and Ahdar and Leigh that the divine authority argument fails in its endeavours to explain why only divine authority should be considered important. See, Eisgruber and Sager, *Religious Freedom and the Constitution*, 103; Ahdar and Leigh, *Religious Freedom in the Liberal State*, 63.

authorities can simply be abandoned. But the basic premise that individuals are sometimes bound by beliefs they cannot ignore is retained, without attempting to distinguish all religious beliefs as a category.<sup>123</sup> As Wojciech Sadurski writes:

There is no basis, in an ideology of a liberal and secular state, to draw the line between the religiously motivated and other deep moral beliefs, with respect to bearing common burdens and fulfilling social duties. It does not follow that conscientious objection must necessarily be disallowed, but rather that it should be measured by the sincerity and intensity of moral reluctance to engage in a certain activity, and not by whether this reluctance has religious rather than secular grounds.<sup>124</sup>

The idea that it is conscience which deserves protection has been particularly popular amongst legal theorists and philosophers alike.<sup>125</sup> But some scholars, such as Conkle, oppose such arguments on the grounds that they assume that

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<sup>123</sup> Psychologist Gordon Allport describes conscience as “the knife-edge that all our values press upon us whenever we are acting, or have acted, contrary to those values.” He observes that it is “by no means exclusively a religious phenomenon” (Gordon Allport, *The Individual and His Religion, a Psychological Interpretation* (New York: Macmillan Company, 1960), 90-91).

<sup>124</sup> Wojciech Sadurski, *Moral Pluralism and Legal Neutrality* (Dordrecht; Boston: Kluwer Academic Publishers, 1990), 190.

<sup>125</sup> Koppleman, “Is It Fair to Give Religion Special Treatment?,” 585. However, I do not want to suggest a false consensus here – definitions and uses of the term “conscience” in the literature are exceptionally varied. Exemptions for both religious and non-religious conscience are advocated by Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006), 118; Nehushtan, “Secular and Religious Conscientious Exemptions,” 245; Bradney, *Law and Faith in a Sceptical Age*, 32; Meyerson, “Why Religion Belongs in the Private Sphere, Not the Public Sphere,” 54; Douglas Laycock, “Formal, Substantive, and Disaggregated Neutrality toward Religion,” *DePaul Law Review* 39(1989-1990): 1002. This was also apparently the view underlying the decision in the well-known conscientious objection case of *Welsh v United States* 398 U.S. 333 (1970).

“obligations to self” are of equal importance to obligations to God.<sup>126</sup> However, it is difficult to accept his concern without accepting the religious arguments for favouring the latter. Further, his concern reflects a very specific religious perspective in itself. Some religious beliefs interpret the rituals within their faith communities as being prescribed for the purpose of saving the believer. Thus an individual fasts during Ramadān and attends Friday prayers at the mosque, not because it benefits God, but rather because it assists individuals to live a good life themselves. God remains unaffected, whether or not human beings carry out particular earthly acts.<sup>127</sup>

Another potential concern with this approach is that retaining the focus upon authority may be unhelpful. Framing this argument in the same terms as the divine authority approach retains the emphasis upon a lack of choice. That focus may be misdirected. Gey charges that McConnell errs because he “does not seek to protect morality as such; rather he seeks to protect the authoritative structure of thought that produces morality. In other words, McConnell is not concerned with moral laws themselves, but rather with the chain of command that produces those laws.”<sup>128</sup> Gey suggests that it may be better not to focus upon the weight of authority the believer perceives, whether that be the moral authority of one’s inner conscience or the external authority of a divine being or cosmic system. Instead, we

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<sup>126</sup> Conkle, “The Path of American Religious Liberty,” 15. This argument is also set out by John Garvey who claims that for some religious believers, “The focus of her claim is not her own destiny. She is concerned instead with the effect on God, as it were” (Garvey, “An Anti-Liberal Argument for Religious Freedom,” 287).

<sup>127</sup> I am indebted to Dr Najibullah Lafraie for this observation. It is also supported by Andrew Rippin’s observation that in Islam, “[r]arely is prayer presented as simply a duty to be fulfilled because it has been decreed by God. Rather, prayer is described as the primary defence of the Muslim against the encroachment of worldly concerns” (Rippin, *Muslims: Their Religious Beliefs and Practices*, 262-63). For a related philosophical discussion on the “divine impassibility” of God in different religions, see William Wainwright, “Concepts of God,” *Stanford Encyclopedia of Philosophy Online*, available at <http://plato.stanford.edu/entries/concepts-god/> (accessed 24 April 2010).

<sup>128</sup> Gey, “Why Is Religion Special?,” 143.

might consider the moral weight implied by the subject matter of the belief. Matters of moral significance to the individual might be protected over those that are trivial.

I have in mind here something similar to Charles Taylor's concept of "strong evaluation."<sup>129</sup> Strong evaluation involves "discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged."<sup>130</sup> That is, it is concerned with "the qualitative *worth* of different desires" that expresses something about "the quality of life, the kind of beings we are or want to be."<sup>131</sup> In this sense it encompasses longstanding moral issues surrounding others' well-being and dignity and whether it is right to kill, steal or refuse assistance to another. But it may go further and include beliefs about how we can live fulfilling and worthwhile lives ourselves.<sup>132</sup> The concept can be applied to religious, spiritual and secular people.<sup>133</sup>

Let us return to Choper's example of religious and non-religious conscientious objectors to military service. Choper refers to the non-religious Pacifist as one who held "conscientious scruples against killing." He claims that where one has "only violated a moral scruple" that person can be expected to experience less trauma

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<sup>129</sup> Charles Taylor, "What Is Human Agency?," in *Human Agency and Language: Philosophical Papers I* (Cambridge; New York; Melbourne: Cambridge University Press, 1985), 15-44. Koppleman discusses this in relation to religious exemptions in, "Is It Fair to Give Religion Special Treatment?," 588-89.

<sup>130</sup> Charles Taylor, "Inescapable Frameworks," in *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989), 4.

<sup>131</sup> Taylor, "What Is Human Agency?," 16, 26.

<sup>132</sup> Taylor, "Inescapable Frameworks," 4.

<sup>133</sup> The idea is also similar to what Philip Kitcher terms "orientation." (Kitcher, "Militant Modern Atheism," 4. This refers to "a complex of psychological states [...] of valuing, desires, intentions, emotions and commitments [...] that does not include factual beliefs, and that embodies a person's sense of what is most significant and worthwhile in his own life and in the lives of others."

than a religious claimant who faces the threat of consequences after death.<sup>134</sup> Some non-religious conscientious objectors to military service may well take exception to the fairness of Choper's phrasing. Referring to the beliefs of a pacifist as "only" moral "scruples" is rather dismissive and glosses over both the depth of feeling with which the beliefs may be held and the highly serious nature of their content. Instead, we could set out the pacifist's case slightly differently.<sup>135</sup> We could describe her objection as being rooted in a deep-seated belief that if she voluntarily kills another human being, she has marred her one and only existence forever with a terrible wrong.<sup>136</sup> Worded this way, her belief is not quite so easy to dismiss.

A person's pacifist beliefs may be vitally important to her sense that she has lived out her one existence in an acceptable manner. She may have been passionately committed to this belief for a long time. Surely it is conceivable that she would encounter significant distress if required to kill another human being. As Marshall argues, "[t]he violation of deeply held moral or political principles may cause as much psychic harm to the believer as would a violation of a religious tenet, even if the latter is believed to have extra-temporal effect."<sup>137</sup>

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<sup>134</sup> Choper, "Defining "Religion" in the First Amendment," 597.

<sup>135</sup> The objection could be applied to the arguments of other theorists also. John Garvey takes a similar approach to Choper, comparing a religious pacifist with "the average Marine" who "also suffers at the thought of leaving his family and going into combat" (Garvey, "An Anti-Liberal Argument for Religious Freedom," 287). For the latter, Garvey implies that only the loss of domestic comforts is experienced. Peter Edge, discussing taxation for military purposes, compares a religious pacifist with someone wanting to spend her money on "home repairs or entertainment," leaving the aside the obvious and more challenging example of a secular moral Pacifist (Peter Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2002), 18-19). Given my concerns with Choper's depiction of his non-religious conscientious objector, it will be clear that I find both Garvey and Edge's analyses entirely insufficient to make a case for awarding an exemption on religious, but not moral grounds.

<sup>136</sup> This wording is based on the formulation Choper used for setting out the case for his religious objector (Choper, "Defining "Religion" in the First Amendment," 597).

<sup>137</sup> William Marshall, "In Defense of Smith and Free Exercise Revionism," *The University of Chicago Law Review* 58, no. 1 (1991): 321. Marshall's stance is endorsed in Gedicks, "An Unfirm Foundation," 562.

My argument here does not depend upon proving that the pacifist always or even just usually experiences more or even the same psychological trauma when required to facilitate war. Rather, what is important here is the fact that the matter is so difficult to judge. It is very hard to determine whether it is the religious or the non-religious claimant who experiences greater trauma in this situation. We cannot simply assume that either the threat of extratemporal consequences or the divine authorship of a belief makes it more important to an individual or more painful to contravene. Thus, I share Ingber's view that "Choper is unjustified in categorically assuming that those possessing [a belief in an afterlife of some sort] will generally experience more torment than those who feel they have done a terrible wrong during their only available life."<sup>138</sup>

Naturally, determining what constitutes a sufficiently "weighty" moral issue will not always be such an easy task as it is in the case of pacifism.<sup>139</sup> However, an observation from the divine authority argument can make a contribution to our understanding here.<sup>140</sup> I noted previously that a distinction can be drawn between divinely required religious headdress and secular headgear because significant moral meaning is associated with the former, but is usually absent in the latter case.<sup>141</sup> Applying that distinction here gives us a reason to prioritise some religious

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<sup>138</sup> Ingber, "Religion or Ideology," 277.

<sup>139</sup> Smith, "Converting the Religious Equality Amendment into a Statute with a Little 'Conscience'," 681.

<sup>140</sup> In this respect, I diverge from Kitcher's orientation concept of "orientation" outlined in note 133 above.

<sup>141</sup> See notes 82-83 above and accompanying text. Perhaps moral content will not *always* be absent in the latter case. It is possible in extreme circumstances to imagine someone wearing a baseball cap as a matter of conscience – perhaps as a tribute to a deceased relative. In that case, the psychological harm associated with asking her to remove it would likely be analogous to that associated with transgressing beliefs that are more typically considered matters of 'conscience' and an exemption should be granted. Similarly, a religious custom that has no moral content or which an individual practiced merely as a matter of cultural preference would *not* receive exemptions under this approach. Because I make these distinctions, I am untroubled by Jeremy Webber's argument that drawing a line between religious and non-religious custom contains an implicit prioritisation of religion. (For that argument see, Jeremy Webber,

customs over non-religious customs. That favouritism is justified for cases in which the religious significance of the practice renders it a 'weighty' issue for practitioners. A distinction is due between religion and non-religion because while many non-religious customs may be important to identity, it is likely that religious customs are usually unique insofar as they are connected to conscience.<sup>142</sup> Drawing this line in practice could be very difficult because the meanings of certain practices are hotly contested.<sup>143</sup> Further, one might still be convinced that non-religious customs have a strong case for exemptions on the basis of the psychological harm approach. However, if we are attempting to narrow the ambit of that approach, then focusing upon beliefs with significant moral weight is a sensible and fair way to achieve this objective.

## Conclusion

The arguments canvassed in this chapter are amongst the most popular justifications for religious exemptions because they are usually thought to single out religious beliefs more successfully than the functional approaches discussed in

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"Understanding the Religion in Freedom of Religion," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Leiden: Cambridge University Press, 2008), 32.)

<sup>142</sup> A similar approach is taken by Rodney Smith who argues that allowing both religious and non-religious exemptions would be so broad as to lead to a lack of government. With that concern in mind, Smith prioritises *all* religious beliefs (both those that appear analogous to secular custom and those that appear analogous to secular conscience) and non-religious beliefs that are based on conscience. Non-religious culture does not make the grade for exemptions in Smith's analysis. See, Smith, "Converting the Religious Equality Amendment into a Statute with a Little "Conscience"," 668-75.

<sup>143</sup> See, Paul Morris, "Covering Islam - Burqa and Hijab: Limits to the Human Right to Religion," *Human Rights Research* 2(2004), 4-7, available online via Victoria University of Wellington at <http://www.victoria.ac.nz/nzcpl/HRRJ/vol2/index.aspx> (accessed 27 September 2010). The issue of how to deal with this practical dilemma is beyond the scope of this study, but one option is to leave the issue of classification in the hands of she who makes the claim. Of course, Barry's concern this practice simply *encourages* cultural practices to be labelled "religious" in order to qualify for an exemption arises again (Barry, *Culture and Equality*, 33). But sincerity issues arise in response to almost any rationale for exemptions that can be given (especially if spiritual beliefs are included), so this is not a problem that is unique to this approach.

chapter one. But the content of religious beliefs cannot be taken at face value in a secular liberal state. It is inappropriate for such a state to enter into any action, including awarding exemptions, on the basis that someone's religious beliefs are true or might be true. Nor can the state act on the opposite understanding. The corollary of this is that in order to give any credence to arguments based on extratemporal consequences or divine authority, we must focus upon the psychological harms associated with the believers' perception that she faces certain consequences in the afterlife or is subject to divine dictates. Once this is borne in mind, the task of distinguishing religious beliefs from others becomes significantly more difficult.

While distinctions can be drawn along religious lines, the pursuit of such a task logically leads us to single out an unnecessarily narrow set of particularly terrible or strict religious beliefs alone. Again, therefore, the better approach is to cease such an endeavour. We should not seek to distinguish only religious higher authorities. Rather, we should draw upon some of the positive contributions of content-based approaches and award exemptions to matters which are subject to higher authorities of different kinds. Both matters of religious and non-religious conscience would then be included. The moral conscience approach is narrower than that in chapter one because non-religious customs and preferences would be excluded. However, religious practices with special significance would be included and the approach explains how this can be done without arbitrarily discriminating against those who practice seemingly analogous non-religious customs.

Several interesting issues related to the role of the state have arisen in this chapter. In particular, one might question whether it is fair to ask a state to ignore the question of religious truth to the extent that I have argued. Does this not favour atheist or agnostic citizens over those who maintain a religious worldview? Am I correct to suppose that an inability to identify something distinctly special about religious beliefs in a secular liberal system represents a problem with the argument,

or is it instead a problem with the secular liberal framework within which I have posed the question? My task in the following chapter is to take up these issues.

### CHAPTER THREE: RELIGION IN SECULAR LIBERAL STATES

Secular liberal democracies impose restrictions on the role of religion in political life. It is often contended that these restrictions institutionalise a bias against religious believers. Differences in the way in which religious and non-religious beliefs are treated under secularism have prompted claims that religious beliefs are marginalised and treated unfairly or even with outright hostility in the public arena.

This chapter provides an in-depth discussion of the role of religion in secular societies. I begin by setting out two very different models of secularism which derive from the basic premise that the state must not force its citizens to comply with any religious doctrine. I argue that strong secularism, which removes religious language from political debate, is only a fair response to an extremely narrow set of fundamentalist beliefs in limited circumstances. I then defend a weak form of secularism for the vast majority of religious beliefs. Weak secularism allows a range of political argumentation in debate on the single condition that legislation must not rest on religious reasons alone. I show that most believers will agree with this minimal condition and explain why we can reject the arguments of those who do not.

Justifying weak secularism provides a defence for my framework and analysis in the previous two chapters. For example, it supports my argument in chapter two that the state should refrain from acting on the assumption that religious claims are either true or false. It also provides a response to the fresh arguments for religious exemptions premised upon political hostility which arise in this chapter. I argue that because the manner in which religious beliefs are treated under weak secularism is justified, it does not entail any hostility towards believers. Further, the unwarranted application of strong secularism to non-fundamentalist religious beliefs is a bias that is best remedied by reverting to a weak model of secularism. Finally, I observe that even societies that institutionalise only a weak form of

secularism might still exhibit a sociological bias against some or even all religious argumentation in the political sphere. But because this bias derives from the democratic preferences of the majority of citizens and not the institutions of secularism, it does not distinguish the marginalisation of religious believers from similar marginalisation faced by other minority groups in the political arena.

### **Liberal Secularism: An Introduction**

Separation between religion and the state is a comparatively recent development in many modern secular societies.<sup>1</sup> However, the secular character of liberal democracies appears to have quickly developed into a widely accepted norm.<sup>2</sup> Some form of separation of religion from the affairs of the state is now defended not only by classical liberals, but also by multiculturalist critics such as Will Kymlicka, Bhikhu Parekh, Tariq Modood and Charles Taylor.<sup>3</sup> Secularism comes in a myriad of different varieties. Each theorist outlines his or her own particular

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<sup>1</sup> Roger Trigg, *Rationality and Religion* (Oxford & Malden, MA: Blackwell Publishers, 1998), 8; Martha C. Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (New York: Basic Books, c2008), 354.

<sup>2</sup> Cecile Laborde, "Secularism and Fair Treatment for Muslims," in *Multiculturalism and Moral Conflict*, ed. Maria Dimona-Cookson and Peter M.R. Stirk (USA; Canada: Routledge, 2010), 134. Unless I indicate otherwise, I use the terms 'secular' and 'secularism' here in reference to the institutions and practices of the state. Within that context, I use the terms very broadly and will adopt additional qualifiers later when I refer to specific varieties. 'Secularism' also has a second meaning, which is often used to refer to the decline in religiosity in many Western societies.

<sup>3</sup> Ibid., 134. Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 3, 111; Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke & New York: Palgrave Macmillan, 2006), 321-35; Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge, UK; Malden, MA: Polity Press, 2007), 78-86; Tariq Modood, "Muslims, Racial Equality and Secularism," in *Multiculturalism and Moral Conflict*, ed. Maria Dimona-Cookson and Peter M.R. Stirk (USA; Canada: Routledge, 2010); Tariq Modood, "Anti-Essentialism, Multiculturalism and the 'Recognition' of Religious Groups," *The Journal of Political Philosophy* 6, no. 4 (1998): 390-97; Charles Taylor, "Modes of Secularism," in *Secularism and Its Critics*, ed. Rajeev Bhargava (Oxford University Press, 1998), 31-53.

conception of what secularism requires, what it does not require, and why.<sup>4</sup> In application, almost every state which purports to operate under a secular framework adopts its own distinct form of religion/state separation.<sup>5</sup> For example, in Britain, secularism is seen to be consistent with the continued existence of an established church and seats are reserved in the legislature for bishops.<sup>6</sup> By contrast, the US Constitution enshrines the principle of 'non-establishment' as a fundamental tenet of religious freedom.<sup>7</sup> France goes further still and requires all religious symbols to be removed from the public arena.<sup>8</sup> What these different varieties of secularism have in common is the core principle that religion should not be enforced on the populace by the state.

Secularism is often said to have resulted from the problems associated with intertwined religious and political spheres in societies exhibiting religious pluralism. Kathleen Sullivan refers to secularism as the positive outcome of a "religious truce" that can be embraced as "the price of ending the war of all sects against all."<sup>9</sup> Helping to ensure a peaceful society is the practical benefit brought by

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<sup>4</sup> Modood argues that we can all be secularists, but agree on very little at all about what it means (Modood, *Multiculturalism*, 77).

<sup>5</sup> Margaret Davies, "Pluralism in Law and Religion," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Leiden: Cambridge University Press, 2008), 72. For an overview of the legal framework regarding religion in the UK, US, Australia and Canada, see Peter Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2002), 75-108. For a discussion of secularism in the UK, US and France, see Modood, *Multiculturalism*, 73-78.

<sup>6</sup> Davies, "Pluralism in Law and Religion," 72; Anthony Bradney, *Law and Faith in a Sceptical Age* (Oxon: Routledge-Cavendish, 2009), 5; Modood, *Multiculturalism*, 73-74.

<sup>7</sup> Modood, *Multiculturalism*, 73.

<sup>8</sup> France considers the state an expressly religion-free zone. *Ibid.*, 75; Cecile Laborde, "Secular Philosophy and Muslim Headscarves in Schools," *The Journal of Political Philosophy* 13, no. 3 (2005): 311, 322.

<sup>9</sup> Kathleen M. Sullivan, "Religion and Liberal Democracy," *The University of Chicago Law Review* 59, no. 1 (1992): 197. It is often acknowledged that secularism saved society from the continuation of religious warfare. See also, Rajeev Bhargava, "What Is Secularism For?," in *Secularism and Its Critics*, ed. Rajeev Bhargava (Oxford University Press, 1998), 497; Issac Kramnick and R. Laurence Moore, *The Godless Constitution: A Moral Defence of the Secular State*

secularism.<sup>10</sup> But this pragmatic case is also informed by complementary moral arguments.<sup>11</sup>

Again, the starting point is the prevalence of diverse religious perspectives in pluralist societies.<sup>12</sup> This is paired with a core moral presumption, namely that all citizens are equal members of society, regardless of which (if any) religious truths they affirm.<sup>13</sup> From this starting point we can trace an influential liberal argument for secularism. According to proponents of ‘public reason’ or ‘justificatory’ liberalism, citizens may only be coerced where they can be given reasons – termed ‘public reasons’ – that explain the necessity of laws that constrain them. This requirement stems from the view that respecting others as equals demands that they not be subjected to legislation which they do not (at least in theory) have good reasons to support.<sup>14</sup> In conditions of deep religious disagreement citizens can and

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(New York: W.W. Norton & Company Inc, 2005), 69-70; Taylor, "Modes of Secularism," 32. Andrew Koppleman refers to ‘the argument from civil peace’ as the ‘classic argument’ for religious neutrality in Andrew Koppleman, "The Fluidity of Neutrality," *The Review of Politics* 66, no. 4 (2004): 643-44.

<sup>10</sup> Andrew Koppleman calls this “the classic argument for religious neutrality” (Koppleman, "The Fluidity of Neutrality," 643). See John Locke, "A Letter Concerning Toleration," in *John Locke, a Letter Concerning Toleration in Focus*, ed. John Horton and Susan Mendus (London: Routledge, 1991), 26.

<sup>11</sup> I want to introduce these points now since different “forms of secularism share several common assumptions” (Parekh, *Rethinking Multiculturalism*, 322).

<sup>12</sup> Juha Raikka, "The Place of Religious Arguments in Civic Discussion," *Ratio Juris* 13, no. 2 (2000): 165; Gerald F. Gaus, "The Place of Religious Belief in Public Reason Liberalism," in *Multiculturalism and Moral Conflict*, ed. Maria Dimona-Cookson and Peter M.R. Stirk (USA; Canada: Routledge, 2010), 22-23.

<sup>13</sup> Jeremy Webber, "Understanding the Religion in Freedom of Religion," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Leiden: Cambridge University Press, 2008), 30; Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000), 38; Nussbaum, *Liberty of Conscience*, 2-3, 72-114.

<sup>14</sup> Christopher J. Eberle *Religious Conviction in Liberal Politics*, (Cambridge: Cambridge University Press, 2002) observes that “‘Respect for others requires public justification of coercion: that is the clarion call of justificatory liberalism’” (quoted in Gaus, "The Place of Religious Belief in Public Reason Liberalism," 21). See also Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14, no. 1 (2006): 5. It is not assumed that each and every citizen *will* in

do reasonably disagree profoundly about religious matters. Therefore no religious reasons will be accepted by all members of a political community. Thus, for secularists, religious reasons fail to meet the standard necessary to constitute adequate grounds for coercion.<sup>15</sup> This view is expounded in different forms by a number of liberal theorists, most prominent among whom is John Rawls.<sup>16</sup>

Excluding religion as legitimate grounds for coercion mandates the principle of *secular liberal neutrality* whereby the state must abstain from involvement in religious disputes. The legislative, judicial and executive branches of government each refrain from advancing any particular religious beliefs.<sup>17</sup> In application, the state must consider any religious truth-claims regarding what action God wills people to take to be irrelevant to the general functions of the state. Thus no model of secularism allows public policy to be justified on religious grounds alone. This line of thinking brings us to what Robert Audi has called the 'principle of the

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*actuality* agree with every piece of legislation to which she is subject, it is merely argued that reasons must be available to her and these must not conflict with her status as a free and equal member of society. This view originally developed out of social contractual theories for justifying liberalism, such as those provided by Hobbes, Locke and Rousseau. More recently, the social contract theory provided by John Rawls in *A Theory of Justice* makes explicit that the problem here is centred upon determining a method of *justification* for legislation, *not* using *consent* as a basis of obligation (see Gaus, "The Place of Religious Belief in Public Reason Liberalism," 19).

<sup>15</sup> Gaus, "The Place of Religious Belief in Public Reason Liberalism," 20.

<sup>16</sup> The primary work is John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 212-54. Other proponents include Bruce Ackerman, Ronald Dworkin, Charles Larmore, Thomas Nagel, Robert Audi and (somewhat more tentatively) Kent Greenawalt. For this attribution of secular public reason theorists I follow Larry Alexander, "Liberalism, Religion, and the Unity of Epistemology," *San Diego Law Review* 30 (1993): 770 and Raikka, "The Place of Religious Arguments in Civic Discussion," 167. For concise summaries of justificatory liberalism see Stephen Macedo, "The Politics of Justification," *Political Theory* 18, no. 2 (1990): 280-82; Joshua Cohen, "Procedure and Substance in Deliberative Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996), 99-100; Gaus, "The Place of Religious Belief in Public Reason Liberalism," 19-24.

<sup>17</sup> Raikka, "The Place of Religious Arguments in Civic Discussion," 163.

secular rationale<sup>18</sup> whereby laws must be supported by secular reasons.<sup>19</sup> In this manner, all forms of secularism ensure that citizens, including the non-religious, remain free from coerced religious observance.<sup>20</sup> In particular, minority religions and their adherents are protected from the potential imposition of a majoritarian religion.<sup>21</sup> Religious truth, in a liberal state, becomes a private matter for each individual to determine according to her conscience.<sup>22</sup> However, the extent to which religion is privatised in this manner differs between the two main models of secularism that I want to consider here.

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<sup>18</sup> Audi, *Religious Commitment and Secular Reason*, 86. See also Gaus, "The Place of Religious Belief in Public Reason Liberalism," 25.

<sup>19</sup> There are, of course, important differences between public reason liberalism, justificatory liberalism and deliberative democracy and between the particular models of each espoused by different theorists. For example, Rawls applies his public reason argument only to a limited sphere of "'constitutional essentials' and questions of basic justice" (Rawls, *Political Liberalism*, 214-15, 227). By contrast, Audi takes a wider view in Audi, *Religious Commitment and Secular Reason*, 87. In this thesis I assume the wider application of the approach that does not attempt the difficult task of determining which matters do and which do not fall into the category of "constitutional essentials." (For critiques of Rawls' approach see, Richard J. Arneson, "Liberal Neutrality on the Good: An Autopsy," in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. Steven Wall and George Klosko (Oxford: Rowman & Littlefield Publishers, Inc, 2003), 206-07., Kent Greenawalt, "Religion, Law, and Politics: Arenas of Neutrality," in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. Steven Wall and George Klosko (Oxford: Rowman & Littlefield Publishers, Inc, 2003), 271-72 and Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton Princeton University Press, 1996), 88-89n9.) See also Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton and Oxford: Princeton University Press, 2002), 108-12.

<sup>20</sup> Salwa Ismail, "Being Muslim: Islam, Islamism and Identity Politics," *Government and Opposition* 39, no. 4 (2004): 614; Webber, "Understanding the Religion in Freedom of Religion," 29-30; Laborde, "Secularism and Fair Treatment for Muslims," 134; Audi, *Religious Commitment and Secular Reason*, 37, 101.

<sup>21</sup> Audi, *Religious Commitment and Secular Reason*, 39. Even Michael McConnell, who is mostly scathing about the "scrupulous secularism" of the US Supreme Court, acknowledges that avoiding the imposition of majoritarian religion is a positive corollary of the Court's secularist stance (Michael W. McConnell, "Religious Freedom at a Crossroads," *The University of Chicago Law Review* 59, no. 1 (1992): 116).

<sup>22</sup> Ismail, "Being Muslim," 614. Modood, *Multiculturalism*, 72.

I will refer to the two variants as weak and strong forms of secularism.<sup>23</sup> Weak secularism separates religion only from the *state*. It says nothing about the arguments that citizens raise in political debates and requires only that state officials abstain from basing decisions solely on religious grounds.<sup>24</sup> Strong secularism goes one step further and separates religion from *politics*, expunging religious language from the political arena.<sup>25</sup> The generalised rationales underlying all forms of secularism that I outlined above do not explain why removing religion from political life is thought to be necessary to the underlying aim of avoiding religious coercion. Thus it is necessary to begin by tracing some arguments for and against strong secularism.

### **Strong Secularism**

#### *Protecting Religion from Politics*

Let us begin by considering two slightly different arguments which purport to expressly prioritise the plight of the religious. The strict public/private distinction in strong secularism is said to ensure that individuals remain free to respond to their personal consciences. All religious citizens are accorded a sphere of free operation within which to practice their religions without state intrusion.<sup>26</sup> Once religious arguments are introduced into the political and hence public sphere, it invites non-religious citizens to challenge the religious doctrine on which they are

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<sup>23</sup> Bhikhu Parekh also uses the labels 'strong' and 'weak' to refer to these different models of secularism. Parekh's outline is in Parekh, *Rethinking Multiculturalism*, 322.

<sup>24</sup> *Ibid.*, 322, 327-35.

<sup>25</sup> This is the 'strong' or 'radical' secularism that is rejected by Parekh and Modood respectively in *ibid.*, 322-27; Modood, "Anti-Essentialism, Multiculturalism and the 'Recognition' of Religious Groups," 391-92. For a more complex range of possible frameworks for religion to engage with both political debate and decision-making see Kent Greenawalt, "Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint," *San Diego Law Review* 30(1993): 668.

<sup>26</sup> Webber, "Understanding the Religion in Freedom of Religion," 29; Michael W. McConnell, "The Problem of Singling out Religion," *DePaul Law Review* 50(2000-2001): 27.

based. Consider Bhikhu Parekh's argument that Catholic reasons for advocating a total ban on abortion could be introduced in the political arena.<sup>27</sup> Parekh argues that non-Catholic citizens are able to engage with the Catholic argument, including by presenting the case that "that the Catholic position is internally inconsistent and misrepresents the central doctrines of the Church."<sup>28</sup> Parekh thinks that a collateral advantage of this is that it may trigger internal debate within Catholicism.<sup>29</sup> But religionists may be uncomfortable about subjecting their vitally important beliefs to the scrutiny of outsiders. Preventing co-religionists from transporting religious beliefs into the arena of the political ensures that all religious citizens' beliefs are protected from external challenge.

A second reason for excluding religion from the political arena can be paired with this first concern. Politics is the realm of debate, but it is also the realm of "cheap shots" and political opportunism.<sup>30</sup> If a citizen is uncomfortable about subjecting her religious views to critical scrutiny, she is likely to be even more upset at the prospect of ridicule which is always the response of *someone* when opinions are entered into political debate.<sup>31</sup> One of the earliest advocates of secularism, Bishop Roger Williams, argued that abstention from the wilderness of politics was necessary in order to ensure the purity of the Christian faith.<sup>32</sup> Indeed, several theorists have argued that the political exercise of religion in the US provides examples of religion being used as a "campaign slogan for politicians" or simply being rendered entirely "banal."<sup>33</sup> Many religionists in the US today agree that for

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<sup>27</sup> Parekh, *Rethinking Multiculturalism*, 325-27.

<sup>28</sup> *Ibid.*, 325.

<sup>29</sup> *Ibid.*, 326.

<sup>30</sup> Kramnick and Moore, *The Godless Constitution*, 19-20, 22.

<sup>31</sup> *Ibid.*, 20.

<sup>32</sup> William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge, New York and Melbourne: Cambridge University Press, 1991), 271.

<sup>33</sup> Kramnick and Moore, *The Godless Constitution*, 155-69; Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: BasicBooks, 1993), 45, 80-81.

the sake of religion itself, religious beliefs are best kept separate from politics. One study found that most believers in the US felt uncomfortable passing judgment on others' convictions because "such a move politicizes religion, taking it out of the private realm where it belongs and placing it in politics – a realm of human activity for which people have relatively little respect."<sup>34</sup>

But critics of strong secularism accept neither of these arguments for excluding religion from the political arena. They maintain that protection of religious belief and practice does not mandate that religious views are never aired in public. Many religious believers want to take political action about matters that concern them as religious citizens. For these believers strong secularism oversteps the mark necessary to protect religious beliefs and begins to impede religionists from engaging in public debate.<sup>35</sup> Frederick Gedicks argues that "the hostility of public life to religion can be traced to one of the conceptual foundations of liberal political theory: the distinction between public and private life."<sup>36</sup>

For many believers, sidelining religious elements of identity before entering the political arena is not an easy prerequisite to meet. Consider the depiction of religious beliefs as overarching guiding principles, which was set out in chapter one. Parekh observes that "[r]eligious people generally seek wholeness in their lives and do not think it is possible or desirable to separate their private and

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<sup>34</sup> Alan Wolfe, "Civil Religion Revisited," in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, 2000), 44.

<sup>35</sup> Tariq Modood argues that politically active religious groups are often met with a "panicky retreat to a liberal public-private distinction" (Modood, "Muslims, Racial Equality and Secularism," 120) and that radical secularism favours "the private kind of religions" (Modood, "Anti-Essentialism, Multiculturalism and the 'Recognition' of Religious Groups," 393).

<sup>36</sup> Frederick Mark Gedicks, "Public Life and Hostility to Religion," *Virginia Law Review* 78(1992): 674. Gedicks also argues that "[k]eeping religion and religious belief confined to private life enables the liberal state to marginalize religion without eliminating it" (*ibid.* 679).

political concerns.”<sup>37</sup> For those who adopt this perspective, the strong secular requirement to bracket religious beliefs from the political arena is extremely difficult. Muslims are often cited as an example of those who have a particularly difficult time making the distinction that strong secularism calls for here.<sup>38</sup>

Silencing religious perspectives in the political arena may also suggest that religious aspects of identity are considered abnormal and undervalued by the state. Parekh worries that this may generate “a crisis of legitimacy” amongst the religious and alienate them from the political system.<sup>39</sup> This recalls the argument from chapter one that unwarranted discrimination on the basis of important aspects of identity has the potential to engender psychological harm.<sup>40</sup>

Considering arguments for and against strong secularism appears to present us with two conflicting views of psychological harm. According to religious supporters of strong secularism, the reality of the political realm could threaten psychological well-being, by challenging centrally important religious beliefs. Opponents of strong secularism argue that this harm instead derives from being

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<sup>37</sup> Parekh, *Rethinking Multiculturalism*, 324. Habermas also thinks that a “compelling argument” flows from the recognition that “true belief is [...] a source of energy that the person who has a faith taps performatively and thus nurtures his or her entire life. This totalizing trait of a mode of believing that infuses the very pores of daily life runs counter, the objection goes, to any flimsy switchover of religiously rooted political convictions onto a different cognitive basis” (Habermas, “Religion in the Public Sphere,” 8). See also Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2002), 157; Nancy L. Rosenblum, “Introduction: Pluralism, Integralism, and Political Theories of Religious Accommodation,” in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, 2000), 15-16 and Greenawalt, “Religion, Law, and Politics: Arenas of Neutrality,” 269.

<sup>38</sup> Laborde argues that current republican argumentation in France “is preoccupied with the question of the seeming incompatibility between Islam and *laïcité*” (Laborde, “Secular Philosophy and Muslim Headscarves in Schools,” 320, see also 321).

<sup>39</sup> Parekh, *Rethinking Multiculturalism*, 324.

<sup>40</sup> Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford; New York: Oxford University Press, 2005), 51; Modood, *Multiculturalism*, 53; Parekh, *Rethinking Multiculturalism*, 334.

treated differently in the political arena. This latter analysis recalls the concerns outlined in the difference approach variant of psychological harm arguments. If one receives messages that one is abnormal, one may suffer mental anguish as a result.

Critics of strong secularism are more convincing here. A call for exemptions is necessarily a *political* matter because it is asking for particular action to be taken by the state. Believers who seek exemptions must then be claiming political relevance for their beliefs and so must accept the critical scrutiny involved.<sup>41</sup> As I argued in chapter one, if people wish their beliefs to be taken seriously by wider society then they cannot seek to shelter them entirely from critical scrutiny, no matter the importance of these beliefs to their identities.

#### *Contestability and Epistemic Difference*

Rejecting arguments that strong secularism is necessary to protect religionists leaves us with justifications premised upon the contestability of religious speech. Introducing religious language into politics is considered especially divisive. Peaceful and fruitful democratic deliberation cannot occur when citizens argue from irrefutably entrenched assertions about mutually exclusive divine dictates. By contrast, reasons formulated in secular language are thought to be less inherently contentious.<sup>42</sup>

At the outset, one logical limitation to the scope of this argument can be outlined. Excluding religious *language* from politics should not be taken to necessitate the exclusion of religious *believers* from the political arena. Religious citizens can only be asked to formulate arguments in secular language. Even if we accept that

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<sup>41</sup>Refer to pages 47-48 of chapter one. My argument there drew on Peter Jones, "Beliefs and Identities," in *Toleration, Identity and Difference*, ed. John Horton and Susan Mendus (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 1999), 77-83.

<sup>42</sup>Raikka, "The Place of Religious Arguments in Civic Discussion," 169; Greenawalt, "Religion, Law, and Politics: Arenas of Neutrality," 268.

religious argumentation premised upon the truth of religious scripture is inherently contentious, this does not form the totality of religious argumentation. One broad category of religious beliefs easily meets the secular language requirement. Much of what religion is about is very much akin to secular philosophy. Religion concerns itself with systems of morality. Belief in God is often only tangentially related to religious moral judgments about what is right and wrong. Thus, if appeals to God's authority are avoided, it becomes difficult to distinguish religious *moral* beliefs from non-religious moral beliefs. Normative arguments are equally controversial, whether they derive from secular or non-secular philosophies. The contestability of divine dictates cannot therefore support the exclusion of religious moral beliefs from political debate.<sup>43</sup> If strong secularism is to be justified on the basis that "God talk" is especially contentious then all it can demand is the debate occurs on secular terms where there is some distance between doctrinal foundation and the philosophical argumentation put forth.

Two implications follow from recognising the limitations of this argument for strong secularism. First, properly construed, strong secularism allows a range of religious arguments into the political arena. But the second implication is that believers who wish to ground their moral arguments strongly and overtly in their belief in a system of karma or in the dictates of a particular non-earthly authority may raise their arguments only after first deleting this overt religious content. Thus, religionists are required to conform to a secular norm, translating their ideas into a religion-free second language that sits in tension with their own central religious identity.<sup>44</sup>

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<sup>43</sup> Larry Alexander argues that "[r]eason in the narrow sense that might be employed to discredit religious arguments equally discredits normative arguments." Reason in a broader sense is equally applicable to religious and non-religious moral views (Alexander, "Liberalism, Religion, and the Unity of Epistemology," 775).

<sup>44</sup> For this reason, Bhikhu Parekh laments the fact that religious citizens are often forced to "speak in a different language to the one in which they think" (Parekh, *Rethinking Multiculturalism*, 323). It should be noted that many proponents of public reason liberalism

Religious believers claim that singling out their beliefs alone as peculiarly divisive is unfair.<sup>45</sup> Extreme social diversity and clashes are prevalent in the realms of political, philosophical and cultural values. Those at the extreme left of the political spectrum clash with those at the extreme right regarding all manner of far-reaching economic and social issues. It is, as Juha Raikka observes, entirely obvious “that there are no secular premises that are literally shared by *every* citizen of a given society.”<sup>46</sup> Steven Smith writes “[r]eliance upon controversial premises in public argument is not only common, but inevitable.”<sup>47</sup> With these concerns in mind, religionists wonder why only their beliefs are the subject of so much concern. Insofar as “[c]onservationists, liberals, Marxists, fascists and others” who “speak in very different languages” are afforded the political floor to present their various divergent and contestable values, arguments and ideals, religionists argue that they too should be allowed this opportunity.<sup>48</sup> The highly contestable nature of both religious beliefs *and* secular beliefs fuel arguments that singling out the former set

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disagree with my conclusion here. They accept the correlation between religious and non-religious philosophical and moral beliefs, but respond by advocating the exclusion of *all* of these categories of contentious claims from the political arena (Raikka, "The Place of Religious Arguments in Civic Discussion," 169). For example, Rawls argues that our diverse “religious and philosophical doctrines,” “our individual and associative points of view, intellectual affinities, and affective attachments” do not provide a satisfactory basis for political agreement (Rawls, *Political Liberalism*, 58, see also 175, 220-22). But this answer will prove unsatisfactory for critics of secularism. Secular systems certainly *do* purport to draw a line between religion and non-religion. The wider exclusion of comprehensive political and philosophical viewpoints is not mandated under any form of secularism and it does not occur in practice.

<sup>45</sup> Parekh refers to it as “discriminatory” and “undemocratic” (Parekh, *Rethinking Multiculturalism*, 324.)

<sup>46</sup> Raikka, "The Place of Religious Arguments in Civic Discussion," 168-69. Liberals might respond to such a criticism by arguing that broad secular principles, such as the idea that “freedom is a good thing” are widely shared and ought to be used to formulate public policy. Yet it is very difficult to imagine such broad principles having any practical operative value in response to real political questions. See also Greenawalt, "Religion, Law, and Politics," 269.

<sup>47</sup> Steven Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," *University of Pennsylvania Law Review* 140(1991-1992): 180.

<sup>48</sup> Parekh, *Rethinking Multiculturalism*, 325.

for political exclusion is biased. But are religious beliefs really no more contestable than others?

It is often thought that the peculiarly contestable nature of religious beliefs derives from the fact that they operate on a distinctive epistemological foundation to that of discursive politics. Stephen Carter believes it is “often [an] unstated premise of many liberal theorists that reasoning and religious belief are mutually exclusive.”<sup>49</sup>

Larry Alexander argues that

The liberal’s rejection of religious-based policies suggests some sort of epistemological divide or discontinuity between what we can claim justifiably to know secularly, so to speak, and what we can claim justifiably to know religiously, the latter being an inferior form of knowledge for the purposes of public policy, though perhaps not for other purposes.<sup>50</sup>

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<sup>49</sup> Stephen L. Carter, “Evolutionism, Creationism, and Treating Religion as a Hobby,” *Duke Law Journal* 1987, no. 6 (1987): 986. Many justifications for religion’s current place in liberal democracies appear to rest implicitly upon drawing distinctions between religious and secular ways of developing and utilising particular truth-claims. See, McConnell, “The Problem of Singling out Religion,” 24. Also note Peter Wenz’s contention that the US Supreme Court tends to distinguish religious and non-religious beliefs for constitutional purposes “primarily by epistemological considerations” in Peter S. Wenz, *Abortion Rights as Religious Freedom* (Philadelphia: Temple University Press, 1992), 131.

<sup>50</sup> Alexander, “Liberalism, Religion, and the Unity of Epistemology,” 774. Similarly, Hunter Baker argues that the Enlightenment’s profession that reason is the proper method for determining the truth “set the stage” for church-state separation. Religion, which was considered to have distinct epistemological basis apart from secular rationality, was thereby removed from the public sphere “so that all citizens may participate in a government predicated on the employment of common reason that everyone possesses” (Hunter Baker, “Competing Orthodoxies in the Public Square: Postmodernism’s Effect on Church-State Separation,” *Journal of Law and Religion* 20, no. 1 (2004-2005): 100-01). See also Gedicks, “Public Life and Hostility to Religion,” 696.

Religion is different because it is a matter of faith. There is “no rational way, no set of principles or forms of reasoning that could, even among reasonable people, determine that one particular religion is true.”<sup>51</sup> Because no religion can *rationally* claim to represent the truth, the state must not advance any one religion over another.<sup>52</sup> Neither rational argumentation nor empirical evidence can establish the truth of a belief in any divine power, let alone one who requires women to wear headscarves, men to wear turbans or even people to abstain from warfare. Because we cannot know these things, it is considered fair to restrict the state from acting upon the assumption that they are true or untrue.<sup>53</sup> This is the view that I set out in chapter two. Religious beliefs are distinct because the possibility of ever knowing the truth of much religious doctrine in rational terms is precluded until death. While religious critics are correct that politics, philosophy and even science are also contested, the difference is that there remains the possibility of developing knowledge in these realms because they subscribe to accepted standards of reasoning.<sup>54</sup>

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<sup>51</sup> Amy Gutmann and Dennis Thompson refer to this as the “skeptical premise.” They argue that most modern arguments for religious toleration rest upon this basis (Amy Gutmann and Dennis Thompson, “Moral Conflict and Political Consensus,” *Ethics* 101, no. 1 (1990): 65-66).

<sup>52</sup> This argument is set out in Koppleman, “The Fluidity of Neutrality,” 642-43 and McConnell, “The Problem of Singling out Religion,” 24-25.

<sup>53</sup> Thus scepticism regarding human ability to determine religious truth forms the basis for treating religion as politically irrelevant. William Galston also argues that contemporary liberal theorists defend state neutrality (more broadly – i.e. not just in the realm of religion) on a sceptical basis, taking the unavailability of knowledge of the good as a starting premise. He contends that liberals trace their argument from this starting point to arrive at their prescribed liberal public dialogue only via a commitment to rationality. Galston demonstrates such a progress in the work of Richard Dworkin, Bruce Ackerman at John Rawls. See William Galston, “Defending Liberalism,” *The American Political Science Review* 76, no. 3 (1982): 624-27.

<sup>54</sup> Lucas Swaine (following William Galston) argues that non-religious beliefs are potentially resolvable in a matter which religious beliefs are not in Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006), 117. See also Christopher Eisgruber and Lawrence Sager, “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,” *The University of Chicago Law Review* 61(1994): 1291. The philosophical implications of this highly prevalent argument are set out in

But does this difference render religious beliefs unable to meet the requirements of the system of discursive politics that justificatory liberalism demands? Two points are emphasised in the standard description of the requirements of political argumentation. If coercive legislation is only allowable when justificatory reasons can be given to support it, then citizens ought to be able to articulate and defend reasons that support their arguments for or against any coercive state action.<sup>55</sup> Bruce Ackerman explains that “[w]henver anybody questions the legitimacy of another’s power, the power holder must respond not by suppressing the questioner but by giving a reason.”<sup>56</sup> Doing so involves us in “deliberative, dialogic decision-making.”<sup>57</sup> In its ideal formulation, the process is a rational one. A given proposition is supported by the use of sound argumentation and empirically established facts. Stephen Macedo explains that public justification demands reasons that are “*public* in the sense of being widely and openly accessible; appeals to inner conviction or faith, special insight, secret information, or very difficult forms of reasoning are ruled out.”<sup>58</sup>

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Peter van Inwagen, "It Is Wrong, Everywhere, Always, and for Anyone, to Believe Anything Upon Insufficient Evidence," in *Philosophy: The Big Questions*, ed. Ruth J. Sample, Chales W. Mills, and James P. Sterba (Malden, MA: Blackwell Publishing Ltd, 2004), 92-94. (Van Inwagen argues that the fact that W.K. Clifford’s thesis on epistemic reservation (the idea that it is wrong to believe on insufficient evidence) tends to be recommended only to religion suggests tacit acceptance of what he terms “the Difference Thesis.” He describes the Difference Thesis as the view that “[e]ither religious beliefs should be held to a stricter epistemic standard than beliefs of certain other types – of which philosophical and political beliefs are the paradigm – or, if they are held to the same epistemic standard as other types, they typically fare worse under this standard than typical beliefs of most other types, including philosophical and political beliefs.”)

<sup>55</sup> Habermas, "Religion in the Public Sphere," 4-5.

<sup>56</sup> Bruce Ackerman, *Social Justice in the Liberal State* (New Haven and London: Yale University Press, 1980), 4, see also 5-8, 371-74.

<sup>57</sup> Daniel O. Conkle, "Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law," *Journal of Law and Religion* 10, no. 1 (1993): 16; Robert Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993), 107.

<sup>58</sup> Macedo, "The Politics of Justification," 281. Similarly, Colin Bird’s attempt to set out the kind of “transparent” claims he believes to be politically admissible follows emphasises “critical scrutiny,” following proofs, empirical examination and other hallmarks of the kind of reasoning

The second element is that conclusions, once reached, ought to be provisional, with some degree of political scepticism favoured over absolute certainty. A vital measure for ensuring continual public acceptability of political truth is that it is considered fallible.<sup>59</sup> It must “remain open to critical debate” and “may change over time.”<sup>60</sup> This second criterion can also be considered a derivative of the first. Rationality prescribes that one must always seek “to proportion the strength of his belief to the strength of the evidence.”<sup>61</sup> If one does not have full evidence, she does not need to remain forever in a state of indecision. But whatever conclusion she reaches, she must regard it constantly with an eye of scepticism and a willingness to reconsider. Thus for public policy purposes, knowledge is developed in a rational and tentative manner.

Determining those faith-based beliefs that are acceptable in political debate and those that are not requires a brief sojourn into the question of religious epistemology. Those who believe because they have ‘faith’ “express a commitment to that which cannot be established by reason, or to that which can be established by reason but not for that reason.”<sup>62</sup> Faith involves going beyond what can be

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exercised in the natural and mathematical sciences (Colin Bird, "Mutual Respect and Neutral Justification," *Ethics* 107, no. 1 (1996): 71-72). Bird's entire approach contains frequent references to the “rational” nature of the debate which he assumes (see, for example, 74, 81, 82, 83, 84).

<sup>59</sup> Michael J. Perry, *Morality, Politics and Law: A Bicentennial Essay* (New York: Oxford University Press, 1988), 98-102; Sanford Levinson, "Review: Religious Language and the Public Square," *Harvard Law Review* 105, no. 8 (1992): 2069.

<sup>60</sup> Steven Gey states that “[i]n a proper democracy, political truth is developed, not discovered, and it may change over time as the individual components of political truth lose their usefulness” (Steven Gey, "Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment," *University of Pittsburgh Law Review* 52(1990-1991): 176). Similarly, Stephen Macedo argues that “[p]ublic justification should be a never-ending commitment,” and requires that citizens “keep debating” and “remain open to a critical dialogue” (Macedo, "The Politics of Justification," 287-88).

<sup>61</sup> Louis P. Pojman, "Belief and Will," *Religious Studies* 14, no. 1 (1978): 8.

<sup>62</sup> Timothy Macklem, "Reason and Religion," in *Faith in Law: Essays in Legal Theory*, ed. Peter Oliver, Sionaidh Douglas-Scott, and Victor Tadros (Oxford: Hart Publishing, 2000), 83. Also, Trigg states that “for many faith and reason seem totally opposed to each other” (Trigg,

proven.<sup>63</sup> Beliefs pertaining to, for example, the truth of the bible or the will of God are established on such bases as a 'feeling' or an extraordinary sensory perception such as a vision.<sup>64</sup> By its very nature, faith involves maintaining "a warranted confidence in matters that cannot be proven with certitude."<sup>65</sup> It is therefore a more intuitive and emotive epistemology and places less emphasis upon rational cognition than public reason liberalism demands.

*Fundamentalist Religious Epistemology: A Limited Defence of Strong Secularism*

Religious believers who hold radical belief-sets assume that there is a sharp distinction between faith and rationality.<sup>66</sup> For this set of believers, faith implies the exclusion of precisely the forms of critical reasoning and evidence which are

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*Rationality and Religion*, 174). But this is a much more contentious issue than it first appears. In a frequently cited work, Larry Alexander states that "I am not sure how to make an epistemological distinction between faith and reason" (Alexander, "Liberalism, Religion, and the Unity of Epistemology," 770).

<sup>63</sup> John Bishop, "Faith as Doxastic Venture," *Religious Studies* 38, no. 4 (2002): 471-72 and Trigg, *Rationality and Religion*, 20.

<sup>64</sup> See M. Peterson et al., *Reason and Religious Belief: An Introduction to the Philosophy of Religion*, 3rd ed. (New York: Oxford University Press, 2003), 17-25, 40-41. Peterson et al describes these *feelings* and *perceptions* as 'religious experience.' They argue that religious experience is subject to the interpretation of the individual who experiences it. In order for her to interpret what she *feels* or *perceives* to be religious, she must maintain a pre-existing set of religious beliefs or at least have an awareness of a certain set of religious beliefs which she can employ to bridge the gap between her experience and her interpretation of its meaning. Thus religious experience must ultimately involve cognition. Charles Taylor gives two detailed examples of religious conversion experiences which emphasise overwhelming religious feeling in Charles Taylor, *A Secular Age* (Cambridge, Mass: Belknap Press of Harvard University Press, 2007), 5, 728-29.

<sup>65</sup> McConnell, "The Problem of Singling out Religion," 26; Peterson et al., *Reason and Religious Belief*, 45-46; Trigg, *Rationality and Religion*, 20.

<sup>66</sup> Roger Trigg states that "[t]he perennial temptation for religious believers is to retreat to 'faith' or some such category, so that their beliefs can no longer be subjected to rational scrutiny" (Trigg, *Rationality and Religion*, 113). In fact, Carter appears to take up the position that religion is about faith *and not* about reason. See, Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby," 992-93, 95. Alexander and Gey also interpret Carter's argument in this manner (Alexander, "Liberalism, Religion, and the Unity of Epistemology," 700n20; Gey, "Why Is Religion Special?," 175-76).

favoured by secularists. According to Soren Kierkegaard, one no longer has faith when she employs evidence and reason to establish proof for her beliefs. Asking a believer to employ rational empiricism means to test her faith would ultimately constitute the worship of logic and science and not the worship of God.<sup>67</sup> It is thus a misguided endeavour and an “indication of the adherent's inadequate faith or devotion.”<sup>68</sup>

If religionists “whose beliefs rest entirely on faith [...] try to justify toleration on the ground that their beliefs though true cannot be proved by reason, they in effect grant reason more authority than faith in all of public life.”<sup>69</sup> Thus many believers reject the proposition with which I began this inquiry into religious epistemology – namely, that because no religion can *rationally* claim to represent the truth, the state must not advance any one religion over another. Strong religious believers instead state with confidence that *their* religion is true and they *know* this. They know this because the Bible tells them, because God has revealed himself to them or because they have received the gift of faith, but the important point is that they know they are correct.<sup>70</sup> For these believers, every instance where rational argumentation fails to prove their beliefs true represents the failure of rational empiricism. It does not in any way suggest to them that their beliefs are less politically relevant. Religious believers thereby claim that they *are* in fact able to demonstrate the truth of their religion, but their arguments simply take a different form to that which liberal

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<sup>67</sup> Soren Kierkegaard, *Concluding Unscientific Postscript*, trans. David F. Swenson and Walter Lowrie (Princeton, N.J.: Princeton University Press, 1941), 182. Soren Kierkegaard was a prominent Danish scholar of the 1800s whose work included philosophy, theology and psychology. For a concise summary of the fideist position, see Peterson et al., *Reason and Religious Belief*, 45-48. See also Gutmann and Thompson, "Moral Conflict and Political Consensus," 67.

<sup>68</sup> Gey, "Why Is Religion Special?," 176.

<sup>69</sup> Gutmann and Thompson, "Moral Conflict and Political Consensus," 67.

<sup>70</sup> Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby," 993.

politics presently favours.<sup>71</sup> A true religious believer must instead be prepared to make a “leap of faith.”<sup>72</sup>

But if rationality is specifically excluded from the arena of religious belief, then believers may have licence to take the view that faith *overrides* rationality.<sup>73</sup> Levinson provides the example of Rabbi Yehuda Levin who argues that being Jewish requires the surrender of one’s intellect to God. God dictates a person’s beliefs and she must not stray merely because of a personal inability to comprehend what God has said.<sup>74</sup> Such a view clearly precludes the model of rational debate which justificatory liberalism prioritises. It may further support *irrationalist* fideism – namely, holding beliefs which directly contradict empirical evidence. This is the form of religious belief involved when Biblical literalists claim that the contradiction between the Bible and evolutionary theory constitutes evidence against the latter, rather than the former.<sup>75</sup>

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<sup>71</sup> Stanley Fish points out that the supremacy of rational thought is a recent phenomenon in our present society. “It hardly need be said that it was once otherwise, that it was once the case that reasoning rooted in religious conviction was central to all avenues of human inquiry” (Stanley Fish, “Mission Impossible: Settling the Just Bounds between Church and State,” *Columbia Law Review* 97, no. 8 (1997): 2310).

<sup>72</sup> Peterson et al., *Reason and Religious Belief*, 45-46. Peterson et al claim that this interpretation of faith is often “very attractive” to religious believers. See also Greenawalt, “Grounds for Political Judgment,” 649.

<sup>73</sup> On faith as believing “beyond” and faith as believing “against” what can be “established rationally on the basis of evidence and argument” see Bishop, “Faith as Doxastic Venture,” 471-72.

<sup>74</sup> Levinson, “Review: Religious Language and the Public Square,” 2075. Levinson’s use of this example comes with the adjunct that he, like many other Jews, rejects Rabbi Levin’s claims.

<sup>75</sup> Carter, “Evolutionism, Creationism, and Treating Religion as a Hobby,” 980-81. See also, Carter, *The Culture of Disbelief*, 175 (Carter observes that for some religious believers “physical evidence that appears to run against the biblical account is only a trap set by the devil for the unwary”). On fundamentalism and biblical inerrancy, see also Ralph W. Jr. Hood, Peter C. Hill, and Bernard Spilka, *The Psychology of Religion: An Empirical Approach*, 4th ed. (New York, London: The Guilford Press, 2009), 418-19.

There is a further facet of difference between many strong religious believers and the model of political discussion that liberals champion. Much religious faith is avowedly less reticent than secular rationalism.<sup>76</sup> Beliefs that are formed on the basis of faith are held with a kind of certitude that rivals, and may sometimes outstrip, that which others feel regarding beliefs reached through scientific and political methods of investigation.<sup>77</sup> Liberal political systems thereby reveal a preference for secular ways of knowing and a bias against religious epistemologies, which favour a more intuitive, emotive and confident process of truth-finding.

Excluding fundamentalist beliefs that deny any role to rational deliberation from the political arena does not leave us with a “state versus religion” bias.<sup>78</sup> It leaves us instead with a warranted prioritisation of beliefs that are not entirely irrational or fanatical. Fanatical and irrational beliefs are properly expunged from politics on the basis that they do not play by the rules of the political game. This holds true whether they are religious or not. As Parekh insists, to ensure that “public discussion and debate are not to be a chaotic process in which participants parade

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<sup>76</sup> Parekh, *Rethinking Multiculturalism*, 321. See also Fish, “Mission Impossible,” 2291. Fish accuses Gutmann and Thompson of equating rationality with the type of reasoning they are accustomed to within the academy (and particularly political science departments) “which means that those within the circle will hold their beliefs at arms length and relate to them in a style marked by diffidence, aversion to strong assertion (except in a very few cases like that of racial discrimination), and a pervasive, if mild and unaggressive, scepticism”.

<sup>77</sup> I want to be clear that this difference between religious belief and deliberative democratic debate only pertains to fundamentalist religious perspectives. It would certainly be an over-generalisation to equate absolute certainty with many more moderate religious perspectives. As discussed in chapter two, many believers consider religion to be the subject of a continuous “search for truth.” Anthony Bradney also observes that scepticism of authority and truth-telling, which he describes as “tropes in modern society” tend to conflict with *religion*, but not necessarily with *personal religiosity* (Bradney, *Law and Faith in a Sceptical Age*, 14-15).

<sup>78</sup> For example, Michael Perry rejects religious revelation and other notions of privileged insight from political dialogue. But he argues staunchly for the inclusion of more moderate religious positions (see, Levinson, “Review: Religious Language and the Public Square,” 2069).

their principles and talk past each other, they require a structure.”<sup>79</sup> One simply cannot engage in discursive politics with people who claim that “religious reasoning does not require consistency, factual statements, or other characteristics of good secular reasoning.”<sup>80</sup> By making such claims a believer excludes the possibility of public justification and therefore political relevance for her beliefs.<sup>81</sup> Roger Trigg argues that the future for a religionist who seeks to separate religion and rationality is to “either become part of a conservation area, preserved, but never criticized, or be thrown on a rubbish heap as relics of a past age.”<sup>82</sup> Religionists cannot be expected to be taken seriously in the political arena if they argue that their beliefs are utterly “impervious to evidence arising from the world.”<sup>83</sup> By doing so, they prevent others from engaging with them in the manner that a system of justificatory deliberative democracy mandates.<sup>84</sup>

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<sup>79</sup> Parekh, *Rethinking Multiculturalism*, 363. John Horton argues that whatever one’s fundamental moral convictions “in practice we need a fairly secure and stable social order to be able to realize them” (John Horton, “Reasonable Disagreement,” in *Multiculturalism and Moral Conflict*, ed. Maria Dimona-Cookson and Peter M.R. Stirk (USA; Canada: Routledge, 2010), 72).

<sup>80</sup> Raikka, “The Place of Religious Arguments in Civic Discussion,” 172n14.

<sup>81</sup> Trigg, *Rationality and Religion*, 2, 5.

<sup>82</sup> *Ibid.*, 5. This brings me back to my earlier claim that beliefs, if they claim political relevance, cannot resist critical scrutiny. Some theorists challenge the “strong faith” conception of religion more generally and not simply in terms of its political application. For example, Bhikhu Parekh argues that “[r]eligion does involve faith but it is not a matter of faith alone [...] it involves judgement, choice and decision, and hence reason and personal responsibility.” He concludes that “[r]eligiously minded citizens are therefore never excused from a rational discussion of their politically relevant beliefs and practices” (Parekh, *Rethinking Multiculturalism*, 334). Parekh is supported by Peterson et al, who argue that it is not possible to detach faith from reason, even when a religious believer claims that her beliefs rest solely upon the former basis. “[T]he instant a believer makes some sort of claim of faith, some statement about her relation to the God she worships, she has automatically entered the arena of rational discussion and dialogue” (Peterson et al., *Reason and Religious Belief*, 10, see also 53).

<sup>83</sup> Trigg, *Rationality and Religion*, 22.

<sup>84</sup> Jeremy Bentham argued that strong fideists introduced “the constant hypothesis of a suspension of our confidence in any experience” which stagnates debate with such a believer (Frances Ferguson, “Beliefs and Emotions (from Stanely Fish to Jeremy Bentham and John Stuart Mill),” in *Politics and the Passions, 1500-1850*, ed. Victoria Kahn, Neil Saccamano, and Daniela

The above argument showed that fundamentalist religious perspectives are politically unhelpful, which perhaps leaves us a little indifferent regarding their inclusion or exclusion from debate. A strong reason to exclude such beliefs derives from the original basis upon which secularism was founded, due to the possibility that dogmatic perspectives could engender conflict. It would be an overreaction to suppose that allowing *moderate* religious beliefs into the political arena would have a detrimental effect on social stability, at least no more so than other political and philosophical distinctions.<sup>85</sup> But where arguments are uncompromising and centre around conflicting ultimate sovereigns, the threat of warfare becomes more salient.<sup>86</sup> Generalisations here can only be tentative. Different local contexts and religious demographics will be pertinent to determining whether strong religious views must be expunged entirely, due to the threat of conflict. But when paired with the observation that they cannot be considered useful additions to debate, states are justified to err on the side of caution.

### *The Boundaries of Strong Secularism*

The rationales outlined above only provide a reason to exclude the most radical religious beliefs from the political arena and only in limited circumstances. It is important to be clear that religion's faith-based epistemology does not support the wholesale exclusion of all religious beliefs from politics. To consider only the strong fideist beliefs discussed thus far would be to preserve an exceptionally narrow understanding of religious faith. Assuming that faith is necessarily diametrically opposed to rationality is a mistake. Indeed, faith and reason are more closely tied together than they first appear. Kent Greenawalt observes that "[i]n the

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Coli (Princeton, N.J.: Princeton University Press, 2006), 244). For a contrary position (opposing including religion *only* where it is not too dogmatic) see Greenawalt, "Religion, Law, and Politics," 271.

<sup>85</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 53-54; Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 209.

<sup>86</sup> Habermas, "Religion in the Public Sphere," 12.

search for religious understanding, there are various levels and techniques. Reasoned deliberation from fundamental premises, for example, so important in secular political philosophy, is certainly one method of ascertaining some religious truths.<sup>87</sup> Thus religious faith may also be to some extent a product of reason.<sup>88</sup> Larry Alexander supports this perspective, arguing that religious beliefs regarding the life and times of Jesus are supported in precisely the same manner as non-religious beliefs regarding the life and times of the first President of the United States.<sup>89</sup> A student may form the view that Washington was the first President because a learned teacher tells her so, or through reading any number of history books, citing numerous eye-witnesses accounts. A religious believer can cite the same sources for her beliefs regarding Jesus.<sup>90</sup> The same is true of more “difficult” dimensions of religious belief. Alexander points out that a religious believer may find some elements of her religion immensely challenging. However, very few secularists are likely to find fault if she believes any number of similarly complex scientific claims despite finding them “counter-intuitive and impossible to conceptualize.”<sup>91</sup> Faith may well play a role in religious belief, but for many believers, it is no more than the final leap that bridges the gap between what can be proven absolutely through reasoned deliberation and the truth which one believes.<sup>92</sup> Simply aligning “religious epistemology” with faith is overly simplistic.

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<sup>87</sup> Greenawalt, "Grounds for Political Judgment," 663.

<sup>88</sup> Alexander, "Liberalism, Religion, and the Unity of Epistemology," 770. This kind of religion may in fact be that which Enlightenment thinkers professed. Baker argues that Enlightenment scholars did not entirely disavow religion. Instead, they “sought to embrace a rational religion” (Baker, "Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation," 99).

<sup>89</sup> Alexander, "Liberalism, Religion, and the Unity of Epistemology," 769.

<sup>90</sup> *Ibid.*, 768-69.

<sup>91</sup> *Ibid.*, 769 (Alexander's example is the belief that the speed of life is constant).

<sup>92</sup> Secularists may still want to argue that reason takes us further towards our conclusions in the case of our secular beliefs than it is able to do for religious beliefs. That is to say, religious believers bridge a significantly wider gap in knowledge with faith. Even if an individual cannot *herself* trace the lineage of her non-religious beliefs back to facts established through acceptable scientific standards of proof, she can be confident that somebody else, a learned scientist, for

Ultimately, “faith” and “religion” are not the synonyms which they are often taken to be.<sup>93</sup>

Alexander’s analysis also serves to demonstrate that something of a gap between a person’s evidence and one’s beliefs is not unique to religion. Secular beliefs are not held solely through rational and empirical investigation and inquiry.<sup>94</sup> Indeed, Trigg asserts that “in recent years, it has become accepted that this as true [sic] of the development of science as of any other area.”<sup>95</sup> To demonstrate the wider role of faith in non-religious spheres, Timothy Macklem asks us to imagine many of the decisions we make about our daily lives such as which city to live in, which partner to choose, which job offer to accept and which cities, potential partners and jobs to reject. We can probably all provide various reasons for the choices we have made, but Macklem argues that reason can only take us part of the way towards reaching our decisions. Since we cannot be entirely certain about the best course of action until we commit ourselves to it, he argues that faith inevitably plays a part. “All ventures into the unknowable,” he writes, “all leaps into the dark, depend on faith.”<sup>96</sup>

If critics are correct that religion is excluded from political debate on the basis that it is perceived to be “inherently irrational [and] obscurantist” then this exclusion is

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example, can fill in the blanks for her. Of course, there may also be complex philosophical arguments which attempt to use rational methods to establish a case for the existence of God or the truth of other religious beliefs (Peterson et al., *Reason and Religious Belief*, 77-102). But, a secularist will say, these cannot ever be *proven* empirically. They cannot ultimately be linked to concrete and indisputable evidence. The question nevertheless comes down to exactly what proportion of faith and reason are required, whether this can be calculated and finally, whether religious believers can legitimately be asked to accept scientific rationality as the final court of appeal.

<sup>93</sup> “Religion does involve faith but is not a matter of faith alone, which is why the two should not be equated,” writes Parekh, *Rethinking Multiculturalism*, 334.

<sup>94</sup> McConnell, “The Problem of Singling out Religion,” 26.

<sup>95</sup> Trigg, *Rationality and Religion*, 20.

<sup>96</sup> Macklem, “Reason and Religion,” 84.

misguided.<sup>97</sup> Many religionists are well equipped to participate in rational political discourse, even when their beliefs ultimately rest upon faith. We need to be very careful about the level of rationality that is claimed to be necessary for public debate. The core principles in liberal democracy only require that a citizen gives reasons for her views and accepts that these will be subject to the workings of a political system which mandates respect for others and continual debate. This leaves a very broad ambit for different types of expression and argument in these debates.<sup>98</sup> It does not necessitate that arguments must be restricted to those that are rational in the strictest sense of logical calculation devoid of emotion, intuition or "leaps of faith."<sup>99</sup> Crucially, faith-based beliefs would not be the only ones to fall shy of such a standard. If consistently applied, it would also exclude many other forms of expression that are commonly exercised in the political sphere. To suggest otherwise is to assume far too much about non-religious argumentation. A review of the kind of debate to which we are regularly privy in our present political systems should serve to demonstrate that it is not as strictly rational as some theorists might hope for. Emotive appeals, rhetoric, hyperbole and faulty reasoning are all readily apparent in much political discourse.<sup>100</sup>

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<sup>97</sup> Webber, "Understanding the Religion in Freedom of Religion," 29. See also Gedicks, "Public Life and Hostility to Religion," 696.

<sup>98</sup> Iris Marion Young, "Communication and the Other: Beyond Deliberative Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996), 126-27; Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 52-80. See also Horton, "Reasonable Disagreement," 67.

<sup>99</sup> Human beings' abilities to reason in this manner is the subject of much debate, but it seems highly dubious to imagine that pure rationality is the most natural and proficient method of decision-making that most people engage in (see Richard Samuels and Stephen Stich, "Rationality and Psychology," in *The Oxford Handbook of Rationality*, ed. Alfred R. Mele and Piers Rawling (Oxford: Oxford University Press, 2004), 279-300).

<sup>100</sup> Margaret Davies observes that in political debate "[r]easons are frequently muddled or masked and cannot be clearly located within one or another area of thought. Reasons are voiced in public spaces but motivated by private desires, emotions, and beliefs which may or may not be articulated and may or may not be religious" (Davies, "Pluralism in Law and Religion," 80).

## Weak Secularism

### *Religious Argumentation without the Possibility of Enforcement*

It is now evident that strong secularism would be unjustified in excluding even most overtly religious speech. Appeals to faith properly fall within the ambit of weak secularism. That is, citizens may raise them in political debate, but officials may not use these arguments as the sole ground for decision-making.<sup>101</sup> However, this presents a potential tension within weak secularism, which Sanford Levinson sets out thus:

If, as a matter of political theory, one requires as a precondition of any law's legitimacy that it must serve an articulable "secular public purpose," then what, precisely, is the importance in the first place of demanding that religious discourse be allowed in the public square? [... Weak secularism] ultimately requires that any such discourse be translated, at the moment that it really counts, into thoroughly secular language.<sup>102</sup>

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See also Kramnick and Moore's depiction of politics in Kramnick and Moore, *The Godless Constitution*, 23.

<sup>101</sup> On the stricter requirements of secularism as it pertains to state officials see Greenawalt, "Religion, Law, and Politics," 273-74; Gaus, "The Place of Religious Belief in Public Reason Liberalism," 29-30; Habermas, "Religion in the Public Sphere," 10.

<sup>102</sup> Levinson, "Review: Religious Language and the Public Square," 2073. Where I have substituted "weak secularism" Levinson refers to specifically to the work of Michael Perry, which is the subject of his review. Perry's position is similar to Parekh's in all the respects relevant for our purposes here. Levinson himself goes on to argue for a greater role of religion in politics, but observes that it is "simply unthinkable that the members of a particularistic religion could ever capture national political institutions" (ibid., 2077) which Macedo takes to suggest that Levinson, like Perry, "would let religious zealots talk but not win" (Stephen

Levinson's challenge suggests that the harms associated with the bracketing of religious views may not necessarily be avoided merely by allowing such beliefs political airtime. If we allow religious beliefs to be debated in public but never allow these views to form the singular basis for public policy, then weak secularism might be thought to concede very little at all to religionists. It is therefore necessary to set out the benefits associated with allowing religion into politics under conditions of weak secularism.

First, opening political debate to religious language allows those who speak most comfortably in religious terminology to participate in the political arena. As Jurgen Habermas argues, citizens who "cannot find secular 'translations'" may still "be allowed to express and justify their convictions in a religious language" because they can trust that other participants in the debate "will cooperate for accomplishing a translation" on their behalf.<sup>103</sup> It does not follow from one citizen's inability or unwillingness to translate her beliefs into secular reasons upon which legislation can be founded, that no such secular reasons exist. Thus there is no harm in allowing these beliefs into the political arena. Of course, even this more accommodating argument still presupposes that it is the *secular core* of the belief that is relevant to the debate and not, as the believer might suppose, the religious foundation.

Some also religionists support the inclusion of religious speech in the realm of political debate with arguments about the value religious beliefs bring to society at

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Macedo, "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism," *Political Theory* 26, no. 1 (1998): 71, 79n53).

<sup>103</sup> Habermas, "Religion in the Public Sphere," 10. Some contend that not only must state officials have secular justifications for their decisions, but also any *citizen* who supports a policy on religious grounds alone must not voice her argument unless she can find additional secular reasons to support it (Raikka, "The Place of Religious Arguments in Civic Discussion," 164). This argument is premised on the claim that "if a certain act is morally wrong, then it is also *prima facie* morally wrong to encourage people to commit it" (*ibid.*, 170). But the contention here does not follow from the premise because, as Habermas shows, it overlooks the wider context in which political arguments are raised.

large. According to one view, religious communities contribute something valuable to democracy which would be lost if those communities were required to structure their political contributions in secular terms. There are three variants of this argument. The first two together assert that religious communities instil moral values into their members, and these values are crucial for democracy. Alexis de Tocqueville believed that “religions provided Americans with the strong moral character without which democracy cannot function.”<sup>104</sup> Additionally, religious communities provide a buffer against state tyranny, questioning the state’s moral authority and thereby acting as a peculiar form of “check and balance.”<sup>105</sup> The argument is made that constraining religious groups from bringing religious language to the political arena impedes them from fulfilling this vital role as supporters of democracy, because it marginalises them and frustrates their endeavours at political action.<sup>106</sup>

It is worth mentioning that the arguments outlined here are sometimes raised in support of religious exemptions. But when used alone to advance a case for religious exemptions the hyperbolic nature of these perspectives becomes immediately apparent. First, it is clearly implausible to attempt to single out religion as the sole, or even the best, source of moral character in citizens.<sup>107</sup> Second,

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<sup>104</sup> See, Carter, *The Culture of Disbelief*, 36. British Judge, Lord Denning, took a similar line to Tocqueville when he warned that, “without religion, there can be no morality, there can be no law” (in Rex Ahdar, ed. *Law and Religion* (Aldershot; Burlington USA: Ashgate, 2000), 2). For a slightly different interpretation of Tocqueville’s argument see Kramnick and Moore, *The Godless Constitution*, 21. For a contemporary defence of the role of religion as a buffer to state tyranny, see Carter, *The Culture of Disbelief*, 124, 26, 32, 34.

<sup>105</sup> Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford; New York: Oxford University Press, 2005), 53-54.

<sup>106</sup> Paul Weithman argues that churches make vital contributions to democratic citizenship and civic argument in Weithman, *Religion and the Obligations of Citizenship*, 91. For a concise summary of Weithman’s argument here, see also Habermas, “Religion in the Public Sphere,” 7.

<sup>107</sup> Ahdar and Leigh, *Religious Freedom in the Liberal State*, 57; Smith, “The Rise and Fall of Religious Freedom in Constitutional Discourse,” 199-202; Sonu Bedi, “Debate: What Is So Special About Religion? The Dilemma of the Religious Exemption,” *The Journal of Political Philosophy* 15(2007): 204; Kramnick and Moore, *The Godless Constitution*, 150; Frederick Mark Gedicks, “An

as Kwame Appiah writes, "religion has no monopoly on the claim of contesting the moral authority of the state."<sup>108</sup> However, while these reasons demonstrate that singling out religion as the most important basis of democratic morality is unwarranted, there may still be something to the more diluted form of this argument insofar as it is used as a reason to support religious argumentation in politics, despite its inherently contentious nature.

The third and more diluted argument that is made about religion's political worth to society is that religion makes a valuable contribution to political debate. Parekh maintains that it is "unwise" to exclude religious language from political debate because "it deprives political life of both the valuable insight religion offers and the moral energies it can mobilize for just and worthwhile causes."<sup>109</sup> Similarly, Habermas opines that "[s]ecular citizens or those of other religious persuasions can under certain circumstances learn something from religious contributions."<sup>110</sup> Such a claim need not necessarily rest upon the possibility that religious beliefs may be true. Whether or not they are true, engaging with religious beliefs introduces new perspectives into the political arena. This may serve to engage fellow believers, but it may also provoke deeper arguments from those who disagree with the newly

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Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions," *University of Arkansas at Little Rock Law Review* 20(1997-1998): 567.

<sup>108</sup> Kwame Appiah, *The Ethics of Identity* (Princeton, New Jersey: Princeton University Press, 2005), 301n39; see also Bradney, *Law and Faith in a Sceptical Age*, 25. Weithman also appears to concede this point. After initially claiming that "if churches did not make these contributions it is not clear what other organizations would" he then goes on to discuss the possibility that non-religious voluntary organisations might also fill this role (Weithman, *Religion and the Obligations of Citizenship*, 91-92).

<sup>109</sup> Parekh, *Rethinking Multiculturalism*, 324.

<sup>110</sup> Habermas, "Religion in the Public Sphere," 10. See also Robert Audi, "The Place of Religious Argument in a Free and Democratic Society," *San Diego Law Review* 30(1993): 686.

introduced viewpoint. Insofar as the debate is furthered by the plurality of viewpoints it encompasses, liberals traditionally welcome diversity.<sup>111</sup>

### *Weak Secularism and Liberal Neutrality*

Religionists are likely to accept all of the above reasons for including religious beliefs in politics. But they may still press a little further and argue that weak secularism does not do enough. It is often argued that singling out religious beliefs as inappropriate grounds for public policy, suggests that they are being treated as untrue, or at least immaterial.<sup>112</sup> But this contention is misguided. Disallowing the enactment of coercive laws that can only be justified for religious reasons does not treat religion as false. In fact, this view says nothing at all about the truth of religion generally, only about its relevance to the political arena.<sup>113</sup> Greenawalt explains that “[w]hatever they may think about religion, proponents of exclusion base their position on premises of democratic government, not on the intrinsic foolishness of religion.”<sup>114</sup>

The argument that weak secularism is offensive fails if it can be shown why the secular system is justified. One cannot simply claim that every perspective which is

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<sup>111</sup> On the advantages of introducing a variety of new ideas into debates, I refer to the preeminent text on freedom of expression in John Stuart Mill, "On Liberty," in *Utilitarianism, on Liberty, and Considerations of Representative Government*, ed. H.B. Acton (London: J.M. Dent & Sons, 1972), 78-113.

<sup>112</sup> Trigg, *Rationality and Religion*, 21. Also, Stanley Fish claims that saying religious belief should not be fought over is “only a short step to saying (what many come to say) that it is not *worth* fighting about” (Fish, "Mission Impossible," 2269).

<sup>113</sup> Macedo, "Transformative Constitutionalism and the Case of Religion," 68-70; Stephen Macedo, "Liberal Civic Education and Religious Fundamentalism: The Case of God V. John Rawls?," *Ethics* 105, no. 3 (1995): 480; Denise Meyerson, "Why Religion Belongs in the Private Sphere, Not the Public Sphere," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 66-67.

<sup>114</sup> Greenawalt, "Religion, Law, and Politics," 269. Greenawalt here is talking about strong secularism, but the principle holds true for weaker forms also.

contrary to one's own is therefore hostile to it.<sup>115</sup> The difference is whether there are reasons to explain the contrary position. In this case, there are. It was established at the outset of this chapter that *some form of secularism* is necessary in order to ensure that citizens are not coerced into religious belief. Weak secularism in the form of separation of religion and the state is the least intrusive way for the state to achieve this aim. It is defended as the best possible solution for all parties concerned, including the religious.<sup>116</sup> One must not forget that before an agnostic case for secularism was set out, religious arguments were put forth. Cecile Laborde reminds us that “[h]istorically, secularism did not succeed primarily because it suited atheists. Rather it suited believers, because it allowed the state to be neutral towards the merits of competing religious views.”<sup>117</sup> Indeed, it is more than a little surprising that in a country such as the US, which claims such a high level of religiosity, so much literature is produced arguing that secularism is the victory of the non-believing minority.

Perhaps, however, the point is that the victory lies with moderate believers, that is, those who are staunchly religious but who vehemently oppose religion dominating the state. It should be remembered that “[p]eople who disagree about their highest ideals and their conceptions of the whole truth, might nevertheless agree that public aims such as peace, prosperity, and equal liberty are very important.”<sup>118</sup> Many religious believers are quite content to distinguish between those of their religious beliefs that are and those which are not compatible with a political

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<sup>115</sup> See, Modood, *Multiculturalism*, 73.

<sup>116</sup> Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*, 271.

<sup>117</sup> Laborde, "Secularism and Fair Treatment for Muslims," 135. Note also that in imposing only a *weakly* secular order, the state does not acquiesce to the desires of atheists, whose preference would surely be for strong secularism. This observation is made in Habermas, "Religion in the Public Sphere," 14-15.

<sup>118</sup> Macedo, "Liberal Civic Education and Religious Fundamentalism," 474. Macedo calls this "political liberalism's virtue: it focuses our attention on shared political values without requiring or expecting agreement on ultimate ends or a comprehensive set of moral values governing all of our lives."

process founded upon these public aims.<sup>119</sup> Kent Greenawalt claims that many who rely on prayer, conversion and religious experiences in order to determine the content of their religious beliefs use methods of reasoning that are entirely compatible with secular norms when they come to formulate a position on political issues.<sup>120</sup> When considering the argument that it might be offensive to require that believers accept the ultimate political inferiority of their religious beliefs as justifications for coercion, one would do well not to overstate the extent of the dispute.<sup>121</sup>

Because weak secularism allows religious arguments to be raised in the political arena, this enables religious reasons to be cited in support of an 'overlapping consensus' surrounding secularism which those who remain unconvinced by agnostic arguments can support.<sup>122</sup> John Locke's *Letter Concerning Toleration* sets out a number of arguments for the separation of religion and the state which are directed at believers.<sup>123</sup> Some are founded upon the nature of coercion and the nature of politics, others directly concern the nature of religious truth but *none* of Locke's various arguments dispute the possible existence of one true faith.<sup>124</sup> Thus, drawing on Locke, one could assert that while a God does (or may) exist, He does

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<sup>119</sup> Meyerson, "Why Religion Belongs in the Private Sphere, Not the Public Sphere," 65.

<sup>120</sup> Greenawalt, "Grounds for Political Judgment," 664.

<sup>121</sup> Macedo suggests that it might simply be pertinent to conclude that if "in responsive to these judgments about appropriate political argument, people feel "censored" or marginalized, they have nothing but their own hypersensitivity to blame" (Macedo, "Transformative Constitutionalism and the Case of Religion," 71).

<sup>122</sup> Charles Taylor advocates this path to secularism in Taylor, "Modes of Secularism," 37-38, 49-50. See also Meyerson, "Why Religion Belongs in the Private Sphere, Not the Public Sphere," 63-64; Raikka, "The Place of Religious Arguments in Civic Discussion," 166.

<sup>123</sup> Locke, "A Letter Concerning Toleration." See also, Rawls, *Political Liberalism*, 145n12; Macedo, "Transformative Constitutionalism and the Case of Religion," 64; Macedo, "Liberal Civic Education and Religious Fundamentalism," 492.

<sup>124</sup> In fact, Locke famously excludes atheists from his argument for toleration (see Locke, "A Letter Concerning Toleration," 47). For a concise summary of Locke's five branches for toleration and a comparison to contemporary arguments for religious neutrality see Galston, *Liberal Purposes*, 259-63.

not entrust the care of his subjects' souls to the magistrate.<sup>125</sup> Further, a religionist could be reminded that history tells us that relying on the state in matters of religion is unwise, as the state might very well err in favour of the false religion and not that which is true.<sup>126</sup> Finally, even if the state favours the right religion and succeeds in promoting it in the minds of its citizens, for many, this is not the correct path to salvation, which requires something more than blindly following the path along which one is pushed by the state.<sup>127</sup> These arguments are grounded in Christian faith, but one might also craft arguments for secularism from other religious perspectives.<sup>128</sup>

It is now apparent that any supposed bias or hostility in the political arena could only pertain to strong believers with more fundamental objections to the ground 'rules' of the liberal political game. Ultimately not all religious believers will be willing to accept even religiously inspired arguments for secularism. There will still be those whose religious perspectives lead them to disagree more fundamentally with some of the basic values of a secular state.<sup>129</sup> Simply requiring that political decisions are predicated on the basis of public persuasion itself marginalises the perspectives of believers who rely solely upon faith-based epistemology. Even where rationality is not overtly emphasised by theorists, a system of deliberative politics necessarily requires some minimal level of acceptance of rationality.<sup>130</sup> Macedo explains that "important transformative dimensions" may follow from

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<sup>125</sup> Locke, "A Letter Concerning Toleration," 18.

<sup>126</sup> This Lockean position is outlined in Gutmann and Thompson, "Moral Conflict and Political Consensus," 68.

<sup>127</sup> Locke, "A Letter Concerning Toleration," 19.

<sup>128</sup> For example, in Islam, the Qu'rān states "Let there be no compulsion in religion," a dictate which is interpreted to apply to Muslims and non-Muslims alike (Riffat Hassan, "Religious Human Rights and the Qur'an," *Emory International Law Review* 10(1996): 91). Rex Ahdar and Ian Leigh also set out some Christian rationales for religious freedom (although they do not connect them to any specific mode of religion/state relations) in Ahdar and Leigh, *Religious Freedom in the Liberal State*, 11-37.

<sup>129</sup> Meyerson, "Why Religion Belongs in the Private Sphere, Not the Public Sphere," 64.

<sup>130</sup> Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby," 987.

“the liberal insistence on the political authority of public reasons.”<sup>131</sup> The justificatory political model renders the truth of an argument secondary to its legitimation through political debate.<sup>132</sup> It follows that secular liberal political structures, even weak ones, *do* favour continuous critical debate and insofar as they do so, they mandate a certain degree of rationality and scepticism over the profession of revealed absolute truth.<sup>133</sup> Thus where Sullivan asserts that (unlike religion) liberal democracy cannot become a “totalistic orthodoxy” because its content is “subject to continual revision” religionists might counter that this liberal system is orthodoxy in itself – one that favours equality and scepticism over truth and certainty.<sup>134</sup>

For some religionists this will be profoundly upsetting. Some theorists have been attracted to a “secularisation by rationalisation” thesis.<sup>135</sup> They suggest that the spread of rationality, which includes intellectual challenges to revealed truths and questioning religious authorities, leads to the corrosion of religious faith. This view is highly dependent on the presupposition that rationality and religion are

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<sup>131</sup> Macedo, "Transformative Constitutionalism and the Case of Religion," 75.

<sup>132</sup> Bird, "Mutual Respect and Neutral Justification," 68.

<sup>133</sup> Macedo, "The Politics of Justification," 281, 84, 93, 95, 98; Macedo, "Transformative Constitutionalism and the Case of Religion," 69; Macedo, "Liberal Civic Education and Religious Fundamentalism," 477. See also Charles Larmore, "Patterns of Moral Complexity (Selections)," in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. Steven Wall and George Klosko (Oxford: Rowman & Littlefield Publishers, Inc, 2003), 54.

<sup>134</sup> Sullivan, "Religion and Liberal Democracy," 201. For an example of an argument against equality see Daniel Conkle, "The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future," *Indiana Law Journal* 71(2000): 8. Although Conkle recognises the great benefits of religious equality he asserts that “we dare not miss the underlying predicate for this requirement: that according to the law, the particular content of religion doesnot matter. Any one religion, whatever its substance, is equal to any other.” Conkle argues that a consequence of this is that religion has been reduced to an inconsequential matter of taste or ceremony.

<sup>135</sup> In this context, ‘secularism’ refers to the second meaning of the term, namely the decline in religiosity in society.

mutually exclusive.<sup>136</sup> But for a radical believer who subscribes to a rationality/faith dichotomy, the “secularisation by rationalisation” argument might cause her to fear that the rational nature of political society heavily threatens the survival of her faith perspective. This may strengthen her view that requiring critical debate in the public arena is responsible for causing society to turn away from the true faith. One who takes this perspective will feel she has ample reason to challenge a liberal system premised on justificatory liberalism.<sup>137</sup>

What can one say to justify secularism to this citizen? Gedicks claims that “[i]t is much easier to argue, as [liberals] do, that liberalism is “neutral” in the conflict between secularism and religion, than it is to proclaim an epistemological or political privilege for secularism.”<sup>138</sup> But Gedicks mischaracterises the liberal position here. In fact, while liberals usually retain epistemological neutrality, they do not usually think that we need to say very much about the political plight of radical dissenters.<sup>139</sup> At least, it is considered a misguided attempt to set out a justification that explains her predicament in a manner entirely devoid of reference to potentially controversial values.

To explain the argument here let me recall some of the core assertions with which I began this thesis. I argued that what is important to establish is not a guaranteed system of religious exemptions at any cost. Exemptions are, or at least ought to be,

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<sup>136</sup> James A. Beckford, *Social Theory and Religion* (Cambridge: Cambridge University Press, 2003), 48.

<sup>137</sup> Rawls poses the question: “How is it possible for those of faith, as well as the nonreligious, to endorse a secular regime even when their comprehensive doctrines may not prosper under it, and indeed may decline?” (quoted in Habermas, “Religion in the Public Sphere,” 6, 19).

<sup>138</sup> Gedicks, “Public Life and Hostility to Religion,” 696.

<sup>139</sup> Audi explains: “This socio-political ascendancy of secular argument in justifying coercion does not, however, imply a commitment to its being epistemically better than all religious argument. Agreeing on the principles – and referees – of a game does not entail believing that, from a higher point of view, there can be no better game, or superior referees” (Audi, “The Place of Religious Argument in a Free and Democratic Society,” 697-98). See also Larmore, “Patterns of Moral Complexity (Selections),” 55.

awarded because we have reasons to award them. The state cannot provide exemptions to every last individual who considers herself burdened by a piece of legislation. If it did, it would be unable to legislate at all. For this reason it is important to prioritise the question of *why* we award exemptions. It is the answer to *that* question which reveals whether or not certain religious beliefs qualify. The question of neutrality is very similar. Liberals should not, do not, and *cannot* defend some kind of “pure” neutrality at any cost.<sup>140</sup> Neutrality is advocated because we have reasons for it and one cannot be neutral for *neutral* reasons.<sup>141</sup> As Jeremy Waldron says, “[o]ne does not, as it were, have to be neutral all the way down.”<sup>142</sup> That would clearly represent an impossible quest.<sup>143</sup> The state cannot be neutral in relation to *every* dispute. If it were, it would be unable to legislate at all. For this reason the important question once again is to establish *why* we ask a state to refrain from involvement in certain disputes.

Like any political system, liberalism cannot stand free of its own justificatory foundations.<sup>144</sup> Someone, such as a theocrat, who seeks to impose an entirely different system to that of secular liberalism reveals that point at which a secular liberal state “takes its stand.”<sup>145</sup> In doing so, she does not weaken that state’s claim to legitimacy. She merely reveals the “rules of the game” over which the state presides as umpire.<sup>146</sup> A liberal system cannot seek the wholesale elimination of any form of coercion. But it can seek to minimise forms of coercion that it has good

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<sup>140</sup> Meyerson, “Why Religion Belongs in the Private Sphere, Not the Public Sphere,” 68-69.

<sup>141</sup> Jeremy Waldron, “Legislation and Moral Neutrality,” in *Liberal Neutrality*, ed. Robert E. Goodin and Andrew Reeve (London and New York: Routledge, 1989), 80-81.

<sup>142</sup> *Ibid.*, 64.

<sup>143</sup> Meyerson, “Why Religion Belongs in the Private Sphere, Not the Public Sphere,” 67-69; Galston, “Defending Liberalism,” 627; Macedo, “Liberal Civic Education and Religious Fundamentalism,” 469-70, 481; Ahdar and Leigh, *Religious Freedom in the Liberal State*, 67.

<sup>144</sup> Galston, *Liberal Purposes*, 298.

<sup>145</sup> Peter Jones, “The Ideal of the Neutral State,” in *Liberal Neutrality*, ed. Robert E. Goodin and Andrew Reeve (London and New York: Routledge, 1989), 28.

<sup>146</sup> *Ibid.*, 19.

reason to perceive to be illegitimate.<sup>147</sup> The justifications of secularism which I outlined at the opening of this chapter may not support the blanket exclusion of religion from politics, but they do provide a robust rationale for the separation of religion and the state premised on the values of religious equality and respect for all citizens. Cecile Laborde writes that “the onus of proof [...] lies with the critics of secularism: they must show that there is an alternative, non-secular, basis on which the common ground of citizenship can be based.”<sup>148</sup> While there is an alternative to strong secularism, there is no better alternative to the weak model.

### **Exemptions**

If religious exemptions are to be justified on the basis that they remedy a bias against religious beliefs under secularism, then such a bias must first be established. I have shown that strong secularism is justified in excluding fundamentalist religious beliefs from politics where they are incompatible with the framework of deliberative democracy and where circumstances provide good reasons to fear that they may generate significant unrest. In such circumstances, excluding religious beliefs from the political arena cannot be considered the product of secular liberal hostility towards religion. Thus no bias exists for exemptions to remedy. The majority of beliefs will only be subject to weak secularism. This allows a very wide range of religious beliefs to be raised in political debate. It enforces only a limited separation of such beliefs from the state in order to prevent the religious coercion of citizens who maintain different religious views or none. Because there are good reasons to support weak secularism, no institutional bias against religious believers is entailed. Therefore, once again, no basis for exemptions arises. It follows from the justifiability of these forms of secularism that if religion's role in a secular liberal state system is to give rise to any political case for exemptions, it must come from the inappropriate application of the strong model of secularism. If religious

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<sup>147</sup> Galston, *Liberal Purposes: Goods*, 298.

<sup>148</sup> Laborde, "Secularism and Fair Treatment for Muslims," 135.

believers are prevented from participating in the political arena without good reason, then exemptions might be used to remedy the unwarranted exclusion of religious voices from political debate.

But this immediately calls to mind the question of whether exemptions are the correct remedy here. Is not the answer simply to open the debate up to include religious beliefs in the range of permissible arguments? This removes the structural bias enforced through the separation of religion and politics and enables all religionists who accept the minimal requirements of respect entailed in deliberative democracy to defend their views in exactly the same manner as all other citizens. Indeed, one can point to the US political system as a very good example of the role that religion already plays in politics. Isaac Kramnick and R. Lawrence Moore argue that many groups in society would “relish” the kind of marginalisation that religious groups in the US claim to suffer.<sup>149</sup> The fact that strong secularism is unjustified is of little consequence for those countries that merely enforce a weak model. If religious groups are welcomed into the political sphere, the question of religious exemptions is redundant because they are not being marginalised any more than other groups and thus no bias, unfairness or psychological harm can be claimed.<sup>150</sup>

But it is pertinent to look a little more critically at the present reality of religious involvement in politics before reaching such a conclusion. As noted at the outset of this chapter, the finer details of secularism vary significantly across different states in practice. Let us now consider whether a case can be made from the forms of secularism that operate in two different states, both of which purport to enforce

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<sup>149</sup> Kramnick and Moore, *The Godless Constitution*, 18.

<sup>150</sup> Baker observes that postmodernism simply demonstrates that religion is not special and therefore should not be excluded from the public sphere. But he notes that the corollary of this is that religious believers would have no reason for exemptions. He concludes that “[r]eligious person and institutions will have to decide which model they prefer and which to advocate” (Baker, “Competing Orthodoxies in the Public Square,” 120-21).

only a weak separation of religion and state. First, let us return to our American example. The US is only weakly secular, both in structure and in practice. However, there are limits to the US public's taste for religious arguments. Those of a non-Christian nature do not enjoy the same political attention as their Christian counterparts.<sup>151</sup> I argued in chapter one that religionists could not claim that having their beliefs overruled in the development of legislation was offensive because some beliefs will always lose a political debate.<sup>152</sup> But that argument depended upon religious beliefs being subject to fair deliberation. If, in fact, this is not the case, then the religious believers might have good cause to feel that they have been illegitimately ignored. Two grounds for exemptions follow.

First, for minority believers, the majority's failure to listen to their speech in politics might reinforce the sense that they are perceived to be abnormal, giving rise to psychological harm due to a lack of recognition. Failure to listen to minority religious voices contributes to a cycle of marginalisation in which religious beliefs are misunderstood and misrecognised.<sup>153</sup>

A second, important implication follows from this point. There is a real concern that if religious voices are marginalised, then they will not be well understood and hence decision-makers will struggle to take religious perspectives into account when creating new rules and regulations. McConnell observes that "to avoid trampling on religious interests the government must be aware of what they are."<sup>154</sup> If governments are presently very often unaware, then believers will be disadvantaged relative to non-religious citizens. It is often observed that this problem is exacerbated by the gradual change in the role of the state in the years since secularism first began to gain favour. Secular liberal states no longer operate

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<sup>151</sup> Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion," *DePaul Law Review* 39(1989-1990): 1014-16.

<sup>152</sup> See chapter one, pages 47-48.

<sup>153</sup> See chapter one, pages 49-54.

<sup>154</sup> McConnell, "Religious Freedom at a Crossroads," 130.

as merely minimal political institutions seeking only to protect direct harms against their citizens. Now “regulation is everywhere.”<sup>155</sup> As the welfare state grows, the private realm within which religion is free to operate uncoerced shrinks.<sup>156</sup> Correspondingly, the risk of unwittingly interfering with religious interests grows.

The argument that silencing religious voices will lead to the “trampling” of religious interests is difficult to apply to mainstream religions. The most dominant religions in society often have their values adopted by secular culture. At the very least they are likely to be better understood by it.<sup>157</sup> Sullivan observes that no mainstream Christian religious practitioner has taken a case for a religious exemption to the US Supreme Court as “[m]ainstream Christianity does not need judicial help; the legislature is likely already to be obliging.”<sup>158</sup>

However, while we have not identified a need to grant exemptions to dominant religious groups, religious minorities are in an important sense differently positioned. Because minority groups lack “political muscle” their ability to access equal political representation with secular and mainstream religious groups is

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<sup>155</sup> Carter, *The Culture of Disbelief*, 144.

<sup>156</sup> McConnell, “Religious Freedom at a Crossroads,” 189, see also 134, 137; Baker, “Competing Orthodoxies in the Public Square,” 109-10. The increased regulation of the public and private spheres by the modern state is also noted in Yossi Nehushtan, “Secular and Religious Conscientious Exemptions: Between Tolerance and Equality,” in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 246 and Carter, *The Culture of Disbelief*, 133, 138, 144.

<sup>157</sup> McConnell, “Religious Freedom at a Crossroads,” 139. Discussing the important US case of *Employment Division v Smith*, 110 S Ct 1595 (1990) McConnell states, “as the *Smith* opinion candidly acknowledges, its interpretation will place “those religious practices that are not widely engaged in” at a “relative disadvantage.” Some religions are close to the center of prevailing culture in America. Their practices rarely, if ever, will conflict with an “otherwise valid law,” because, in a democracy, the laws will reflect the beliefs and preferences of the median groups. Religious groups whose practices and beliefs are outside the mainstream are most likely to need exceptions and accommodations.”

<sup>158</sup> Sullivan, “Religion and Liberal Democracy,” 216. Sullivan’s argument is cited with approval in Carter, *The Culture of Disbelief*, 128. See also Laycock, “Formal, Substantive, and Disaggregated Neutrality toward Religion,” 1015-16.

inhibited.<sup>159</sup> This creates an imbalance between different religious groups that is unfair. Minority religious groups which cannot participate politically are also impeded from gaining wider understanding and social recognition for their particular perspectives. Exemptions in this context essentially amount to a kind of affirmative action. They provide a method for giving religious minority groups an equal standing in politics.

This argument runs up against the very same limitations set out in regards to the difference approach discussed in chapter one. Once again the emphasis in this argument for exemptions is on the word 'minority.' In chapter one I showed that there was nothing in the degree to which some religious minorities are treated as abnormal that distinguished them from other marginalised groups and individuals. The secular character of the liberal state cannot supplement that argument because the state is only weakly secular. The institutional relationship between religion and the state imposes no structural barriers against the inclusion of religious language in politics. The problem here results from a democratic preference for strong secularism in states that impose only weak secularism at a structural level. It thus represents a *sociological* rather than *structural* bias that is no different to that faced by other marginalised groups. This means that the secular nature of liberal state institutions is entirely immaterial. Religious minorities share a lack of social visibility with minority cultural and linguistic groups, homosexuals, old people, poor people, disabled people and others.<sup>160</sup> Each of these groups, like religious minorities, are subject to restrictions resulting from the expansion of the welfare state into what was traditionally the 'private' sphere.<sup>161</sup> Exemptions for members of religions can therefore be made but only in terms of a general acceptance of

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<sup>159</sup> Sullivan, "Religion and Liberal Democracy," 216.

<sup>160</sup> Iris Marion Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," *Ethics* 99, no. 2 (1989): 265.

<sup>161</sup> As observed in McConnell, "Religious Freedom at a Crossroads," 134n97, 189.

exemptions for ‘minority groups.’ Religious minorities are included in this number, while dominant religious groups would not be afforded exemptions on this basis.

But not every country is as accommodating to even majority religious perspectives in the public sphere as the US appears to be. New Zealand provides quite a different context for examination. Rex Ahdar and John Stenhouse observe that the New Zealand media is unsympathetic or even overtly hostile towards Christian political parties and their policies. One Christian Member of Parliament opined that someone who was outspoken about his or her religious views would be unlikely to gain a prominent leadership position within the New Zealand Government.<sup>162</sup> This marginalisation of religious perspectives in New Zealand politics is based on the social preferences of the majority within a democratic country. In theory, New Zealand is only weakly secular. There is no structural bias excluding religious political parties, as their existence, however marginal, attests. Nor is there any formal ban on religious argumentation in the political sphere. However, the marginalisation of Christian parties and others who openly express religious viewpoints in politics may suggest that the reality of New Zealand’s political system is much closer to the model of strong secularism.

Because in New Zealand *all* religious viewpoints, including those of dominant religions are sidelined, this could be considered a kind of “epistemological bias” against religious ways of thinking more broadly. But I do not think that acknowledging this broader sociological bias necessarily broadens the case for exemptions. Recall the two potential effects of marginalising religious talk that I discussed in relation to the US. First, a preference for non-religious language may temper understanding of religious perspectives, increasing the likelihood that they

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<sup>162</sup> Rex Ahdar and John Stenhouse, *God and Government: The New Zealand Experience* (Dunedin: University of Otago Press, 2000), 19-20. New Zealand’s Deputy Prime Minister Bill English, who is Catholic, observed that over religiosity is considered politically unwise in New Zealand politics. (This comment was made in a public forum discussion at the University of Otago, 12 May 2010.)

will be trampled upon in ignorance. But I remain unconvinced that this will be the effect in reality. Even if there is a preference for non-religious conversation in the political sphere, religions that have strong historical connection with a society and are quietly and privately practiced by significant numbers of citizens will probably be well understood. It is still likely only to be religious minorities who suffer a lack of understanding when religious speech is not favoured by a political community.

If my argument here appears to rest on conjecture, that should only serve to demonstrate that any case for exemptions that is founded upon a deficit in social understanding raises difficult (albeit salient) empirical questions. It presses us to determine and then calculate some level of social visibility that a particular perspective must attain before we can assume that contrary legislation has not been created in ignorance of the minority viewpoint. But calculating exactly which believers and religious groups are not being adequately listened to is likely to be fraught with difficulties.<sup>163</sup> Fluctuations in the size and influence of different religious groups over time as the numbers and origin of immigrants change is only one complicating factor. Individual spiritual believers who are by definition small and very probably politically weak may appear an obvious candidate. But even here we run into difficulties because offering exemptions to individuals on the basis of a lack of social understanding would seem to require determining whether or not the content of the particular belief for which an exemption is sought is well understood by society. Claiming that “mainstream” Christianity is well understood and will not need judicial help raises the question as to where the boundaries of the “mainstream” lie.<sup>164</sup> Anyone asking for an exemption is likely to assert that her perspective is in some sense a minority position that has not been sufficiently understood by wider society. The difficulty here should not be overstated, but nor should it be overlooked as it represents a significant impediment to the practical implementation of exemptions on this basis.

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<sup>163</sup> Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 211.

<sup>164</sup> *Ibid.*, 217-18.

A second problem with awarding exemptions to the unheard minority is that the argument looks rather paradoxical. One might be tempted to argue that the very process of awarding exemptions implies that decision-makers are in fact listening to these claimants.<sup>165</sup> Perhaps, one might say, the better response might be to take claimants' perspectives into account more widely in the creation of general legislation. This process could be furthered by the implementation of specific group-representation policies to assist religious groups in their efforts to be included in the political process.<sup>166</sup> Further, if it is a lack of social understanding that is causing the unconscious interference with minority viewpoints, we might be better to strike at the heart of the problem by implementing comparative religious education into the school curriculum, teaching young citizens about the content of the many different beliefs and practices which are important to their peers. This in turn perpetuates the psychological harm associated with misrecognition from society.

Finally, Steven Smith's concern about the potential long term effects of classifying some believers as minorities and awarding exemptions on that basis is worth calling attention to. He believes that a second paradox lies in the fact that this policy "would seem to ratify and, if it were systematically implemented, even codify the very sense of first-class and second-class status" which the exemptions were "ostensibly seeking to overcome."<sup>167</sup> Certainly, there is a real concern that dismissing religious claims through an exemption policy could aid in perpetuating legislative ignorance towards religious groups by institutionalising the separate treatment of religious groups, rather than engaging with them.

The critiques just cited are important and ought to temper our enthusiasm for religious exemptions as a lasting solution to religious pluralism. But I do not think

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<sup>165</sup> In fact, Sullivan's argument is that minority religious groups lack the muscle to secure exemptions also (Sullivan, "Religion and Liberal Democracy," 216).

<sup>166</sup> See, Young, "Polity and Group Difference," 259-66; Young, *Inclusion and Democracy*, 141-53.

<sup>167</sup> Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," 217.

they completely subvert the argument for exemptions here. Take the first apparent paradox. Successfully claiming exemptions might presuppose some “political muscle.” But it is usually thought that considerably more muscle is involved in breaking open political dialogue which was previously deaf to that group’s claims. Awarding exemptions to a set minority group is usually thought to be the most pragmatic response to minority differences because it has a lesser impact upon wider society.<sup>168</sup> Christian Joppke claims that exemptions are “the least controversial (because costless) and most widely practiced form of multicultural accommodation.”<sup>169</sup> By contrast, Stephen Macedo observes that, “small and politically weak religious groups” are unlikely to be taken seriously if accommodation is left to “democratic branches.”<sup>170</sup> With exemption policies a little compromise on the part of the state goes a long way towards easing the burden felt by minority groups.<sup>171</sup> Exemptions are therefore more likely to be effective in alleviating religious claimants’ concerns than democratic processes which could remain stubbornly close-minded to any generalisation of laws designed to account for minority groups.<sup>172</sup> My argument here is a tentative one. Ideally, it would be desirable to engage with minority groups rather than single them out for legal exemptions. But I am unconvinced that we have yet reached a level of open communication which would allow us to rely solely on political and educational processes without unduly trampling on minority interests in the meanwhile.<sup>173</sup>

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<sup>168</sup> As Brian Barry contends in Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001), 39.

<sup>169</sup> Christian Joppke, "The Retreat of Multiculturalism in the Liberal State: Theory and Policy," *The British Journal of Sociology* 55, no. 2 (2004): 238.

<sup>170</sup> Macedo, "Liberal Civic Education and Religious Fundamentalism," 487.

<sup>171</sup> Lucas Swaine argues that “[m]inor exemptions, while of little consequence to liberal gov’t and the citizens of a liberal polity and in no way compromising the integrity of the law, are of major importance to religious adherents” in Swaine, *The Liberal Conscience*, 80.

<sup>172</sup> Macedo, "Liberal Civic Education and Religious Fundamentalism," 487.

<sup>173</sup> On this point see Jonathan Seglow, "Theorizing Recognition," in *Multiculturalism, Identity and Rights*, ed. Bruce Haddock and Peter Sutch (London and New York: Routledge, 2003), 89-91.

New Zealand's democratic bias against religious reasoning and language fails to single out religious beliefs generally as distinctly misunderstood and therefore inadvertently trampled upon. But perhaps a generalised case for religious exemptions derives from the *imbalance* involved in silencing religious voices in political debate and requiring believers to translate their ideas into secular terminology before society will take them seriously. I have shown that a great variety of religious beliefs can be accommodated into the political debate in weakly secular states. Religious beliefs are not usually irrational or fanatical and hence it is only a very limited set that can be justifiably considered inappropriate to political debate. However, the democratic preference for secular language suggests that religious beliefs generally are misperceived as being less worthy of political attention than secular beliefs. This might be considered unfair, offensive and wrong.<sup>174</sup> It also means that the political system does not cater to those who wish to live their lives according to religious modes of reasoning and expression. A case might be made that exemptions allow religionists to conform to faith-based reasoning that the political system fails to represent.<sup>175</sup>

But even this argument does not show religious groups are more special than other minority groups. Religion is not the only form of reasoning that is perceived by society to fall short of the idealised standard of rational argumentation. Iris Marion Young writes that modern states, insofar as they have adopted straight white male bourgeoisie norms of "discourse framed in unemotional tones of dispassionate reason," marginalise the perspectives of other social groups who naturally express

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<sup>174</sup> Webber, "Understanding the Religion in Freedom of Religion," 29. See also Gedicks, "Public Life and Hostility to Religion," 696.

<sup>175</sup> The discussion here draws on Stanley Ingber's argument that beliefs resting on human reason or intuition are represented in the political process, whereas those that rest upon divine authority are not (Stanley Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses," *Stanford Law Review* 41(1988-1989): 286). This might appear particularly unfair if one recalls the argument in chapter one that nobody is entirely in control of what she believes.

their views in alternate manners.<sup>176</sup> Indeed, part of what causes the political marginalisation of many other groups, including women and minority cultural groups, is the prejudice against their alternative forms of reasoning and expression. Marginalised groups often rely on emotion, storytelling and rhetoric which is sidelined by the political system.<sup>177</sup> If inclusive democratic discourse needs to account for a range of different voices then it needs to accommodate more than just religious voices.

## Conclusion

This chapter has demonstrated that excluding the majority of religious beliefs from political debate is unwarranted and critics are right to take issue with it. But the correct response to this finding is to advocate a weaker form of secularism in place of strong models. The weak secularism favoured by most liberal democratic societies provides a fair and justifiable framework to govern the political involvement of religious and non-religious citizens alike. It does not institutionalise a bias against religious beliefs. It merely ensures that religious arguments cannot form the sole basis of coercive legislation and since this is justified, there is no need to award exemptions to any religious believers as a result of this fact.

But a closer examination of the way in which religious reasoning and expression are treated in the political system in reality does support a case for exemptions. Religious believers are often marginalised in political debate. This prevents religious minorities from having their interests taken into full consideration when legislation is enacted. Thus considering the manner in which religion is treated

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<sup>176</sup> Young, "Polity and Group Difference," 253, 254-55, 268-69. See also Young, *Inclusion and Democracy*, 52-80 and McConnell, "Religious Freedom at a Crossroads," 134n97.

<sup>177</sup> Young, "Communication and the Other: Beyond Deliberative Democracy," 128-132. As with religious believers, marginalisation may occur even where these differences are more a matter of vast over-generalisation than reality. For example, women might be more readily seen as unduly emotional irrespective of whether a particular woman is in fact any more emotional than the masculine 'norm.'

within political dialogue strengthens the case for exemptions which arose under the psychological harm approach. One should be wary of suggesting that exemptions provide a complete and final answer to the marginalisation of minority groups. Nevertheless, they may lessen the impact of majority prejudices within a democratic system.

Crucially, however, the origins of this marginalisation are to be found only at the societal and not the institutional level in weakly secular states. They arise from a majority distaste for religious (or minority religious) speech. Thus the implementation of weak secularism is immaterial to the argument and fails to distinguish religious beliefs as special. In chapter one I found that religious minorities are not the only citizens to be sometimes subject to hostility or treated as abnormal. In this chapter I have demonstrated that they are not the only citizens subject to political marginalisation. All citizens who suffer the effects of policies enacted in ignorance of their views deserve the same remediation, whether or not their marginalised views are religious in nature.

## CONCLUSION

Religious beliefs frequently receive exemptions from generalised legislation in secular liberal societies. But I have argued in this dissertation that this special treatment does not rest upon a clearly explicated and consistently applied moral foundation. This leaves open the question of whether religious exemptions are justified or if they merely reflect the continued application of outmoded assumptions about religion.

I have examined a range of possible justifications for the practice of awarding religious exemptions and found that a number of the rationales that are frequently cited in the literature fail to provide satisfactory foundations for religious exemptions. For example, the threat that a believer will suffer extratemporal consequences if she transgresses her religious beliefs is a concern with too narrow an ambit to cover the overwhelming majority of religious exemption claims. Further, because the state cannot draw any assumptions about the truth or falsity of religious beliefs it cannot award exemptions on the basis that one of its citizens is subject to certain extratemporal consequences or divine dictates. Since the separation of religion and the state is justifiable, the state's abstention from judgment on these and other religious matters does not reveal any institutionalised bias against religion that exemptions might remedy.

Yet my investigation also produced a number of reasons why religious believers *do* often deserve the benefits of special provisions. In chapter one I found that psychological harm is a significant risk when people are forced to contravene their centrally important beliefs or when such beliefs are treated as contemptuous or abnormal by wider society. I evaluated the various roles that religious beliefs play in the lives of their holders and concluded that they often fall into the category of centrally important beliefs upon which the psychological harm approach relies. Religious citizens are often strongly attached to their beliefs as they relate to them at an emotional level and use them as guiding life principles so that contravention

is perceived to be highly difficult or impossible. Exemptions relieve religionists from the severe anguish entailed in transgressing such important components of their self-understanding. Further, awarding exemptions so that believers can continue engaging with important aspects of their identities might provide a useful mechanism for countering the hostility or perceptions of abnormality some believers face in society.

In chapter two I examined the content of religious beliefs and showed that a person's perception that her beliefs stem from an external authority, such as a divine authority, indicates that she may face particularly great psychological harm if required to contravene her beliefs. This provides a reason to award exemptions that takes the substance of the beliefs into consideration but does not rest upon the state making any religious judgments. Further, I argued that religious beliefs which are connected to divine authority are likely to constitute "weighty" moral issues for a believer, even when they appear inconsequential to non-religious citizens. Some interpretations of the Islamic practice of veiling would thus qualify for exemptions on this basis, as would a religious objection to warfare.

Finally, I found that the nature of political debate in the US and New Zealand is such that many religious believers in these societies are subject to a sociological bias that effectively silences some or all religious voices in the political arena. This can lead to decisions being enacted in ignorance of minority religious group beliefs and practices, and thereby contribute to unwarranted interference with the concerns of these citizens. Exemptions provide one mechanism for diluting the effects of this democratic prejudice.

But the analysis in each chapter has consistently shown that while there are a number of good reasons to provide exemptions to religionists, the tendency to prioritise their claims over those of non-religious citizens cannot withstand critical scrutiny. None of the above justifications for belief-based exemptions apply to *all* the religious beliefs of all believers. More significantly, none apply to religious

beliefs alone. Equitably applied, each of the arguments logically encompasses a broad range of non-religious beliefs as well as religious ones. In chapter one I demonstrated that a whole host of personal characteristics can become centrally important to one's identity. Many personal attributes, including gender and ethnicity, provide frameworks of strong emotional attachment that can lead to governing moral principles and beliefs which permeate all manner of daily pursuits. Asking an individual to contravene related beliefs, or accept hostility from society about the aspect of her identity which gave rise to them, could cause significant psychological harm, just as it might for a religious believer.

Chapter two revealed that even arguments that focus on the content of religious beliefs fail to illuminate a reason to single out religion. Accepting that religious authority is particularly special would require us to accept that one is more strictly governed by such an authority than she is by other non-religious authorities including, in particular, individual conscience. But unless we are to arrive at the strange conclusion of advocating special exemptions for only the most demanding and fundamentalist (and therefore least liberal) of religious beliefs, then there is no reason to draw this distinction. The argument for awarding exemptions to "weighty" moral issues also fails to single out religion. Significantly, it provides a reason in many instances to draw a line between religious practices such as veiling and seemingly equivalent secular preferences such as hat wearing. Yet religious practices that the believer does not consider to be subject to divine authority are not matters of conscience. Rather, they merely constitute cultural preferences and therefore have no moral case for exemptions on this basis. Meanwhile, secular beliefs such as pacifism clearly qualify.

In the third chapter, I determined that the political structures in liberal democratic states do not serve to distinguish religious beliefs from others for exemption purposes. Many marginal social groups other than religious minorities encounter a democratic bias against their modes of reasoning and expression in social debate. These groups often suffer the same prejudice.

So what are the implications of these findings in practice? The most important one is that while we have reasons to continue awarding religious exemptions, fairness demands that exemptions are also extended to non-religious beliefs that meet the qualifying criteria. From a moral standpoint, there is no reason to prioritise religious beliefs as a category. In practice, it may be that many non-religious believers who are eligible for exemptions according to my reasoning will not lodge claims because such endeavours have proven unsuccessful in the past. By contrast, religious believers in many countries are quite accustomed to litigation. If this, or indeed any other element of their religious identities, causes them to file a greater number of claims, then it clearly follows that religious believers are likely to continue to receive more exemptions than others. The crucial point is that this potential difference in outcome does not derive from any moral justification for favouring religious beliefs.<sup>1</sup> Recognising this is highly important given the potential for hostility to result when one group is seen to be the unwarranted recipient of favourable treatment.

Taken separately each of the justifications that I have outlined for exemptions has a fairly broad ambit. Thus, some might consider that awarding exemptions under each of the separate rationales I have set out creates too many “loopholes” to general legislation and renders granting exemptions on each of these bases an unwieldy policy in practice. The temptation might be to respond by raising the bar to require that beliefs meet *several* of the criteria for exemptions in order to qualify. In other words, they must be centrally important to identity, subject to social and political discrimination *and* important moral issues. I raise this possibility not because I seek to endorse it but because it is important to point out that even this stricter set of criteria still fails to draw a division between religious and non-

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<sup>1</sup> At least one theorist predicts a growing demand for special treatment from a range of claimants in multicultural societies. But he also believes that most claims will derive from religious beliefs (Yossi Nehushtan, "Secular and Religious Conscientious Exemptions: Between Tolerance and Equality," in *Law and Religion in Theoretical and Historical Context*, ed. Peter Cane, Carolyn Evans, and Zoe Robinson (Cambridge: Cambridge University Press, 2008), 246.)

religious beliefs. Let me return to the example of conscientious objection to warfare with which I began this thesis. Both the Quaker and the Pacifist hold an important moral belief that may be centrally important to their identity and runs against the grain in many societies that perpetuate militaristic notions of masculinity so that they can be equally subject to discrimination.

One final matter deserves explication. My argument should only be considered to provide *prima facie* reasons for awarding exemptions enabling people to carry out certain qualifying beliefs. Chapter three demonstrated that state action or inaction is always founded upon minimal values of some sort. Regardless of whether or not beliefs are held by discriminated minorities or represent the centrally important moral values of their holders, the state will insist that they accord with some basic level of societal morality. It is likely that there will be some beliefs that meet the *prima facie* justifications, but fail this final hurdle. Beliefs that cause immediate harm to others such as racist or murderous beliefs are ready examples that will be judged reprehensible and overruled. But this line will always be shifting in accordance with changing social judgments about which beliefs can be accommodated for the sake of avoiding psychological harm to those who hold them and which are simply too reprehensible to be allowed exemptions. Exemptions can only be directed at indirect obstruction of believers, not that which is the deliberate product of valued judgment by the state.

Let us return one last time to our hypothetical military objectors. My analysis discloses a number of sound reasons for awarding exemptions to the Quaker. But it also demonstrates that these justifications apply to the Pacifist with equal force. Consequently, fairness dictates that both claimants ought to receive exemptions. There is no basis for treating the Quaker more favourably than the Pacifist, solely because of the religious basis of the former's belief and this observation maintains validity when a wider variety of religious and non-religious beliefs are evaluated. The extreme diversity of religious beliefs and believers and of situations in which clashes between beliefs and laws arise makes justifying any claim for the

prioritisation of religious beliefs as a set category impossible to sustain. There is no reason to favour religious believers over their secular counterparts. Religious beliefs are often special, but so too are many non-religious beliefs. Decision makers in secular liberal states ought to give careful attention to both.

## WORKS CITED

- Ackerman, Bruce. *Social Justice in the Liberal State*. New Haven and London: Yale University Press, 1980.
- Ahdar, Rex. "The Inevitability of Law and Religion: An Introduction." In *Law and Religion*, edited by Rex Ahdar, 1-16. Aldershot; Burlington USA: Ashgate, 2000.
- Ahdar, Rex, and Ian Leigh. *Religious Freedom in the Liberal State*. Oxford; New York: Oxford University Press, 2005.
- Ahdar, Rex, and John Stenhouse. *God and Government: The New Zealand Experience*. Dunedin: University of Otago Press, 2000.
- Alexander, Larry. "Liberalism, Religion, and the Unity of Epistemology." *San Diego Law Review* 30 (1993): 763-97.
- Allport, Gordon. *The Individual and His Religion, a Psychological Interpretation*. New York: Macmillan Company, 1960.
- Appiah, Kwame. *The Ethics of Identity*. Princeton, New Jersey: Princeton University Press, 2005.
- Appiah, Kwame. "Identity, Authenticity, Survival. Multicultural Societies and Social Reproduction." In *Multiculturalism: Examining the Politics of Recognition*, edited by Amy Gutmann, 149-63. New Jersey and West Sussex: Princeton University Press, 1994.
- Arneson, Richard J. "Liberal Neutrality on the Good: An Autopsy." In *Perfectionism and Neutrality: Essays in Liberal Theory*, edited by Steven Wall and George Klosko, 191-218. Oxford: Rowman & Littlefield Publishers, Inc, 2003.
- Audi, Robert. "The Place of Religious Argument in a Free and Democratic Society." *San Diego Law Review* 30 (1993): 677-701.
- Audi, Robert. *Religious Commitment and Secular Reason*. Cambridge: Cambridge University Press, 2000.
- Baker, Hunter. "Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation." *Journal of Law and Religion* 20, no. 1 (2004-2005): 97-121.
- Bankston III, Carl L. "Rationality, Choice and the Religious Economy: The Problem of Belief." *Review of Religious Research* 42, no. 4 (2002): 311-25.
- Barry, Brian. *Culture and Equality: An Egalitarian Critique of Multiculturalism*. Cambridge, Mass.: Harvard University Press, 2001.

- Bartels, Edien. "'Wearing a Headscarf Is My Personal Choice' (Jasmina, 16 Years)." *Islam and Christian-Muslim Relations* 16, no. 1 (2005): 15 - 28.
- Beckford, James A. *Social Theory and Religion*. Cambridge: Cambridge University Press, 2003.
- Bedi, Sonu. "Debate: What Is So Special About Religion? The Dilemma of the Religious Exemption." *The Journal of Political Philosophy* 15 (2007): 235-49.
- Benhabib, Seyla. *The Claims of Culture: Equality and Diversity in the Global Era*. Princeton and Oxford: Princeton University Press, 2002.
- Benhabib, Seyla. "Toward a Deliberative Model of Democratic Legitimacy." In *Democracy and Difference: Contesting the Boundaries of the Political*, edited by Seyla Benhabib, 67-94. Princeton Princeton University Press, 1996.
- Bernstein, Mary. "Identity Politics." *Annual Review of Sociology* 31 (2005): 47-74.
- Besecke, Kelly. "Seeing Invisible Religion: Religion as a Societal Conversation About Transcendent Meaning." *Sociological Theory* 23, no. 2 (2005): 179-96.
- Bhargava, Rajeev, ed. *Secularism and Its Critics*: Oxford University Press, 1998.
- Bhargava, Rajeev. "What Is Secularism For?" In *Secularism and Its Critics*, edited by Rajeev Bhargava, 486-542: Oxford University Press, 1998.
- Bird, Colin. "Mutual Respect and Neutral Justification." *Ethics* 107, no. 1 (1996): 62-96.
- Bishop, John. *Believing by Faith: An Essay in the Epistemology and Ethics of Religious Belief*. Oxford: Oxford University Press, 2007.
- Bishop, John. "Faith as Doxastic Venture." *Religious Studies* 38, no. 4 (2002): 471-87.
- Bou-Habib, Paul. "Locke, Sincerity and the Rationality of Persecution." *Political Studies* 51 (2003): 611-26.
- Bradney, Anthony. *Law and Faith in a Sceptical Age*. Oxon: Routledge-Cavendish, 2009.
- Brock, Peter. *The Roots of War Resistance: Pacifism from the Early Church to Tolstoy*. Nyack, NY: Fellowship of Reconciliation, 1981.
- Bruce, Steve. "Religion and Rational Choice: A Critique of Economic Explanations of Religious Behaviour." *Sociology of Religion* 54, no. 2 (1993): 193-205.
- Calhoun, Craig. "Social Theory and the Politics of Identity." In *Social Theory and the Politics of Identity*, edited by Craig Calhoun, 9-26. Cambridge, USA; Oxford, UK: Blackwell, 1994.
- Carter, Stephen L. *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*. New York: BasicBooks, 1993.

- Carter, Stephen L. "Evolutionism, Creationism, and Treating Religion as a Hobby." *Duke Law Journal* 1987, no. 6 (1987): 977-96.
- Childress, James F. "Appeals to Conscience." *Ethics* 89, no. 4 (1979): 315-35.
- Chodorow, Nancy. "Preface to the Second Edition." In *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*, vii - xviii. Berkley and Los Angeles: University of California Press, 1999.
- Choper, Jesse. "Defining "Religion" in the First Amendment." *University of Illinois Law Review* (1982): 579-604.
- Choper, Jesse. *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*. Chicago: University of Chicago Press, 1995.
- Chryssides, George D. *Exploring New Religions*. London, New York: Cassell, 1999.
- CNN Wire Staff. "French Burqa Ban Clears Last Legal Obstacle." available at CNN Online, <http://edition.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/?hpt=T2> (last accessed 18 December 2010).
- Cohen, Joshua. "Procedure and Substance in Deliberative Democracy." In *Democracy and Difference: Contesting the Boundaries of the Political*, edited by Seyla Benhabib, 95-119. Princeton: Princeton University Press, 1996.
- Conkle, Daniel. "The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future." *Indiana Law Journal* 71 (2000): 1-36.
- Conkle, Daniel. "Toward a General Theory of the Establishment Clause." *Northwestern University Law Review* 82 (1987-1988): 1114-94.
- Conkle, Daniel. "Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law." *Journal of Law and Religion* 10, no. 1 (1993): 1-32.
- Datta, V.N. *Sati: A Historical, Social and Philosophical Enquiry into the Hindu Rite of Widow Burning*. London: Sangman, 1988.
- Davies, Margaret. "Pluralism in Law and Religion." In *Law and Religion in Theoretical and Historical Context*, edited by Peter Cane, Carolyn Evans and Zoe Robinson, 72-99. Leiden: Cambridge University Press, 2008.
- Davis, Stephen T. "Pascal on Self-Caused Belief." *Religious Studies* 27, no. 1 (1991): 27-37.
- Dimona-Cookson, Maria, and Peter M.R. Stirk, eds. *Multiculturalism and Moral Conflict*. USA; Canada: Routledge, 2010.

- Doe, Norman, and Anthony Jeremy. "Justifications for Religious Autonomy." In *Law and Religion*, edited by Richard O'Dair and Andrew Lewis, 421-42. Oxford; New York: Oxford University Press, 2001.
- Edge, Peter. *Legal Responses to Religious Difference*. The Hague: Kluwer Law International, 2002.
- Edwards, David. "The History of Blasphemy and the Rushdie Affair." In *Liberalism, Multiculturalism and Toleration*, edited by John Horton, 157-77. Houndmills, Basingstoke, Hampshire and New York: Palgrave, 1993.
- Eisenberg, Avigail. "Identity and Liberal Politics: The Problem of Minorities within Minorities." In *Minorities within Minorities: Equality, Rights and Diversity*, edited by Avigail Eisenberg and Jeff Spinner-Halev, 249-70. Cambridge: Cambridge University Press, 2005.
- Eisgruber, Christopher, and Lawrence Sager. *Religious Freedom and the Constitution*. Cambridge, Mass.: Harvard University Press, 2007.
- Eisgruber, Christopher L., and Lawrence G. Sager. "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct." *The University of Chicago Law Review* 61, no. 4 (1994): 1245-315.
- El Guindi, Fadwa. *Veil: Modesty, Privacy and Resistance*. Oxford, UK; New York, NY: Berg, 1999.
- Evans, Carolyn. "Introduction." In *Law and Religion in Theoretical and Historical Context*, edited by Peter Cane, Carolyn Evans and Zoe Robinson, 1-15. Cambridge: Cambridge University Press, 2008.
- Ferguson, Frances. "Beliefs and Emotions (from Stanely Fish to Jeremy Bentham and John Stuart Mill)." In *Politics and the Passions, 1500-1850*, edited by Victoria Kahn, Neil Saccamano and Daniela Coli. Princeton, N.J.: Princeton University Press, 2006.
- Festenstein, Matthew. *Negotiating Diversity: Culture, Deliberation and Trust*. Cambridge: Polity, 2005.
- Fish, Stanley. "Mission Impossible: Settling the Just Bounds between Church and State." *Columbia Law Review* 97, no. 8 (1997): 2255-333.
- Fisher, Amanda. "Jewish Community Upset at Ban on Kosher Killing." *The Dominion Post*, 9 June 2010, available online at <http://www.stuff.co.nz/national/3788986/Jewish-community-upset-at-ban-on-kosher-killing> (accessed 27 November 2010).

- Flew, Antony. *The Presumption of Atheism and Other Philosophical Essays on God, Freedom, and Immortality*. New York: Barnes & Noble, 1976.
- Frame, Richard O. "Belief in a Nonmaterial Reality - a Proposed First Amendment Definition of Religion." *University of Illinois Law Review* 1992, no. 3 (1992): 819-52.
- Galston, William. "Defending Liberalism." *The American Political Science Review* 76, no. 3 (1982): 621-29.
- Galston, William A. *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*. Cambridge, New York and Melbourne: Cambridge University Press, 1991.
- Garvey, John H. "An Anti-Liberal Argument for Religious Freedom." *Journal for Contemporary Legal Issues* 7 (1996): 275-91.
- Garvey, John H. "Free Exercise and the Values of Religious Liberty." *Connecticut Law Review* 18 (1985-1986): 779-802.
- Gaus, Gerald F. "The Place of Religious Belief in Public Reason Liberalism." In *Multiculturalism and Moral Conflict*, edited by Maria Dimona-Cookson and Peter M.R. Stirk, 19-37. USA; Canada: Routledge, 2010.
- Gedicks, Frederick Mark. "Public Life and Hostility to Religion." *Virginia Law Review* 78 (1992): 671-96.
- Gedicks, Frederick Mark. "An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions." *University of Arkansas at Little Rock Law Review* 20 (1997-1998): 555-74.
- Gey, Steven. "Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment." *University of Pittsburgh Law Review* 52 (1990-1991): 75-187.
- Gordon, Sarah Barringer. *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*. Chapel Hill: The University of North Carolina Press, 2002.
- Greenawalt, Kent. "Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint." *San Diego Law Review* 30 (1993): 647-75.
- Greenawalt, Kent. "Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy." *William and Mary Law Review* 48 (2006-2007): 1605-42.
- Greenawalt, Kent. "Religion, Law, and Politics: Arenas of Neutrality." In *Perfectionism and Neutrality: Essays in Liberal Theory*, edited by Steven Wall

- and George Klosko, 257-80. Oxford: Rowman & Littlefield Publishers, Inc, 2003.
- Gutmann, Amy, and Dennis Thompson. "Moral Conflict and Political Consensus." *Ethics* 101, no. 1 (1990): 64-88.
- Habermas, Jurgen. "Religion in the Public Sphere." *European Journal of Philosophy* 14, no. 1 (2006): 1-25.
- Haddock, Bruce, and Peter Sutch, eds. *Multiculturalism, Identity and Rights*. London; NY: Routledge, 2003.
- Hardy, B. Carmon. *Solemn Covenant: The Mormon Polygamous Passage*. Urbana: University of Illinois Press, 1992.
- Harmer-Dionne, Elizabeth. "Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction." *Stanford Law Review* 50, no. 4 (1998): 1295-347.
- Harrison, Victoria S. "The Pragmatics of Defining Religion in a Multi-Cultural World." *International Journal for Philosophy of Religion* 59, no. 3 (2006): 133-52.
- Hassan, Riffat. "Religious Human Rights and the Qur'an." *Emory International Law Review* 10 (1996): 85-96.
- Heal, John. "Belief." In *A Companion to Epistemology*, edited by Jonathan Dancy and Ernest Sosa, 45-48. Oxford; Cambridge, Mass.: Blackwell Reference, 2000.
- Heal, John. "Belief in and Belief That." In *A Companion to Epistemology*, edited by Jonathan Dancy and Ernest Sosa, 48-49. Oxford; Cambridge, Mass.: Blackwell Reference, 2000.
- Henriques, Diana B. "In God's Name: As Exemptions Grow, Religion Outweighs Regulation." *New York Times*, 8 October 2006.
- Hood, Ralph W. Jr., Peter C. Hill, and Bernard Spilka. *The Psychology of Religion: An Empirical Approach*. 4th ed. New York, London: The Guilford Press, 2009.
- Horton, John, ed. *Liberalism, Multiculturalism and Toleration*. Houndmills, Basingstoke, Hampshire and New York: Palgrave, 1993.
- Horton, John. "Liberalism and Multiculturalism: Once More Unto the Breach." In *Multiculturalism, Identity and Rights*, edited by Bruce Haddock and Peter Sutch, 25-41. London; NY: Routledge, 2003.
- Horton, John. "Reasonable Disagreement." In *Multiculturalism and Moral Conflict*, edited by Maria Dimona-Cookson and Peter M.R. Stirk, 58-74. USA; Canada: Routledge, 2010.

- Hunter, John A., Kypros Kypri, Natalie M. Stokell, Mike Boyes, Kerry S. O'Brien, and Kathlee E. McMenamin. "Social Identity, Self-Evaluation and in-Group Bias: The Relative Importance of Particular Domains of Self-Esteem to the in-Group." *British Journal of Social Psychology* 43 (2004): 59-81.
- Iban, Ivan C. "Religious Tolerance and Freedom in Continental Europe." *Ratio Juris* 10, no. 1 (1997): 90-107.
- Ingber, Stanley. "Religion or Ideology: A Needed Clarification of the Religion Clauses." *Stanford Law Review* 41 (1988-1989): 233-694.
- Ismail, Salwa. "Being Muslim: Islam, Islamism and Identity Politics." *Government and Opposition* 39, no. 4 (2004): 614-31.
- Jones, Peter. "Beliefs and Identities." In *Toleration, Identity and Difference*, edited by John Horton and Susan Mendus, 65-86. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 1999.
- Jones, Peter. "The Ideal of the Neutral State." In *Liberal Neutrality*, edited by Robert E. Goodin and Andrew Reeve, 9-38. London and New York: Routledge, 1989.
- Jones, Peter. "Rushdie, Race and Religion." *Political Studies* 38 (1990): 687-94.
- Joppke, Christian. "The Retreat of Multiculturalism in the Liberal State: Theory and Policy." *The British Journal of Sociology* 55, no. 2 (2004): 237-57.
- Karst, Kenneth L. *Belonging to America: Equal Citizenship and the Constitution*. New Haven: Yale University Press, 1989.
- Kaufman, Gordon D. . *The Theological Imagination: Constructing the Concept of God*. Philadelphia, Pennsylvania: Westminster John Knox Press, 1981.
- Kelly, Paul. "Liberalism, Secularism and the Challenge of Religion - Is There a Crisis?" In *Cultural Politics in a Global Age: Uncertainty, Solidarity and Innovation*, edited by David Held and Henrietta L. Moore, 124-31. Oxford: Oneworld Publications, 2008.
- Kierkegaard, Soren. *Concluding Unscientific Postscript*. Translated by David F. Swenson and Walter Lowrie. Princeton, N.J.: Princeton University Press, 1941.
- Killingley, Dermot. "Hinduism." In *Major World Religions: From Their Origins to the Present*, edited by Lloyd Ridgeon. New York: RoutledgeCurzon, 2003.
- Kirkland, Anna. "Representations of Fatness and Personhood: Pro-Fat Advocacy and the Limits and Uses of Law." *Representations* 82 (2003): 24-51.

- Kirkpatrick, Lee A. "An Attachment-Theory Approach to the Psychology of Religion." In *The Psychology of Religion: Theoretical Approaches*, edited by Bernard Spilka and Daniel N. McIntosh. Boulder, Colorado; Oxford, UK: Westview Press, 1997.
- Kitcher, Philip. "Militant Modern Atheism." *Journal of Applied Philosophy* (5 October 2010), available via Wiley Online Library <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5930.2010.00500.x/pdf> (accessed 6 October 2010).
- Koppleman, Andrew. "The Fluidity of Neutrality." *The Review of Politics* 66, no. 4 (2004): 633-48.
- Koppleman, Andrew. "Is It Fair to Give Religion Special Treatment?" *University of Illinois Law Review* (2006): 571-603.
- Kramnick, Issac, and R. Laurence Moore. *The Godless Constitution: A Moral Defence of the Secular State*. New York: W.W. Norton & Company Inc, 2005.
- Kymlicka, Will. *Multicultural Citizenship. A Liberal Theory of Minority Rights*. Oxford: Oxford University Press, 1995.
- Laborde, Cecile. "Secular Philosophy and Muslim Headscarves in Schools." *The Journal of Political Philosophy* 13, no. 3 (2005): 305-29.
- Laborde, Cecile. "Secularism and Fair Treatment for Muslims." In *Multiculturalism and Moral Conflict*, edited by Maria Dimona-Cookson and Peter M.R. Stirk, 131-48. USA; Canada: Routledge, 2010.
- Larmore, Charles. "Patterns of Moral Complexity (Selections)." In *Perfectionism and Neutrality: Essays in Liberal Theory*, edited by Steven Wall and George Klosko, 47-60. Oxford: Rowman & Littlefield Publishers, Inc, 2003.
- Laycock, Douglas. "Formal, Substantive, and Disaggregated Neutrality toward Religion." *DePaul Law Review* 39 (1989-1990): 993-1018.
- Levinson, Sanford. "Review: Religious Language and the Public Square." *Harvard Law Review* 105, no. 8 (1992): 2061-79.
- Levy, Jacob T. *The Multiculturalism of Fear*. New York: Oxford University Press, 2000.
- Lipner, Julius. *Hindus: Their Religious Beliefs and Practices*. 2nd ed. London and New York: Routledge, 2010.
- Locke, John. "A Letter Concerning Toleration." In *John Locke, a Letter Concerning Toleration in Focus*, edited by John Horton and Susan Mendus, 12-56. London: Routledge, 1991.

- Lott, Bernice. *Multiculturalism and Diversity: A Social Psychological Perspective*. West Sussex, UK; Malden, MA: Wiley-Blackwell, 2010.
- Macedo, Stephen. "Liberal Civic Education and Religious Fundamentalism: The Case of God V. John Rawls?" *Ethics* 105, no. 3 (1995): 468.
- Macedo, Stephen. "The Politics of Justification." *Political Theory* 18, no. 2 (1990): 280-304.
- Macedo, Stephen. "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism." *Political Theory* 26, no. 1 (1998): 56-80.
- Macklem, Timothy. "Reason and Religion." In *Faith in Law: Essays in Legal Theory*, edited by Peter Oliver, Sionaidh Douglas-Scott and Victor Tadros, 70-87. Oxford: Hart Publishing, 2000.
- Mangan, J.A. "Duty Unto Death: English Masculinity and Militarism in the Age of the New Imperialism." In *Tribal Identities: Nationalism, Europe, Sport*, edited by J.A. Mangan, 10-38. London and Oregon: Frank Cass Publishers, 1996.
- Marshall, William. "In Defense of Smith and Free Exercise Revisionism." *The University of Chicago Law Review* 58, no. 1 (1991): 308-28.
- Marshall, William. "Religion as Ideas: Religion as Identity." *Journal of Contemporary Legal Issues* 7 (1996): 385-406.
- Marshall, William. "Truth and the Religion Clauses." *DePaul Law Review* 43 (1993-1994): 243-68.
- McConnell, Michael W. "Accommodation of Religion." *The Supreme Court Review* (1985): 1-59.
- McConnell, Michael W. "Believers as Equal Citizens." In *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, edited by Nancy L. Rosenblum, 90-110. Princeton: Princeton University Press, 2000.
- McConnell, Michael W. "The Origins and Historical Understanding of Free Exercise of Religion." *Harvard Law Review* 103, no. 7 (1990): 1409-517.
- McConnell, Michael W. "The Problem of Singling out Religion." *DePaul Law Review* 50 (2000-2001): 1-48.
- McConnell, Michael W. "Religious Freedom at a Crossroads." *The University of Chicago Law Review* 59, no. 1 (1992): 115-94.
- Mendus, Susan. "Choice, Chance and Multiculturalism." In *Multiculturalism Reconsidered: Culture and Equality and Its Critics* edited by Paul Kelly. Cambridge; Malden, MA: Polity Press, 2002.

- Mendus, Susan. "Religion and Education: More on God V John Rawls." unpublished article, available online at, <http://www.york.ac.uk/depts/poli/staff/profiles/slm.htm> (accessed 18 December 2009).
- Mendus, Susan. "Should Religion Be Special?" unpublished article, available online at, <http://www.york.ac.uk/depts/poli/staff/profiles/slm.htm> (accessed 18 December 2009).
- Mendus, Susan. "The Tigers of Wrath and the Horses of Instruction." In *Liberalism, Multiculturalism and Toleration*, edited by John Horton, 193-206. Houndmills, Basingstoke, Hampshire and New York: Palgrave, 1993.
- Meyerson, Denise. "Why Religion Belongs in the Private Sphere, Not the Public Sphere." In *Law and Religion in Theoretical and Historical Context*, edited by Peter Cane, Carolyn Evans and Zoe Robinson, 44-71. Cambridge: Cambridge University Press, 2008.
- Mill, John Stuart. "On Liberty." In *Utilitarianism, on Liberty, and Considerations of Representative Government*, edited by H.B. Acton, 78-113. London: J.M. Dent & Sons, 1972.
- Modood, Tariq. "Anti-Essentialism, Multiculturalism and the 'Recognition' of Religious Groups." *The Journal of Political Philosophy* 6, no. 4 (1998): 378-99.
- Modood, Tariq. *Multiculturalism: A Civic Idea*. Cambridge, UK; Malden, MA: Polity Press, 2007.
- Modood, Tariq. "Muslims, Incitement to Hatred and the Law." In *Liberalism, Multiculturalism and Toleration*, edited by John Horton, 139-56. Houndmills, Basingstoke, Hampshire and New York: Palgrave, 1993.
- Modood, Tariq. "Muslims, Racial Equality and Secularism." In *Multiculturalism and Moral Conflict*, edited by Maria Dimona-Cookson and Peter M.R. Stirk, 113-30. USA; Canada: Routledge, 2010.
- Moreman, Christopher M. *Beyond the Threshold: Afterlife Beliefs and Experiences in World Religions*. Lanham: Rowman & Littlefield Publishers, Inc. , 2008.
- Morris, Paul. "Covering Islam - Burqa and Hijab: Limits to the Human Right to Religion." *Human Rights Research* (2004), available online via Victoria University of Wellington at <http://www.victoria.ac.nz/nzcpl/HRRJ/vol2/index.aspx> (accessed 27 September 2010).
- Nehushtan, Yossi. "Secular and Religious Conscientious Exemptions: Between Tolerance and Equality." In *Law and Religion in Theoretical and Historical*

- Context*, edited by Peter Cane, Carolyn Evans and Zoe Robinson, 243-67. Cambridge: Cambridge University Press, 2008.
- Nelson, Hilde Lindemann. *Damaged Identities, Narrative Repair*. Ithaca and London: Cornell University Press, 2001.
- Nozick, Robert. *The Nature of Rationality*. Princeton: Princeton University Press, 1993.
- Nussbaum, Martha C. *Liberty of Conscience: In Defence of America's Tradition of Religious Equality*. New York: Basic Books, c2008.
- Parekh, Bhikhu. *A New Politics of Identity: Political Principles for an Interdependent World*. Houndmills, Basingstoke, Hampshire, New York: Palgrave Macmillan, 2008.
- Parekh, Bhikhu. *Rethinking Multiculturalism: Cultural Diversity and Political Theory*. Basingstoke & New York: Palgrave Macmillan, 2006.
- Perry, Michael J. . *Morality, Politics and Law: A Bicentennial Essay*. New York: Oxford University Press, 1988.
- Peterson, M., W. Hasker, B. Reichenbach, and D. Basinger. *Reason and Religious Belief: An Introduction to the Philosophy of Religion*. 3rd ed. New York: Oxford University Press, 2003.
- Phillips, Anne. "'Really' Equal: Opportunities and Autonomy." *The Journal of Political Philosophy* 14, no. 1 (2006): 18-32.
- Pojman, Louis P. "Belief and Will." *Religious Studies* 14, no. 1 (1978): 1-14.
- Price, H. H. "Belief 'in' and Belief 'That'." *Religious Studies* 1, no. 1 (1965): 5-27.
- Quong, Jonathan. "Cultural Exemptions, Expensive Tastes, and Equal Opportunities." *Journal of Applied Philosophy* 23, no. 1 (2006): 53-71.
- Raikka, Juha. "The Place of Religious Arguments in Civic Discussion." *Ratio Juris* 13, no. 2 (2000): 162-76.
- Ramadan, Tariq. *What I Believe*. Oxford, New York: Oxford University Press, 2010.
- Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1993.
- Ridgeon, Lloyd. "Islam." In *Major World Religions: From Their Origins to the Present*, edited by Lloyd Ridgeon. New York: RoutledgeCurzon, 2003.
- Rippin, Andrew. *Muslims: Their Religious Beliefs and Practices*. 3rd ed. London, New York: Routledge, 2005.
- Robbins, Thomas. "Combating "Cults" and "Brainwashing" in the United States and Western Europe: A Comment on Richardson and Introvigne's Report." *Journal for the Scientific Study of Religion* 40, no. 2 (2001): 169-75.

- Rorty, Amelie Oksenberg, and David Wong. "Aspects of Identity and Agency." In *Identity, Character and Morality: Essays in Moral Psychology*, edited by Owen Flanagan and Amelie Oksenberg Rorty. Cambridge, Massachusetts; London, England: The MIT Press, 1990.
- Rosenblum, Nancy L. "Introduction: Pluralism, Integralism, and Political Theories of Religious Accommodation." In *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, edited by Nancy L. Rosenblum, 3-31. Princeton: Princeton University Press, 2000.
- Rosenblum, Nancy L., ed. *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*. Princeton: Princeton University Press, 2000.
- Sadurski, Wojciech. *Moral Pluralism and Legal Neutrality*. Dordrecht; Boston: Kluwer Academic Publishers, 1990.
- Sager, Lawrence. "The Moral Economy of Religious Freedom." In *Law and Religion in Theoretical and Historical Context*, edited by Peter Cane, Carolyn Evans and Zoe Robinson, 16-25. Cambridge: Cambridge University Press, 2008.
- Salmons, David B. "Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion." *The University of Chicago Law Review* 62 (1995): 1243-74.
- Samuels, Richard, and Stephen Stich. "Rationality and Psychology." In *The Oxford Handbook of Rationality*, edited by Alfred R. Mele and Piers Rawling, 279-300. Oxford: Oxford University Press, 2004.
- Sandel, Michael. "Religious Liberty - Freedom of Conscience or Freedom of Choice?" *Utah Law Review* (1989): 597-615.
- Seglow, Jonathan. "Theorizing Recognition." In *Multiculturalism, Identity and Rights*, edited by Bruce Haddock and Peter Sutch, 79-93. London and New York: Routledge, 2003.
- "Shechita: Kosher Slaughter - a Jewish Religious Ritual Needed to Provide Kosher Food ". <http://www.kosherlaughter.co.nz/koshermeat/> (accessed 27 November 2010).
- Skjeie, Hege. "Religious Exemptions to Equality." *Critical Review of International Social and Political Philosophy* 10, no. 4 (2007): 471-90.
- Smith, Michael E. "The Special Place of Religion in the Constitution." *Supreme Court Review* 1983 (1983): 83-123.

- Smith, Rodney K. "Converting the Religious Equality Amendment into a Statute with a Little "Conscience"." *Brigham Young University Law Review* 1996 (1996): 645-88.
- Smith, Steven. "The Rise and Fall of Religious Freedom in Constitutional Discourse." *University of Pennsylvania Law Review* 140 (1991-1992): 149-240.
- Somers, Margaret R., and Gloria D. Gibson. "Reclaiming the Epistemological "Other": Narrative and the Social Constitution of Identity." In *Social Theory and the Politics of Identity*, edited by Craig Calhoun, 37-99. Cambridge, USA; Oxford, UK: Blackwell, 1994.
- Spickard, James V. "Rethinking Religious Social Action: What Is "Rational" About Rational-Choice Theory?" *Sociology of Religion* 59, no. 2 (1998): 99-115.
- Sullivan, Kathleen M. "Religion and Liberal Democracy." *The University of Chicago Law Review* 59, no. 1 (1992): 195-223.
- Swaine, Lucas. *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism*. New York: Columbia University Press, 2006.
- Taylor, Charles. "Inescapable Frameworks." In *Sources of the Self: The Making of the Modern Identity*, 3-24. Cambridge: Cambridge University Press, 1989.
- Taylor, Charles. "Modes of Secularism." In *Secularism and Its Critics*, edited by Rajeev Bhargava, 31-53: Oxford University Press, 1998.
- Taylor, Charles. "The Politics of Recognition." In *Multiculturalism and "the Politics of Recognition": An Essay*, edited by Charles Taylor and Amy Gutmann, 25-73. Princeton: Princeton University Press, 1992.
- Taylor, Charles. *A Secular Age*. Cambridge, Mass: Belknap Press of Harvard University Press, 2007.
- Taylor, Charles. "What Is Human Agency?" In *Human Agency and Language: Philosophical Papers I*, 15-44. Cambridge; New York; Melbourne: Cambridge University Press, 1985.
- Taylor, Nancy M. *The New Zealand People at War: The Home Front*. Vol. 1. Wellington: Historical Publications Branch, Department of Internal Affairs, Government Printer, 1986.
- Tietz, J. B. . "Jehovah's Witnesses: Conscientious Objectors." *Southern California Law Review* 28 (1954-1955): 123-38.
- Trigg, Roger. *Rationality and Religion*. Oxford & Malden, MA: Blackwell Publishers, 1998.
- Trilling, Lionel. *Sincerity and Authenticity*. London: Oxford University Press, 1972.

- Tsuchiya, Kiyoshi. "Buddhism." In *Major World Religions: From Their Origins to the Present*, edited by Lloyd Ridgeon. New York: RoutledgeCurzon, 2003.
- Tushnet, Mark. "Religion and Theories of Constitutional Interpretation." *Loyola Law Review* 33 (1987-1988): 221-40.
- United Nations Commission on Human Rights. "Conscientious Objection to Military Service - Commission on Human Rights Resolution 1998/77." available online at <http://www.unhcr.ch/Huridoca/Huridoca.nsf/0/5bc5759a53f36ab380256671004b643a?Opendocument> (accessed 21 January 2010).
- United Nations Economic and Social Council. "The Question of Conscientious Objection to Military Service: Report of the Secretary-General Prepared Pursuant to Commission Resolution 1995/83." available online at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/a7d0cccd1226af02802566f6004ea36a?Opendocument> (accessed 25 January 2010).
- Urubshurow, Victoria Kennick. *Introducing World Religions*. New York: Routledge, 2008.
- van Holten, Wilko. "Can the Traditional View of Hell Be Defended? An Evaluation of Some Arguments for Eternal Punishment." *Anglican Theological Review* 85, no. 3 (2003): 457-76.
- van Inwagen, Peter. "It Is Wrong, Everywhere, Always, and for Anyone, to Believe Anything Upon Insufficient Evidence." In *Philosophy: The Big Questions*, edited by Ruth J. Sample, Charles W. Mills and James P. Sterba, 87-98. Malden, MA: Blackwell Publishing Ltd, 2004.
- Verkuyten, Maykel, and Ali Aslan Yildiz. "Religious Identity Consolidation and Mobilization among Turkish Dutch Muslims." *European Journal of Social Psychology* 40, no. 3: 436-47.
- Wainwright, William. "Concepts of God." Stanford Encyclopedia of Philosophy Online, available at <http://plato.stanford.edu/entries/concepts-god/> (accessed 24 April 2010).
- Waldron, Jeremy. "Legislation and Moral Neutrality." In *Liberal Neutrality*, edited by Robert E. Goodin and Andrew Reeve, 61-83. London and New York: Routledge, 1989.
- Young, Iris Marion. "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship." *Ethics* 99, no. 2 (1989): 250-74.
- Young, Iris Marion. "Communication and the Other: Beyond Deliberative Democracy." In *Democracy and Difference: Contesting the Boundaries of the*

*Political*, edited by Seyla Benhabib, 120-36. Princeton: Princeton University Press, 1996.

Young, Iris Marion. *Inclusion and Democracy*. Oxford: Oxford University Press, 2000.