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## Rescuing Liberalism from Critical Religion

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Liberal secularism is the political philosophy according to which the state protects religious freedom and is itself religiously neutral. But what do liberal political philosophers think religion is, and how does it affect what they say about how liberal states should deal with religion? Although I write in the analytical, normative tradition of political theory, I share with Continental-influenced, post-structuralist critics a deep-seated interest in the opacity and ambiguity of language. One of the paradoxes I explore is that, for all its commitments to clarity and precision, Anglo-American analytical political philosophy has relied on a strikingly vague understanding of religion – an imprecision carried over to the loose analogue between religion and ‘conception of the good’ popularized by John Rawls.

Yet more precision is required, lest liberalism remain vulnerable to what I call the Critical Religion challenge. This points out that the liberal conception of religion is sociologically naïve, ethnocentric, and Protestantized, and its very definition and regulation are bound up with the exercise of an arbitrarily sovereign secular power. In this Article, I first set out what I call the Critical Religion challenge to liberalism. I then provide a preliminary liberal egalitarian response, which clarifies a few misperceptions and misunderstandings. Finally, I set the stage for a nuanced version of the critique, which deserves to be taken more seriously than liberals have so far. This, I argue, opens the way to a more complex, *disaggregated* conception of religion, which should inform a pluralist, also disaggregated, conception of liberal secularism.

### I. The Critical Religion Challenge to Liberalism

Let us begin with the classic statement of liberalism’s religion by John Locke. Religion, Locke thought, is about the aspirations to salvation of the individual soul. The state has no authority

to shape or control such aspirations: it cannot effectively compel inward belief, nor does it have the competence and wisdom to distinguish true from false belief. The state should, therefore, adopt a policy of toleration of religious beliefs. Its role is limited to the care and protection of 'outward things, such as money, land, houses, furniture, and the like'. In such domains, churches are in turn incompetent, and should not meddle with the business of government. What is 'above all things necessary', Locke famously wrote, is 'to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other' (Locke, 1991, 17).<sup>1</sup> In contemporary liberalism, this basic intuition has evolved into what has been called 'two-way protection': protection of religion from the state, and protection of the state from religion (Gutmann 2000, 2003).<sup>2</sup>

Now a group of theorists today ask probing questions about liberalism's religion – the concept of religion at the heart of liberalism – and it is important that liberal political philosophers adequately respond to it. Critical Religion points to the indeterminacy and inadequacy of the liberal construal of religion itself. This critique has been developed by an eclectic group of writers, among whom Talal Asad, William Cavanaugh, Peter Danchin, Stanley Fish, Timothy Fitzgerald, Saba Mahmood, Elizabeth Shakman-Hurd, Stephen Smith and Winnifred Fallers Sullivan (Asad 1993, 2012, Cavanaugh 2009, Fish 2000, Fitzgerald 2005, Mahmood 2009, 2005, Hurd 2015, Smith, 2009, 2010, Sullivan 2005, 2015).<sup>3</sup> These are anthropologists, sociologists, philosophers, historians, lawyers, comparative politics and

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<sup>1</sup> John Locke, *A Letter Concerning Toleration*, reprinted in John Horton & Susan Mendus (eds.) *A Letter Concerning Toleration in Focus*. London: Routledge, 1991, p. 17.

<sup>2</sup> Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003) and 'Religion and state in the United States: A Defense of Two-Way Protection', in Nancy L. Rosenblum (ed.), *Obligations of Citizenship and the Demands of Faith* (Princeton: Princeton University Press 2000, 127-164

<sup>3</sup> Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993); Talal Asad, "Thinking about Religious Belief and Politics," in *Cambridge Companion to Religious Studies*, ed. Robert Orsi (New York: Cambridge University Press, 2012); William T. Cavanaugh, *Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (New York: Oxford University Press, 2009); Stanley Fish, 'Mission Impossible. Setting the Just Bounds between Church and State', in Stephen M. Feldman (ed.) *Law & Religion. A Critical Anthology*. New York: New York University Press, 2000, 383-410; Tim Fitzgerald, *The Ideology of Religious Studies* (Oxford: Oxford University Press, 2005); Saba Mahmood, "Religious Reason and Secular Affect," *Critical Inquiry* 35, no. 4 (Summer 2009): 836-862; Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005); Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion*. (Princeton: Princeton University Press, 2015); Stephen D. Smith, 'Discourse in the Dusk: The Twilight of Religious Freedom' 122 *Harvard Law Review* 1869 (2009); Stephen D. Smith, *The Disenchantment of Secular Discourse* (Cambridge, MA: Harvard University Press, 2010); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005); Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood & Peter G. Danchin (eds.) *The Politics of Religious Freedom*. (Chicago: University of Chicago Press, 2015).

religious studies experts, all versed in methodologies that openly reject the claims of normative liberal political philosophy – Foucauldian, Schmittian, post-colonialist, pragmatist, or Realist. Their main claim is that the liberal attempt to define what Locke called the ‘just bounds’ between the state and religion is a ‘mission impossible’, in Stanley Fish’s memorable phrase, because there is no non-arbitrary way to single out, and fairly regulate, a stable, recognizable sphere of religion (Fish 2000).<sup>4</sup>

Critical Religion is a broad church, so let me distinguish three lines of criticism, which I call: Semantic, Protestant, and Realist.

The *Semantic critique* points out that there is no stable, universally valid empirical referent for the category of religion. Comparative historians of religion have shown that religion is a distinctively modern and western concept. It was born, from the 16<sup>th</sup> century onwards, out of a mix of Christian disputes about truth, European colonial expansion, and the formation of nation-states. The idea that the world is divided into different religions offering competing ways of individual salvation was born during the European Renaissance and Reformation. European global expansion invented religion in other places. Thus it was, famously, that Hinduism was invented as an ancient, venerable faith – in fact, a parcelling out of the social life and customs of the people living near the Indus river into ‘religious’ and ‘non-religious’ practices. But it is impossible to discern any common core or essence to all the world religions. Christianity, Islam, Judaism, Buddhism, Shintoism have nothing in common – and no feature that would allow us to distinguish them from non-religious ideologies, such as nationalism. The category of religion, in sum, fails to capture a universally recognizable or semantically coherent reality (Smith 1991; Smith 1998; Nongbri 2013; Asad 2003; Fitzgerald 2005; Balagangadhara 1994; King 1999, Mandair 2009, Masuzawa 2005).<sup>5</sup>

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<sup>4</sup> Stanley Fish, ‘Mission Impossible. Settling the Just Bounds Between Church and State’, in Stephen M. Feldman (ed.) *Law & Religion. A Critical Anthology*. New York: New York University Press, 2000, 383-410.

<sup>5</sup> See, eg., Wilfred Cantwell Smith, *The Meaning and End of Religion* (Minneapolis: Fortress Press, 1991 [1962]); Jonathan Z. Smith, “Religion, Religions, Religious,” in *Critical Terms in Religious Studies*, ed. Mark Taylor (Chicago: University of Chicago Press, 1998), 269-284; Brent Nongbri, *Before Religion* (New Haven: Yale University Press, 2013); Talal Asad, *Formations of the Secular. Christianity, Islam, Modernity* (Palo Alto: Stanford University Press, 2003); Tim Fitzgerald, *The Ideology of Religious Studies* (Oxford: Oxford University Press, 2005); S. N. Balagangadhara, *The Heathen in His Blindness: Asia, the West, and the Dynamic of Religion* (Leiden: Brill, 1994); Richard King, *Orientalism and Religion: Post-Colonial Theory, India and the ‘Mystic East’* (New York: Routledge, 1999); Arvind-pal S. Mandair, *Religion and the Specter of the West: Sikhism, India, Postcoloniality, and the Politics of Translation* (New York: Columbia University Press, 2009); Tomoko Masuzawa, *The Invention of World Religions:*

The *Protestant critique* focuses on the political and legal treatment of religion and argues that liberal law is biased towards individualistic, belief-based religions. Talal Asad has shown how the Protestant Reformation in Europe initiated a newly secular mode of political governance, which relies on a set of foundational and mutually reinforcing binary oppositions: between divine and civil obligations, between belief and reason, between thought and action, and between mind and body. And in line with the Protestant rejection of Catholic ritualism, the emerging secular order sees true religion as located on the first side of each opposition: religion is about mind, belief and thought, rather than constituting an activity in the world. Religious ritual and practices were seen by Locke to require merely bodily acts, and therefore were not essential to religion. Religion, on this modern Protestant reading, is private, voluntary, individual, textual, about obligation, and about belief (Asad 2012; Mahmood 2005, 2009; Sandel 1998; Hurd 2015; Spinner-Halev 2015; Sullivan 2005; Sullivan, Hurd, Mahmood, & Danchin, 2015; White 1998).<sup>6</sup>

This construal of religion has found its way in both national and international law, and in public discourse. Consider, for example, three popular arguments defending regulations of Islamic veiling in Europe. The first argument is that Muslim dress can be regulated because it belongs simply to the realm of practices – *forum externum* – not to the realm of belief – *forum internum*. The second is that veiling is not a religious obligation strictly speaking: it is not one of the five pillars of Islam, and there are disagreements, within the Islamic community, as to whether it is required by the faith, or whether it is a non-obligatory act. The third argument suggests that because veiling is not endorsed *freely* by women, it does not express the proper nature of religious belief as voluntary and chosen. Inherent to these interpretations of Muslim

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*Or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago: University of Chicago Press, 2005)

<sup>6</sup> Talal Asad, 'Thinking about Religious Belief and Politics', in Robert Orsi (ed.) *Cambridge Companion to Religious Studies*. Cambridge: Cambridge University Press, 2012, 36-57; Saba Mahmood, 'Religious Reason and Secular Affect', *Critical Inquiry* 35, no. 4 (Summer 2009): 836-862; Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject*. Princeton: Princeton University Press, 2005; Michael Sandel, 'Religious Liberty: Freedom of Choice or Freedom of Conscience?', in *Secularism and its Critics*, ed. Rajeev Bhargava (Oxford: Oxford University Press, 1998); Elizabeth Shakman Hurd, *Beyond Religious Freedom. The New Global Politics of Religion*. Princeton: Princeton University Press, 2015; Jeff Spinner-Halev, 'Hinduism, Christianity and Liberal Religious Toleration', *Political Theory* Vol. 3, No. 1, February 2005, 28-57; Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*. Princeton: Princeton University Press, 2005; Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood & Peter G. Danchin (eds.) *The Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015); James Boyd White, 'Talking about Religion in the Language of the Law: Impossible but Necessary', *Marquette Law Review*, Vol. 81, Winter 1998 No. 2, 177-202.

practices is a Protestant construal of religion, based on faith, voluntariness, and fulfilment of duties (Scott 2007; Bowen 2008; Laborde 2008; Fernando 2014).<sup>7</sup>

As Saba Mahmood and others have shown, however, a great deal of religious practice – ritual observance, dietary habits, dress and bodily behaviour – have little to do with faith, sincerity, or choice. In Judaism, Islam, Hinduism, aboriginal religions, as well as many forms of Christianity, practices and community are more important than belief and individuality. One implication of the Protestant critique is that, once the religious experience is seen as an embodied, practice- and community-based way of life, it is difficult *to single it out* in relation to other social practices. It is no longer clear what is special about religion: why it should be specially protected or contained. In a book entitled *The Impossibility of Religious Freedom*, Winnifred Sullivan concludes that there is no justification for privileging a high-minded, textualist understanding of ‘true’ religion: she argues instead for a regime, not of special treatment, but of equality (Sullivan 2005).

The **Realist critique**. There are two versions of this critique of liberal regulation of religion: it amounts to the naked exercise of arbitrary power; or to the establishment of an alternative religion, that of liberalism. According to the first, liberalism is incoherent and arbitrary because it constantly produces what it denies: the so-called ‘secular’ state is unavoidably entangled with religion, and there is no meaningful separation between religion and state. The moment when the law is faced with deciding which practices are religious and which are secular, it engages in a theological exercise and gives up on its own secularity. All states ‘establish’ religion, formally or informally - states as different as Egypt, France, Turkey or the USA manage religion for their own purposes – particularly in the name of arbitrary, secular notions of ‘public order’. The second, more radical version of the Realist critique posits that secular liberalism itself is a religion. Liberalism cannot impartially govern the religious because it is a rival metaphysics or substantive way of life. Liberalism is a ‘secular fundamentalist’ and normalizing project, one that designates heretics and dissidents as ‘unreasonable’ – a loose, rhetorical category that designates those who do not agree with its own articles of faith (Agrama 2012;

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<sup>7</sup> On veiling controversies, see Joan Scott, *The Politics of the Veil*. Princeton University Press, 2007; John R. Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space*. Princeton: Princeton University Press, 2008; Cécile Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, 2008; Mayanthi Fernando, *The Republic Unsettled: Muslim French and the Contradictions of Secularism*. Durham: Duke University Press, 2014.

Campos 1994; Dressler & Mandair 2011; Sullivan, Yelle & Taussig-Rubbo 2011; Sullivan & Beaman, 2013; Smith 2004).<sup>8</sup>

This is a thought-provoking challenge to liberalism. My answer to it is two-pronged. First, the critique relies on a distorted and inaccurate picture of liberal theory. Second, once these distortions are corrected, there remain blind spots in the liberal theory of secularism and religion, which need to be addressed.

## II. Liberal Egalitarianism

The dominant academic school of liberal political theory today embraces what might be called liberal egalitarianism. This is a school of thought that explicitly denies that religion is special and that it should be subjected to a special regime of protections and constraints (Dworkin 2013; Eisgruber & Sager 2007; Taylor & Maclure 2011; Schwartzman 2012).<sup>9</sup> This, I argue, offers a plausible liberal answer to the critical religion challenge.

Liberal egalitarianism seeks to extend and generalise the protections (and burdens) traditionally associated with religion (when these are justified) to a broader category of what John Rawls called ‘conceptions of the good’ (Rawls 1972, 1996).<sup>10</sup> What is called neutrality in contemporary liberal philosophy is a generalization of the classical ideal of religious toleration. The liberal state is no longer required merely to be neutral as between religions; it has to be neutral also between all aspects of its citizens’ conceptions of the good, whether these are

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<sup>8</sup> See, eg., Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: Chicago University Press, 2012); Paul F. Campos, ‘Secular Fundamentalism’, *Columbia Law Review*, Vol. 94, No. 6, October 1994, 1814-1827; Markus Dressler & Arvind-Pal S. Mandair, *Secularism & Religion-Making*. New York: Oxford University Press, 2011; Winnifred Fallers Sullivan, Robert Yelle, and Mateo Taussig-Rubbo, eds., *After Secular Law* (Palo Alto: Stanford University Press, 2011); Winnifred Fallers Sullivan and Lori G. Beaman, eds., *Varieties of Religious Establishment* (London: Ashgate, 2013); Steven Smith, ‘The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom’, *University of San Diego School of Law, Public Law and Legal Theory Research Paper Series*. 2004.

<sup>9</sup> Representative liberal texts are Ronald Dworkin, *Religion without God* (Cambridge, Mass.: Harvard University Press, 2013); Christopher Eisgruber & Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge Mass.: Harvard University Press, 2007); Charles Taylor & Jocelyn Maclure, *Secularism and Freedom of Conscience*. (Cambridge Mass: Harvard University Press, 2011); Micah Schwartzman, ‘What if Religion Is Not Special?’ 79 *U. Chi. L. Rev.* 1351 (2012).

<sup>10</sup> John Rawls, *A Theory of Justice*. (Oxford: Oxford University Press, 1972), John Rawls, *Political Liberalism*. (New York: Columbia University Press), 1996 (1987).

spiritual or secular. This liberalism is *egalitarian* in two senses. First, because it is not rooted in a secularist worldview, it does not exclude religious believers: it is not sectarian or ‘secular fundamentalist’ in this way. Rawls hoped that citizens otherwise deeply divided in their comprehensive, ethical and religious commitments, could converge on a political conception of liberal justice. The upshot is that the liberal state does not single out religious views and conceptions as uniquely problematic for purposes of legitimacy. It does not separate itself uniquely from religion but, rather, refrains from endorsing or promoting any controversial or comprehensive conception of the good.

Second, the liberal state does not uniquely protect *religious* beliefs and practices from intolerance, repression, and discrimination. Religious freedom is only one instantiation of a more basic right - a right to personal freedom or ethical independence, which is also at stake in other controversies around conscience, sexuality and abortion. There is nothing special about religion, such that religious citizens should receive uniquely privileged treatment in the law – say, in the form of exclusive exemptions on the ground of religious belief. As thinkers such as Rawls and Ronald Dworkin argued, it is the human capacity for moral or spiritual agency, not for leading good lives with a determinate, perhaps religious, content, that should ground the respect that the state owes to persons *qua* persons. In their book, *Religious Freedom and the Constitution*, US constitutionalists Christopher Eisgruber and Lawrence Sager argue that religion should be treated as no worse, but also no better, than other forms of human experience.

Having sketched the main outlines of liberal egalitarianism, I now show that it offers a promising answer to the Critical Religion challenge. Let me discuss the three lines of criticism in turn.

**The Semantic Critique.** Egalitarian liberalism is not vulnerable to the semantic critique because it is not interested in religion *per se*: it deploys an interpretive, not a semantic, conception of religion. Recall that the semantic critique is that there is no such thing as religion: there is no set of features that all ‘religious’ beliefs, practices and activities share. But even assuming this is true (I’ll leave that question aside), it is not a problem for liberal egalitarians.

The question egalitarian liberals ask is not whether the law adequately captures what is ordinarily meant by religion. From a normative perspective, this begs the prior question,

namely, what is it about religion that is protection-worthy? What deeper normative values underpin protection of freedom of religion? In line with Ronald Dworkin's interpretive theory of law, the basic thought is that political-legal concepts cannot be reduced to their semantic meaning (Dworkin 1996; Letsas 2006).<sup>11</sup> Consider: the law of free speech does not protect *all* that ordinary language calls speech (eg. libel) and it does not *only* protect what ordinary language calls speech (eg. flag burning). Legal and semantic meanings do not overlap, because the law has a specific interpretive purpose. What matters is that the law, or the theory, expresses and protects the correct underlying values – for example, a moral power such as the human capacity to form and revise one's conception of the good – whatever it is.

Because liberal egalitarianism does not single out religion as an area of uniquely special concern, it need not get embroiled in controversial definitions of what religion is. All citizens deserve equal respect as citizens, whatever their particular conception of the good. Liberal egalitarians have generalised the notion of 'religion' to a broader, vaguer, and therefore less ethnocentric and biased category. Religion is morally and politically salient as one of the conceptions of the good, ethical worldviews, ways of life, etc., that make up the pluralism of contemporary societies. The state is not secular but it is neutral about the good. As a result, religious believers and groups neither enjoy nor suffer exclusively special legal treatment; they are treated under a broader regime of equality, in line with Sullivan's own injunction at the end of *Impossibility of Religious Freedom*.

**The Protestant Critique.** The now-familiar charge here is that liberalism is biased against both practice-based and un-chosen conceptions of the good. We saw that this charge was pertinent in relation to public discourses about Islamic veiling in Europe. But it is unclear that it applies to academic, philosophical liberalism. Philosophers and lawyers have discussed the legitimacy of exemptions from laws that burden religious *practices* – Shabbat and Friday prayers; religious dress and symbols; the ingestion of peyote; ritual animal slaughter, refusal of blood transfusions and vaccinations, and so forth. They have disagreed over the legitimacy of exemptions, but not because practices are not properly religious. Theirs is a normative dispute, not an empirical debate about what religion is.

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<sup>11</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), 78. For an application to religion, see Dworkin, *Religion without God*; George Letsas, 'Accommodating What Needn't Be Special', *Law and Ethics of Human Rights* 10 (2): 319-340 (2016).



The liberal state does not regulate *forum externum* just because it is *externum*. This is a necessary but not a sufficient condition. In both Locke and Mill, we find the notion that religious practices can only be interfered with *if* they injure or harm others, or otherwise infringe on their rights. To take up again the critics' favourite example of Muslim veiling: few liberals would argue that there can be any justification for direct bans on practices *that do not infringe on the rights of others*. If there is a case for the regulation of a religious practice, it is not because the practice is not properly religious, but because it runs against a compelling state interest – such as prevention of harm to others. In other words, what is at stake is *not* the liberal conception of religion but, rather, its theory of interpersonal harm and individual rights.

How about the charge that liberals, in their commitment to the legal right of freedom of religion, misconstrue religion as a voluntary choice? Again, this rests on a misunderstanding. Liberal law of freedom of religion does not claim to *describe* how individuals in fact experience having a religion, nor to *prescribe* how individuals should relate to their religion. Just as the law of divorce emphasises the contractual, voluntary nature of marriage without describing how marriage is experienced, and without prescribing the value of divorce, likewise, the law of freedom of religion protects a moral capability – a protection against certain types of coercion and persecution– without postulating that religion should be experienced as a voluntary choice. On this view, it does not matter how religious commitments were acquired (whether they were voluntarily chosen), provided people identify with them. People might experience being 'called' by a divine presence or 'claimed' by a community, instead of 'choosing their religion'. What the law of freedom of religion does is to protect their right to leave their religious community or change religion, should they wish to do so. It does not say that people should be free from religion, nor that they should be free within their religion.

**The Realist Critique.** There are two variants of the Realist critique, which we may call *liberalism-as-power*; and *liberalism-as-religion*. According to the first charge, secular liberalism is a mode of state governance based on the constant and arbitrary reconfiguration and regulation of religion in the interests of secular state power. Two responses must be made here. First, critics sometimes write as though state definition and regulation of religion is *per se* troubling or embarrassing for liberals. But it is not. The fact that regulation of religion is 'normative' in a Foucauldian sense - it shapes the way that people experience the world - does not entail that

it is impermissible in a liberal normative sense. It may be true that the states of both Saudi Arabia and France ‘define’ and ‘regulate’ religion; just as it is true that both the UK and Uganda ‘define’ and ‘regulate’ homosexuality. But it is not good enough to point out that power is everywhere, and that everywhere it is normative. Just ask members of sexual and religious minorities in Uganda or Saudi Arabia. There are good and bad, better or worse exercises of power – and critical religion theorists cannot escape normative critique in this sense (Fraser 1984).<sup>12</sup> What they criticise as ‘oppressive’ or ‘hegemonic’ are, in substance, little different from normative liberal criteria.

Second, critics understand the idea of separation too literally. They write as though liberals, insofar as they are committed to ‘neutrality’, are committed to something like a ‘separate sovereignty’ view of church-state relations. Thus Peter Danchin writes that ‘the neutrality thesis is no longer tenable. Rather than withdraw from the religious domain, the modern secular state... intervenes and.. reconfigures substantive features of religious life’ (Danchin 2017, 185).<sup>13</sup> But this confuses neutrality – a normative abstract principle – with separation – a particular institutional and political framework. Of course, the liberal state intervenes in religious life – as in social life - in sundry ways, and often does so permissibly. States extend their fire services protection to churches, mosques and synagogues; they do not exempt religious officials from the purview of criminal law; they provide financial support to a range of religious associations and charities: such activities may breach strict separation, but they are not *ipso facto* incompatible with neutrality. Liberal neutrality does not amount to ethical scepticism or nihilism. It is domain-specific: the liberal state is neutral about the diverse conceptions of the good life but it is not neutral about the political values of justice and the right, and the demands of social cooperation.

This nicely takes us to the second main Realist charge – that liberalism is merely another religion. This suggests that liberalism is (in Fish’s words) ‘anything but impartial... it is [a] notion of the good, *as contestable as any other*’ (Fish 2001, 157).<sup>14</sup> It cannot claim to regulate and

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<sup>12</sup> Nancy Fraser, ‘Foucault on Modern Power: Empirical Insights and Normative Confusions’, *Praxis International*, Vol. 1, Issue 3, 1984, pp. 272-287.

<sup>13</sup> Peter G. Danchin, ‘Religious Freedom as a Technology of Modern Secular Governance’, in Leora Batnitzky & Hanoch Dagan (eds.) *Institutionalizing Rights and Religion: Competing Supremacies*. Cambridge: Cambridge University Press, 2017, 184-205, p. 185

<sup>14</sup> Stanley Fish, *The Trouble with Principle*. Cambridge Mass.,: Harvard University Press, 2001, p. 157.

arbitrate between diverse religions and conceptions of the good because it is itself a religion. It is, in a sense, judge and party. How should we understand this? Stanley Fish might mean that liberalism is a controversial doctrine: it is not universally shared. This is correct, but need not trouble liberals. Political liberals, following John Rawls's later work, seek to justify liberalism to a wide consistency of individuals holding diverse conceptions of the good but, as we saw, no liberal (even political liberals) claim that liberalism is uncontroversial. Liberals take their own side in debates about justice. If this is what is meant by the idea that liberalism is a religion, liberals are guilty as charged, but the charge is trivial.

Second, Fish might mean that liberalism is a religion in the thicker sense that it is a rival metaphysics and a comprehensive way of life: it is a direct competitor to traditionally religious doctrines and therefore cannot claim to accommodate them fairly. This is a more damaging charge, and is indeed a valid criticism of one variant of liberalism – one inspired by Enlightenment ideals of rationality, individual autonomy from religion, and substantive secularism (such as, for example, a version of French *laïcité*). This, however, is not the liberal egalitarian tradition I associate with. Liberal egalitarianism, much in the spirit of Rawls's political liberalism, seeks to provide a fair framework of co-existence between citizens holding a variety of doctrines, religious and non-religious. It is not itself grounded in any comprehensive metaphysical, ontological, or ethical doctrine. It does not seek to enforce a comprehensively liberal and secular way of life on citizens, but instead affirms political principles of justice, notably the fair distribution of 'primary goods' (goods that everyone values whatever else they value) such as freedoms, rights and opportunities. The liberal framework promises the fairest way of living together under terms that preserve the equal freedom of all. The onus is on critics of liberalism to explain how the alternative – the imposition by the state of one religion on all its citizens – might be defensible at all. There has been no shortage of radical critiques of philosophical liberalism, but few have positively defended attractive alternatives – from agonistic, relativist, or truth-based perspectives. Most of the disputes, it turns out, are disputes within the (liberal) family.

So far, so good. It looks as though liberal egalitarianism can rebut the most radical versions of the Critical Religion charge. To recap my argument: the response to the Realist Critique is that liberalism is grounded in a distinctive political ethics, but it is not metaphysical and comprehensive. The response to the Protestant Critique is what is worthy of protection are

people's conceptions of the good, which are not necessarily chosen, and include practices, not simply beliefs. And the response to the Semantic Critique is that there is no need to get embroiled in semantic discussions about what is and is not religious: the state extends equal respect to all individuals as holders of conception of the good, and is neutral about the good in general (not only about religion). Liberal egalitarians generalise religious toleration into a principle of state neutrality about the good, and do not worry about the category of religion at all. This is the basic move of Rawlsian political philosophy.

### III. Disaggregating Religion and Secularism

While this basic move is sound, it is insufficient. As I argue in my book *Liberalism's Religion*, the problem with contemporary liberal theory is that many of the ambiguities of the concept of religion have been carried over to the equally vague notion of 'conceptions of the good' (Laborde 2017a).<sup>15</sup> It is too vague to say that 'the liberal state 'protects the good' or 'contains the good'. We need to say more about the dimensions of 'the good' (and, therefore, 'religion') that justify special protection or special containment in a liberal state. And we need to recognise that, given the extent of reasonable disagreement about the respective domains of the good and the right, there is much more indeterminacy about the terms of liberal justice than liberals have thus far accepted.

While existing theories of liberal egalitarianism are not vulnerable to crude versions of the Critical Religion challenge, therefore, they are vulnerable to more subtle versions of it. Here are two subtle challenges, which I call Ethical Salience and Jurisdictional Boundary.

**Ethical Salience** posits that liberalism, for all its claims to neutrality, cannot dispense with an evaluation of the ethical salience of different conceptions, beliefs and identities. There are obvious cases where appeal to the idea of neutrality about the good is too unspecific. Should Muslim hijabs as well as fashion hats be exempted from regulations about workplace uniforms? Are state-sponsored religious symbols analogous to cultural symbols? Should Intelligent Design theories be taught on a par with Darwinism in schools? Is criticising a religion

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<sup>15</sup> Cécile Laborde, *Liberalism's Religion*. Cambridge Mass., Harvard University Press, 2017.

the same thing as criticising a race? Working through the details of these analogies and disanalogies (and many others), we can see that ‘religion’ is an internally complex concept – with different interpretively relevant features – and that simple appeal to neutrality about the good will not do much work in resolving acute legal and political disputes (Laborde 2017b)<sup>16</sup> The upshot is that we need to develop a *disaggregated* conception of religion, one that maps our *interpretation* of religious phenomena onto the distinctively *normative* values of the liberal state.

In *Liberalism’s Religion*, I argue that the liberal state is not neutral toward religion or the good generally, but only toward a *restricted* subset of religion or the good. But there are multiple sub-sets, which connect in different ways to different values. In relation to non-establishment and state-church separation, the state should not endorse any conception of the good that (i) infringes personal ethics or (ii) entrenches social vulnerability or (iii) is inaccessible in public reason. When religious or secular conceptions of the good and identities do not exhibit these features, the state can permissibly establish or endorse them. In relation to exemptions, the salient sub-set is a different one: what I call integrity-protecting commitments (which include Muslim hijabs, but not fashion hats). Neutrality, I argue, is compatible with special concern for that special set, as it is rooted in a thin theory of the good. So I disaggregate neutrality, just as I disaggregate religion.

The second challenge to liberal egalitarianism, **Jurisdictional boundary**, posits that there is no neutral way to draw the boundary between the good and the right, between religion and non-religion, between the private and the public. Note that this claim is different from the cruder charge that neutrality just is ‘mission impossible’, in Fish’s phrase. As I suggested, liberal neutrality is domain-specific. The liberal state is only neutral towards comprehensive conceptions of the good life; it should not side with or favour any of them. But the state is not neutral towards the domain of justice or the right: it seeks to adjudicate *interpersonal* relations – relations between persons – in ways that protect the equal liberty of all. This is a basic

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<sup>16</sup> Cécile Laborde, ‘The Evanescence of Neutrality’, *Political Theory*, First Online: May 2017. Vol. 46, Issue 1, pp. 99-105.

principle of liberal political morality. A sovereign state that maintains rightful relations between people is not arbitrary or oppressive.

Yet this leaves open a further question, picked out by the jurisdictional boundary challenge. Even assuming that critics agree that the state rightly deals with justice and not with ‘the good’ (even in the disaggregated mode referred to above), they might reasonably disagree about where the boundary between the right and the good lies. Such disagreements are central to recent controversies. Is clergy selection a prerogative of churches, or does it fall under the domain of state law (under anti-discrimination legislation, for example)? Can the abortion controversy be settled without resolving the ethical question of the moral status of the fetus? In cases such as these, the boundary between the good and the right is *essentially* contested, and there is scope for ordinary democratic contestation, with greater indeterminacy – and reasonable disagreement – about justice than many liberals have thus far assumed (Laborde 2018).<sup>17</sup>

An important implication follows. Not all legitimate liberal states will adopt the same institutional and legal arrangements. There is a wide variety of permissible liberal secular regimes – and the US/French model of strict separation is not a universally applicable model. This is because liberal states should only maintain a ‘separation’ from those aspects of religion or the good that undermine their legitimacy; and because there is greater foundational disagreement about justice itself than liberals have countenanced. The liberalism I recommend, therefore, is more modest and more honest than existing versions of political liberalism (such as Quong 2011)).<sup>18</sup>

It is more honest because it is prepared to concede to religious critics that liberalism is rooted in commitments – including metaphysical, ontological commitments – that they might reasonably reject. Liberalism need not be comprehensive or perfectionist; but it relies on a substantively liberal - secular and individualistic – ontology of persons. And it is more modest because it explicitly recognizes that some of these disagreements can only be resolved democratically. Because of reasonable disagreement about justice and its boundaries, there is

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<sup>17</sup> See also Cécile Laborde, ‘Abortion, Marriage and Cognate Problems’, *American Journal of Jurisprudence*, Volume 63, Issue 1, 1 June 2018, pp. 33–48,

<sup>18</sup> The most sophisticated recent theory is Jonathan Quong, *Liberalism without Perfection*. Oxford: Oxford University Press, 2011, which I discuss in *Liberalism’s Religion*.

greater scope for democratic contestation over one or another reasonable conception of liberal justice. If we are to defend liberalism, we will have to give up, or at least modify, some claims made on behalf of liberal neutrality. This much we will have learnt from the Critical Religion challenge – and it is, I have suggested, a salutary lesson. This also helps us answer the worry – articulated by Critical Religion theorists but also more recently, from a different perspective, by liberal philosopher Gerald Gaus (Gaus 2012)<sup>19</sup> - that liberals confuse their preferred progressive conception of justice with a universal, neutral one. As progressives, we had better take seriously the depth of disagreement about liberal justice itself – it is much more indeterminate and inconclusive than liberal neutralists claim. This, I hope, is another response to those who worry that liberalism, far from being a potentially universal framework for the democratic and fair resolution of conflicts about religion, is in fact the sectarian, comprehensive ideology of western progressives – the religion of liberals.

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<sup>19</sup> See, for example, Gerald Gaus, 'Sectarianism Without Perfection? Quong's Political Liberalism', *Philosophy and Public Issues*, 2 (2), Fall 2012, 7-15.