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Three Cheers for Liberal Modesty

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Abstract

Many liberals have been immodest in postulating that their own progressive, secular liberalism is the only one that can be justified in public reason. In *Liberalism's Religion*, I articulate a more modest theory of liberalism and religion. While I personally endorse progressive secular liberalism, I argue that it is only one of the reasonable conceptions of liberal justice. This liberal modesty has profound, hitherto unnoticed implications for (i) the role of religious arguments in the public sphere, (ii) the legitimacy of religious establishment, and (iii) the justifiability of religious exemptions. In this Article, I defend these three claims by providing replies to my critics.

Keywords

Public Reason – Religious Establishment – Reasonable Disagreement – Religious Exemptions - Integrity.

In current controversies about the place of religion in the state, liberal political philosophers tend to defend a progressive, individualistic, secular liberalism. Many of them, however, are also *political* liberals: they believe that liberalism is not the sectarian creed of left-wing progressives, and that it must be justified to all reasonable citizens. But these liberals have not considered whether alternative conceptions of the place of religion in the state can also be justified. Can there be reasonable disagreement about the place of religion in the state? Liberals have been immodest in postulating that their own progressive, secular liberalism also happens to be the only one that can be justified to all reasonable citizens. In *Liberalism's Religion*, I articulate a more modest theory of

liberalism and religion. Although I personally endorse a version of progressive secular liberalism, I locate it among a broader set of reasonable conceptions of liberal justice.

Many liberal egalitarians argue that liberal neutrality demands (i) strict separation between state and religion (ii) no special treatment (eg. exemptions) for religion. I deny both. I argue that while these commitments are compatible with liberalism, they are not entailed by it. There is greater reasonable disagreement about religion and the state than many liberals have thus far recognised. States meet liberal standards of legitimacy, in my view, when they implement one of the reasonable conceptions of liberal justice. The upshot is that liberals should not confuse their preferred conception of justice with the only reasonable one. Connectedly, they should not castigate as equally unreasonable conservative religious believers, on the one hand, and religious fanatics and fundamentalists, on the other. Not all critics of progressive, secular liberalism are unreasonable. Liberals' claims otherwise have fostered a disdainful and often vindictive alienation from liberalism on the part of many conservative religious believers. This is regrettable and dangerous (politically) and it is unsound (philosophically), as it goes against the spirit of Rawlsian political liberalism: to find mutual terms of cooperation among people who disagree profoundly, including about justice.

In what follows, I develop arguments for these various claims by providing responses to my critics in this volume. The majority of them cast doubt on my suggestion that secular, progressive liberalism is not the only reasonable conception of liberal justice. They focus their attention on three of my claims. The first is that public reason need not be substantively liberal; it only needs to be accessible. The second is that some forms of religious establishment are compatible with liberalism. The third is that neutrality is not incompatible with substantive judgements of integrity, which itself ground claims for exemptions. I explicate these three ideas in turn, and in the process make good on my defense of liberal modesty.

Public Reason and Accessibility

In Rawlsian versions of public reason liberalism, citizens appeal to shared liberal principles in their democratic deliberations. This is because, on a liberal conception of political justification, state coercion is legitimate when it appeals to reasons that reasonable citizens could accept. In *Liberalism's Religion*, I put forward a different conception of the relationship between public reason and liberal legitimacy. Instead of building liberal principles directly into the reasons that idealised citizens accept, I distinguish between public reason *stricto sensu* (the actual reasons that are the currency of democratic deliberation) and overall liberal legitimacy (the all-considered judgements

about the liberal permissibility of institutions and laws). As a result, my theory of public reason is more permissive than Rawlsian versions: it draws on a broader pool of reasons than liberal principles of freedom and equality. My theory of liberal legitimacy, in turn, is more critical of existing practices: because it is not tied to already liberal societies, it provides external criteria with which to assess the legitimacy of laws and institutions in non-liberal societies. The upshot is that public reason *stricto sensu* is a necessary but not a sufficient condition for liberal legitimacy. A simple illustration suffices to make the point. A state may offer sound public reasons for its policies, yet these policies may be illiberal (consider, for example, a state that justifies severe repressive policies by appeal to the notion of public order). My approach gives theoretical shape to this intuitive notion.

My critics in this volume focus on public reason *stricto sensu*, which I define as a principle of *public accessibility of state-proffered reasons*. Only reasons provided by state officials must be public: citizens may bring to democratic debate any consideration or argument they think is relevant to the issue at stake. State officials, by contrast, are under a duty to offer publicly accessible reasons when they seek to justify state coercion. It is not sufficient that reasons be *intelligible* only by reference to the standards of the speaker; but it is too demanding to require that reasons be *shared*: that all endorse the same reasons by reference to shared standards. Public reasons should, however, be *accessible*: they should be understood by actual citizens. Public reasons are the currency of democratic debate: when state officials present reasons for laws, it is important that citizens – even if they disagree with the law, or the reason – be able to assess and challenge them. On my theory, accessible reasons do not overlap with secular reasons: reasons can be inaccessible even if they are not religious, and not all religious reasons are inaccessible.

In his thoughtful commentary, **Sune Laegaard** presses me on the accessibility condition. How do we identify accessible reasons? Are reasons accessible when deliberators share the same premises or evaluative framework, even as they disagree about the validity of the reason? Or are reasons accessible when deliberators agree about the validity of the reason, yet disagree about whether it is sufficient to justify laws? The gist of Laegaard's comments is that it is more productive to conceptualise the accessibility of public reasons in relation to the latter ('output') than the former ('input') condition. He is right, and his useful suggestions allow me to reformulate the accessibility condition more precisely. On reflection, I should not have followed Vallier and D'Agostino in explicating accessibility by reference to shared premises (Vallier & D'Agostino 2014). This condition is too demanding, and threatens to collapse accessibility into shareability, as Laegaard points out. Instead, let me say that accessible reasons are understood by citizens by reference *to their own or to shared premises*, and there is reasonable disagreement about whether they suffice to

justify laws. (By contrast, intelligible reasons are understood only from the premises of the speaker, and they are not sufficient to justify laws. Shared reasons are understood from shared premises, and they are sufficient to justify laws).

Equipped with this slightly revised conception of accessibility, I now move to offer a response to **Aurélia Bardon**'s probing challenge. Bardon thinks that the accessibility condition is so weak that it fails to do any justificatory work. In controversies such that over same-sex marriage, my approach would unconvincingly distinguish between accessible reasons (such as appeal to the value of tradition) and non-accessible reasons (such as appeal to Biblical authority). Admittedly, the fact that a reason is accessible does not mean that it is a good or decisive reason; nor that is sufficient to legitimate particular laws. Bardon concedes this, yet she doubts that appeal to the value of tradition (*Tradition*) is any more accessible than appeal to Biblical authority (*Bible*). The accessibility condition cannot distinguish between them.

I disagree. To see why, let me distinguish three distinct types of reason. The first is appeal to divine authority, for example, as revealed in the Bible. This is an intelligible reason (it can be understood by reference to the theistic premise of the speaker) but it is not accessible (one cannot disagree about what God wills without sharing the contested premise that God exists). The second is appeal to the value of tradition. Just like appeal to other contested values such as progress, welfare, sustainability, solidarity, and so forth, it is accessible in my sense. This is because it *can be understood and endorsed from different premises, although there is reasonable disagreement about whether it suffices to justify laws*. For a reason to be accessible, it does not need to be grounded in shared premises, nor to be evaluated *via* a shared framework. It simply needs to figure in the set of reasons that have *some* weight in different evaluative frameworks. Such reasons are 'detachable' from specific evaluative frameworks, and state officials should not invoke the latter when advancing public reasons. C*ontra* Bardon's suggestion, this does not mean that deliberation about them is not possible, from a variety of comprehensive evaluative frameworks, in the public and private sphere. The key point is that (*Tradition*) is accessible because it is detachable from particular comprehensive frameworks. (Different evaluative frameworks – perhaps barring revolutionary utopias - place some value on tradition, albeit for different deeper reasons: from the importance of legal stability and the honouring of legitimate expectations, to more conservative commitments to the intrinsic value of accumulated collective wisdom). By contrast, (*Bible*) is not accessible because it is not so detachable from a particular theistic framework.

The third type of reason is appeal to a secularized religious tradition, such as Christian (or Islamic, or Hindu) cultural tradition. This is also an accessible reason. What does the justificatory

work is not appeal to deeper foundations such as divine authority, as in (*Bible*) but, rather, the empirically ascertainable embeddedness of Christianity in laws, norms and cultures. The fact that a particular cultural norm or practice has a religious origin does not make the authority of that norm inaccessible. Religious tradition, from this point of view, is no different from other kinds of tradition; and Christianity stands alongside Roman law or the Enlightenment as one among the variegated cultural sources of the western heritage. Just as we disagree about the continuing validity of Roman law or enlightenment rationalism, so we disagree about the validity of Christian-inspired ethical universalism or family law. The value of the patrimonial dimensions of religion can be debated even by those who deny that God exists and that he has made his Will known through a sacred text.

The upshot is this. (*Tradition)* might be a bad or unconvincing reason – I agree with Bardon that it often is. But it is not an invalid *qua* inaccessible reason. This is important in relation to controversies such as same-sex marriage. Conservative appeals to the value of the traditional family are *not* on the same plane, epistemically speaking, as appeal to Biblical authority. To suggest that they are is drastically to narrow public debate and confirm conservative suspicion that appeal to liberal public reason only serves to validate left-wing progressive legislation. Instead, liberals should say that while there may be *some* value in tradition, it is not sufficient to justify refusal to extend marriage to LGBTQ couples. On my view, the tradition-based rejection of same-sex marriage is deeply flawed, but this is not because it relies on epistemically suspect, non-public reasons. It is, rather, because it conflicts with liberal norms of equality and it is rooted in an unattractive vision of the good of marriage (Laborde 2018).

While Bardon thinks accessibility is not sufficient, **Jeff Howard** contends that it is not even necessary for public justification. His argument is that if a law is unjust, the reasons given for it are irrelevant. Persecution of a gay citizen is unjust, regardless of whether it is undertaken by appeal to divine revelation or to accessible (if flawed) reasons. As Howard vividly puts it, it's all injustice to him.

I agree that the accessibility of justificatory reasons is not the only or the chief determinant of the justice of laws. Yet it does not follow that reasons are altogether irrelevant. It *does* matter whether the gay citizen is persecuted in the name of reasons that he – and the broader democratic public - can engage with. Persecution in the name of a faith that one does not share, just as oppression at the hands of an arbitrary and Kafkaesque power, adds the insult of epistemic alienation to the injury of unjust treatment. This, I think, is a plausible interpretation of the early modern insight that one of the most grievous wrongs of religious establishment is the fact that the state coerced citizens in the name of *faith* - a source not only of foundational disagreement but also

of epistemic exclusion (Forst 2011). The persecuted gay citizen may well object to (*Tradition*) as much as to (*Bible)*; but at least (*Tradition*) can be contested and subjected to democratic deliberation.

To see the implausibility of Howard's suggestion, consider now a Christian state committed to liberal principles, which scrupulously upholds citizens' rights to freedom and equality, *because this is what the Bible demands*. If we grant Howard's view that the reasons for law are irrelevant to their legitimacy, this state is legitimate. But this is implausible. The problem with the Christian liberal state, on my view, is that it does not respect its citizens as democratic reasoners. It does not provide them with accessible reasons, as it makes the liberal quality of laws dependent on an interpretation of what the Bible demands. Only a sub-set of citizens, those for whom Biblical injunctions are normative, can engage in continuing democratic deliberation over what liberal principles of freedom and equality require. Accessibility turns out to be a necessary, separate condition.

Legitimacy, Justice and Religious Establishment

In his wide-ranging challenge, Howard also puts pressure on the distinction I draw between legitimacy and justice. He agrees that *Divinitia* is legitimate but, in his view, this is not because it implements a reasonable conception of liberal justice. Rather, *Divinitia* is what Rawls calls a decent state: it is not fully liberal, but it is not so unjust that it forfeits its legitimacy. My own view is different. *Divinitia* does not implement my preferred conception of liberal justice, but it is a *bona fid*e member of the family of reasonable conceptions of liberal justice. What Howard calls justice is *his* preferred conception of justice: the one he sincerely thinks is the best one. What I call justice is a broader set that includes my preferred conception of justice as well as other reasonable liberal conceptions of justice. While the difference might appear merely semantic, there are substantive issues at stake here.

First, I argue that the features that disqualify religious establishment at the bar of (any reasonable conception of) liberal justice are not present in *Divinitia.* Howard does not discuss them in detail, but it is significant that the objections he mounts against establishment in general are only valid against illegitimate forms of religious establishment – and therefore not against *Divinitia*. Howard objects to the state 'affirming truth' or endorsing 'divisive identities'. But this misses my point, which is that when religion is unconcerned with truth, or untainted by divisiveness, the reasons for objecting to its recognition by the state disappear. Recognition of religion, in these cases, is *permitted* by justice. It is not clear whether Howard disagrees.

Consider the following example. Suppose the great majority of the population of society X identify with a religion and suppose, further, that this is a non-truth-based, non-exclusive and non-divisive religion (perhaps a version of Buddhism, Sufi Islam, traditional African religion, or Confucianism). On Howard's strict disestablishmentarian position, state symbolic recognition of this shared heritage is unjust, and the state of X should, instead, endorse strictly secular symbols and references. Suppose however that in X, secular symbols are culturally alien, for example because they are associated with an imported, western tradition. This is not to suggest that the introduction of liberal *laws and norms* is a western imposition (even if it is, it might be a legitimate one). It is, rather, that, as far as symbols are concerned, there is no such thing as cultural neutrality. Once we give their due to the cultural dimensions of all forms of symbolism – secular as well as religious – it is reasonable to hold the view that symbolic state recognition of religion might be at least permitted by justice, in cases where it is as (or more) inclusive than secular symbolism.

Second, to grant that proponents of *Divinitia* are reasonable entails that they have good reasons also to accept *Secularia* as a reasonable liberal state too. Consider, for example, debates about whether Muslims in Europe have good reasons to accept European secular orders. Can they be loyal to such states, not simply as a *modus-vivendi*, but as legitimate liberal orders? (March 2009). My approach allows us to say that, while some Muslims might reasonably prefer a more religiously-friendly, *Divinitia*-style state, they have nonetheless good reasons to be loyal to *Secularia*. They may legitimately challenge the fairness of this or that particular arrangement in European *Secularia* (for example, some secular policies in France, see Laborde 2008). But, just as Muslim-majority countries can favour *Divinitia*-style arrangements, so secularised countries can legitimately favour *Secularia*-style arrangements. Such states are not illegitimate just because they do not implement the particular (reasonable) conceptions of justice favoured by some of its citizens. My approach, therefore, allows us to recast the debate between advocates and critics of European secularism by highlighting a wider scope of reasonable agreement between them – agreement about the boundaries of reasonable disagreement itself.

Jean Cohen, much like Howard, doubts that any form of state religious endorsement is compatible with liberalism. Like him, though, she underplays the importance of introducing a more interpretive – disaggregative – conception of religion in order to distinguish between legitimate and illegitimate endorsement. Cohen's comments bring to light much of what we agree upon - even though the devil, as she notes, is in the details. I agree with her that while path-dependent symbolic establishments might be acceptable at time t, they might lose legitimacy at time t+ 1 when increased religious and ethical pluralism makes disestablishment the least divisive, and the most egalitarian, option. Furthermore, and in contrast to what she implies, I too think that a state

that enshrines religion as a source of law, announces an official religion, and enforces its tenets in its courts or via religious courts is not ever legitimate by liberal lights. My theory of minimal secularism, with its criteria of accessibility, divisiveness and personal freedom, is explicitly designed to explain what is wrong with such a state.

But the key point here is that what matters is not the particularly *religious* nature of the doctrine thereby established. It is, rather, its contingent features of inaccessibility, comprehensiveness and divisiveness. Consider family law in many contemporary states. It bears traces of traditional monotheistic moral and social norms – typically, monogamy, patriarchy, heterosexuality, fidelity, social reproduction. How compatible these legal norms are with liberal principles should not be determined by reference to whether the norms are really 'religious' or 'secular'. Rather, whatever their historical origin, they should be assessed in relation to their compatibility with principles of accessibility, freedom and equality.

Because I do not think that an undifferentiated concept of 'religion' can meaningfully be set as the opposite of 'liberalism', I am more relaxed than Cohen about the porosity between religion-friendly cultural formations and liberal orders. Struggles for emancipation and social reform have historically been spurred by religious movements, often against the oppressive, divisive or inegalitarian tendencies of secular regimes. Consider, to name just a few, the Civil Rights struggle in the United States, Liberation Theology in Latin America, the *Solidarnosc* movement in Poland, Islamic reform movements during the Arab Spring, and religiously-inspired pacifism around the world. It seems to me that no general case can be made that 'all religious identities are divisive if politicized', as Cohen contends. Instead, we should attempt to identify which features of religion should not be mobilised by state power, when, and why, without postulating that religious identity is in itself more inimical to liberal legitimacy than, say, nationalism, ethnicity or secular comprehensive ideologies.

Cohen also zooms in on our disagreement over the question of sovereignty and the challenge of religious institutionalism. Although I have been inspired by her pioneering work on this subject, I put forward a slightly different interpretation of that challenge. Religious institutionalists take liberal egalitarians to task for disregarding religious autonomy and asserting the state's prerogative to allocate the respective sphere of competences of groups. The question is: is this a disagreement about justice, or is it a more fundamental disagreement about sovereignty and jurisdiction? Are critics challenging the particular way in which the line is drawn, or are they challenging the authority of the state in drawing the line in the first place? By contrast to Cohen, I

argue that the challenge is best understood as a reasonable disagreement about justice, not jurisdiction.

My main argument, as she notes, is exegetical. I show that, at crucial junctures of their argument, religious institutionalists such as Steven Smith or Victor Muniz-Fraticelli step back from drawing the radical implications of their own suggestions. In particular, they explicitly refuse to claim that churches should be sovereign over what they take to be their own affairs – that they should have *Kompetenz-Kompetenz*. My suggestion is that we should take them at their own words. Unless they are prepared to defend an alternative political order – perhaps a form of neo-medieval, radically pluralist constitutionalism – we should accept to see them as *bona fide* interlocutors in the debate about the boundaries of liberal justice. As I suggested in my introduction, to accuse all critics of liberalism of being apologists of religious sovereignty – of being essentially anti-liberal - makes liberalism unnecessarily sectarian. It also papers over real difficulties with the theoretical structure of liberalism – notably the fact that its commitment to sovereignty cannot be merely defended by appeal to freedom, rights and neutrality.

Sune Laegaard also raises questions about the distinction between legitimacy and justice, and in particular about my solution to the Jurisdictional Boundary problem. In Chapter 5 of *Liberalism's Religion*, I argue that once a state secures liberal legitimacy, it has the meta-jurisdictional authority to settle questions of justice, including setting the boundary of religion itself. In particular, the state has the authority to delimit the proper competences of religious associations in its midst. Laegaard agrees with my argument that liberal neutralists have no easy answer to the Jurisdictional Boundary problem and that, ultimately, they must justify and defend state sovereignty. Yet Laegaard identifies a potential problem with my two-pronged solution. Can the legitimacy of a state be assessed *before* and *independently* of its setting the jurisdictional boundary? This might run into a regress problem akin to the democratic boundary problem: as legitimacy depends on boundary-setting, it cannot precede it.

In response, let me state that it is not the case that *any* boundary setting is compatible with liberal legitimacy. As I argue in *Liberalism's Religion*, core liberal rights protect religious individuals and groups from coercion and persecution motivated by animus. A state that would not adequately protect these basic rights of religion would be illegitimate. Disagreement about this is not reasonable: sovereignty does not authorize violations of basic rights: it is *constrained by* principles of freedom and equality. Of course, this line of argument assumes a kind of second-order reasonableness: it assumes that there is no reasonable disagreement about the scope of reasonable disagreement. Reasonable disagreement cannot run all the way down without threatening liberal

justice itself. On this point, I agree with political liberals such as Rawls and Quong. But I also suggest that when liberal principles are inconclusive or indeterminate about particular laws, it is acceptable to resort to procedural – democratic - solutions. States have what European lawyers calls a 'margin of appreciation' to interpret the scope of rights. On my view, there can reasonable disagreement about how far they should ban or endorse religious symbols, how deeply they should apply non-discrimination norms within church internal life, how much or how little religious education they should provide in schools, how much they should delegate the running of public services to civil society associations. It is insofar as its policies remain within the domain of reasonable disagreement about liberal justice that Divinitia is legitimate.

In her penetrating essay, **Chiara Cordelli** raises a fundamental philosophical objection to Divinitia – a fairness objection to any kind of religious establishment. This is a version of the neutralist critique of perfectionism – a debate closely related to the themes of *Liberalism's Religion*. Cordelli begins by taking seriously my own argument, that forms of religious establishment might not be objectionably inaccessible, comprehensive, or divisive. But, she asks, might they not be unfair in other ways, which are not captured by my theory? Given that even symbolic establishment requires extraction and transfer of resources (typically, through taxation), how can we justify that some citizens be required to subsidize the conceptions of the good of others? Is this not *unfair*?

In response, let me first note that to be required to subsidise a policy that one disagrees with is not unfair. Right-wing libertarians are required to subsidise welfare states; and pacifists' taxes are channelled towards expensive defence budgets. One might reply that those disagreements are disagreements *about justice,* not about the good. But, then, the onus is on neutralists to explain why disagreements about justice are less egregious from the perspective of the justification of coercive taxation to dissenters. The most sophisticated argument is Quong's distinction between foundational and merely justificatory disagreement. But, as I show in Chapter 3 of *Liberalism's Religion*, the distinction is not plausible, and it has been convincingly rebutted by others (Fowler & Stemplowska 2015). Neither appeal to the mere fact of disagreement, nor appeal to different types of disagreement helps explain why taxing in the name of the good is more unfair than taxing in the name of justice.

Cordelli anticipates this response, and points out that while a political order *has to* realise justice (it is a condition of its legitimacy) it does not *have to* endorse any conception of the good. So the question can be reformulated as follows: why is endorsement of the good permissible, given that it is not required? Critiques of neutralism have offered a variety of answers to this question. They have said, for example, that endorsement of the good is permissible when it is not paternalist

- or otherwise disrespectful of people's abilities to find the good for themselves -; or when it is non-coercive; when it is merely aspirational instead of edificatory, and so forth (Kramer 2017). For my part, I have suggested a three-criteria test for the legitimacy of religious endorsement (and, by extension, perfectionist policies). Appeal to the good has to be grounded in public, accessible reasons; the policy has to respect the equal status of all citizens; and the policy should not impose a comprehensive ethics of life on citizens. Properly interpreted, I believe that these criteria take the sting out of the neutralist challenge to perfectionism, including Cordelli's version of it. While most taxation for purposes of religious endorsement will be illegitimately unfair, some will be permissible.

I would concede a point to Cordelli, however. The fact that a policy of religious establishment is not *illegitimately unfair*, as I put it, does not mean that it is not unfair from the perspective of some reasonable conceptions of liberal justice. I do not deny, in particular, that the taxation of secular citizens for the maintenance of even purely symbolic religious establishment raises issues of justice. But, once we are satisfied that the policy meets the three criteria of minimal secularism, further debate about whether the policy is fair falls under the domain of reasonable democratic debate. The issue cannot be resolved directly by appeal to second-order neutrality (or secularism). As a citizen, I may hold that justice requires both an extensive, universal welfare state and a strictly secular state. But I should recognise that others may reasonably disagree with me – because they favour a libertarian state or a more religiously-inspired state. In that case, I must be prepared to make my case in democratic deliberation and - were the majority to prefer a libertarian Divinitia - I must accept that it is not illegitimately unfair that I be taxed to support that state.

Cordelli further asks whether the fact that a state symbolically endorses integrity-protecting commitments (such as religion) rather than bare preferences (such as beer-drinking) does any work in this argument. It does not. I argue that some symbolic religious establishment might be permissible if it is endorsed democratically. But what makes it permissible is that it is endorsed democratically, not that it is religious. A democratic state could as legitimately choose to promote beer drinking (the municipality of Munich has funded the popular beer festival of *Oktoberfest* almost without interruption since 1819). So it is important to stress – contrary to Cordelli's interpretation - that the moral weight of integrity does not justify state special *support* for religion. If anything, the moral weight of integrity justifies greater restraint on the part of the state in interfering within the sphere of personal ethics (this is how I reconstruct Dworkin's version of restricted neutrality, which applies it primarily to religious and sexual ethics). When public authorities intervene in such areas, they are particularly prone to violate both personal liberty and civic equality, in precisely the

ways that minimal secularism disallows. The upshot is that religious establishment is permissible if and only if it is as benign as a beer festival.

So the notion of integrity teaches a negative lesson from the point of view of what the state can permissibly *support*: it singles out those areas of life where state promotion is *prima facie* suspect. But the notion of integrity also has a positive import from the point of view of what the state has a duty to *protect*. It explains why freedom of religion and conscience are special liberties, which can only be limited – or burdened – by appeal to compelling state interests. The difference between state support and state protection is, of course, a contested one – it stands at the intersection of the Establishment and Free Clauses of the First Amendment and is at the heart of the most contested judicial decisions of the US Supreme Court. But it is, I think, one of our firmly considered judgements that a law that burdens religious exercise violates liberty to a greater extent than a law that burdens beer drinking, or any other bare preference. The notion of integrity – a weakly perfectionist notion - explains why this is true. It is still the case, as Cordelli insightfully remarks, that the difference between integrity-respecting commitments and bare preferences is not as clear as it could be. On this point, I readily concede that more work needs to be done.

Integrity, Exemptions, Discrimination

Paul Bou-Habib develops a different challenge to my conception of integrity. I have been inspired by his important writings on the subject, and we agree on most substantive judgements. But we take somewhat different argumentative paths. In previous work, Bou-Habib has argued that the normative force of claims for religious accommodation lies in the value of integrity – on this we agree. In his commentary, Bou-Habib sharply zooms in on the remaining differences between us. As he notes, our accounts are not likely to differ much in their practical implications. We agree that while it is necessary that claims for exemptions be justified by appeal to the integrity of the claimant, this is not sufficient. The pursuit of integrity must be constrained by the rights of others (and other interests pursued by the law). We might also reach identical substantive conclusions in a range of different cases.

We differ, however, in how we conceptualise the relationship between integrity and morality. The test I favour has three steps. It asks whether (i) the claimant's integrity is bound up with the practice (a non-moralised integrity test); (ii) the practice meets some minimal standards of moral acceptability (a moral abhorrence test) (iii) the practice is compatible with the publicly affirmed liberal conception of justice (an overall permissibility test). Bou-Habib's test, by contrast,

has a simpler, two-stage structure: (i) does this practice show basic consideration for the rights of others (moralised integrity); (ii) is it compatible with the interests pursued by the law (overall permissibility)?

My three-stage test has, I think, two main advantages. First, a non-moralised definition of integrity allows us to recognise that people can perform morally abhorrent actions with integrity. Consider actions performed in tragic situations, where agents must sacrifice something of value in order to pursue something else of value. The ethical dilemmas in which Abraham and Antigone found themselves are poignant because we recognise their tragic predicament. When Bou-Habib writes that there is no value in committing a morally abhorrent act, he means that we should not commit them. This may be true, but the formulation erases the crucial difference between doing something morally abhorrent out of brutality, hatred, or wickedness, and doing something abhorrent 'with regret' – in full awareness of one's morally compromised position. To illustrate, consider a parent with two critically ill infants. Both will die unless one of them donates his vital organs to the other. The parent might sacrifice one of her children (thereby doing something morally abhorrent) but this might be the only way for her to maintain her integrity (as a loving mother). Cases such as these suggest that we should not build moral acceptability into our definition of integrity. Some acts are morally abhorrent (and therefore should not be considered for exemptions) but they may still be compatible with integrity (and underpin extenuating circumstances judgements, for example).

The three-stage test has an additional, more significant advantage. It allows judges to treat a wide range of reasonable, non-morally abhorrent claims with appropriate respect. What I call morally ambivalent claims are claims that could be fitted into one of the reasonable conceptions of liberal justice. They, however, can be turned down *at the third stage* because they conflict with the rights of others, as interpreted through the publically affirmed conception of liberal justice. To grant morally ambivalent claims stage-2 recognition – to see them as *pro tanto* candidates for exemption – is a way publicly to affirm the reasonableness of some disagreements about liberal justice. Bou-Habib's theory, by contrast, makes no space for the category of morally ambivalent claims. All the moral work is done at the first stage: either a practice shows 'consideration for the rights of others' – in which case it shows integrity, and goes through – or it doesn't – in which case it does not exhibit integrity in the first place, and gets rejected *on this ground*. One unfortunate implication is that morally abhorrent practices such as infant sacrifice are considered in exactly the same way as morally ambivalent practices such as mild corporal punishment inflicted on children. Bou-Habib claims that the difference does not amount to much if both these practices are denied

exemptions at the last stage. But I think the stage of the deliberation during which the rejection happens matters, because it concerns the public affirmation of the moral status of the practice.

To illustrate, consider a parent (or a school with a traditionalist religious ethos) who sincerely believes that the moral edification of her child would benefit from occasional mild corporal punishment. On my three-step judgement, a judge might respond to the claim by saying 'Yes, your integrity is at stake; and no, this is not a morally abhorrent action. But we have an overriding commitment to protect the child's interest, so we will deny your claim.' By contrast, on Bou-Habib's moralised two-step judgement, the judge will in effect say: 'you have failed to show basic consideration for the interests of others; therefore you do not even act with integrity'. The problem with this response is twofold. First, it does not take seriously the difference between the violent, wicked child-abuser and the conscientious traditionalist parents. It denies that the latter are reasonable, and that their conception of the good is not incompatible with one of the permissibly liberal conceptions of justice. Even worse, it denies that the traditionalist parents act with any kind of integrity. Bou-Habib's moralised theory would treat the claims of traditionalist believers who are reasonable in a political liberal sense in exactly the same way as it would treat unreasonable fanatics and wicked murderers. This, in my view, is the main flaw of the two-stage approach. It unconvincingly builds a sectarian conception of what it means to 'show consideration for the interests of others' into the notion of integrity. One implication is that only religious believers who act out in strict conformity with the publicly affirmed liberal conception of justice have any chance of obtaining an exemption. My theory, by contrast, allows for reasonable disagreement over what it means to treat others with basic consideration (above a minimal threshold of moral non-abhorrence).

Peter Jones also finds fault with my conception of integrity. His is a nuanced, thoughtful and wide-ranging critique. I shall focus on two fundamental points. First, Jones is not convinced by my attempt to substitute a theory of *integrity* for the simpler, conventional notion of freedom of *religion*. In his view, freedom of religion provides a straightforward rationale for both individual and collective cases of exemption. *Individuals* who seek exemptions seek to do what is right, because it is demanded by God: they are not primarily motivated by a wish to act out of integrity. Similarly, *groups* who seek religious exemptions merely seek to practice religion collectively: they are not primarily motivated by concerns about their associational integrity or coherence.

I do not deny that these are key dimensions of the religious experience. Phenomenologically, it seems highly plausible that religious believers, acting individually or collectively, do so out of a first-order commitment to do right by their faith, not out of a second-

order commitment to act with integrity. But, the question we should ask, on the interpretive approach defended in *Liberalism's Religion*, is not: 'what is the religious experience like?' but, rather, 'what is it about the religious experience that generates specific duties on others?'. This is particularly salient in the case of exemptions, where what has to be justified is a special not a general right: a right not to be subjected to obligations that fall on others. The advantage of integrity, as pointed out by Bou-Habib, is that it appeals to a good that can be recognised as a good even by non-religious citizens. It is also more specific than a general interest in doing what is right – which, in itself, is too weak to justify a *pro tanto* right to exceptions. Integrity, in a word, picks out what is ethically salient in the religious experience when a claim to exemption is made – a value that is weighty enough to ground duties of others. But it is true, as Jones notes, that as individual believers themselves define what is central to their integrity, the individual integrity standard remains a subjectivist standard. This is, I think, an advantage of the integrity view: judges do not have to get embroiled in definitions of what is and what is not objectively 'religious', when what is at stake is the ability of individuals to live with integrity as they see it.

The standard of collective integrity, by contrast, is not purely subjective. While individuals have final sovereignty over which values and purposes are central to their integrity, it is not so clear, in the case of groups, who has the authority to define what collective integrity demands. It is not enough, for example, for the shareholders of *Hobby Lobby* to claim that their for-profit family business is 'religious' for the company to benefit from religious freedom protections. What matters, I argue, is a more objective test of integrity – a test of coherence, for example, between the actual purposes of those joining the association and the activities it centrally pursues. Because granting exceptions to groups often means granting them special powers over their individual members (eg. no protection from anti-discrimination legislation), group leaders cannot be the sole, sovereign adjudicators of collective integrity. The integrity of artificial collective persons, then, has a different shape from the integrity of natural persons.

The second important objection raised by Jones concerns the two justifications for individual exemptions that I put forward – Disproportionate Burden and Majority Bias. Jones casts doubt about the scope of the latter. How do we know, he asks, whether non-neutral social rules are objectionably *biased*? He raises two examples. First, Jews and Sabbatarians incidentally benefit from the recognition of Saturday as a day of rest in addition to Sunday (in post-Christian societies). On my theory, however, the mere presence of an advantage only constitutes majority bias if it benefits historical majorities. Second, are Christians still beneficiaries of the Sunday rule, given that the great majority of them do not go to church on Sundays? It is true that majority bias is eroded by societal secularization. Yet (for now) it persists, not necessarily through greater advantages and

benefits, but in the complex modes of symbolic recognition of historically dominant identities. Muslims' demand for Friday exemptions make sense against a background of broader *cultural* dominance of historically Christian groups, and need not rigidly track the current distribution of opportunities for *religious* exercise between majority and minorities. That said, I share Jones's view that religious accommodation is often best defended from Disproportionate Burden rather than Majority Bias, as what counts as unfair background in religiously diverse, and mostly secularised societies is often difficult to tell.

Daniel Sabbagh takes up similar issues, and raises probing questions about my treatment of the notion of discrimination. He rightly notes that I do not systematically frame my analysis in terms of discrimination, that I use an implausibly non-moralised, descriptive conception, and that I make few references to actual discrimination law. I plead guilty to all these charges. But this is because I do not think that the legal notion of discrimination is the best analytical framework to theorize the fair accommodation of religious claims.

This, I should note, is not as eccentric a position *in law* as Sabbagh's critique might imply. A number of lawyers and legal theorists have expressed suspicion about the notion of religious discrimination (Calvès 2011); and the accommodation of religious claims, in countries such as the USA and Canada, is not primarily driven by a discrimination framework. To be sure, the notion of discrimination is useful to capture the wrong of egregious types of disparate treatment that are motivated (or can only be justified) by anti-religious animus (or prejudice against racialized religious groups). But more problematic is the view that any law or rule that incidentally burdens some religious citizens is *prima facie* discriminatory, just because of the disparate burden it occasions. It is because I am sceptical about the scope of the notion of indirect religious discrimination that, in *Liberalism's Religion*, I try to articulate two alternative frameworks, which I call Disproportionate Burden and Majority Bias.

As Sabbagh notes, legal theorists such as Christopher Eisgruber and Lawrence Sager seek to ground the liberal justification for religious exemptions in ideals of equality and non-discrimination. It is because some religious groups are victims of structural prejudice and casual neglect that measures should be taken to rectify the disadvantage they suffer. On this view, members of religious minorities suffer discrimination, on a par with members of racial or sexual minorities. I endorse the egalitarian, discrimination-based argument for exemption (of which Majority Bias is a formulation) but I do not think it is always the best or most appropriate framework to scrutinize the fairness of religious accommodation.

First, the discrimination framework is too collectivist, and is unable to accommodate the individualization of religious freedom claims. In the UK *Eweida* case, adoption of a discrimination-based framework led judges to reject a British Airways employee's demand to wear a Christian cross, on the grounds that she belonged to no group that held it a duty to wear a cross. On my view, we should not ask whether Eweida is discriminated against as a member of a vulnerable group of Christians. Rather, we should ask whether the exercise of what she takes to be her religious duty is disproportionately burdened by the rule. The Disproportionate Burden test allows us to assess Eweida's claim on its own merits, without having to look for a broader disadvantaged group.

Second, and connectedly, the discrimination framework requires that an independent measure of group disadvantage be provided. Women or members of racial minorities are wrongly discriminated against by some facially neutral rule just in case the rule perpetuates or aggravates the disadvantage they *already* suffer. By analogy, one can say that members of religious minorities are disadvantaged by rules that accentuate existing institutional biases towards religious majorities. (This is captured by the Majority Bias test.) But it seems more problematic to say that religious citizens are discriminated against just by virtue of living under secular (non-religious) institutions. In post-Christian societies, Christians are *not* a religious minority in the way that Muslims or Jews are (although members of minority Christian groups, such as Sabbatarians in the USA, may be). This does not mean that members of historically dominant religions have no claim for exemption at all. It means that the claim they have falls under Disproportionate Burden, rather than Majority Bias. Disproportionate Burden is a more stringent, but also a more individualised test, as I suggested above. It is a test rooted in the value of religious freedom, not one rooted in the value of equality. Religious accommodation, in other words, is not only or always a response to wrongful discrimination. Religious identity is sometimes like race or gender and, in that case, should be protected by anti-discrimination measures; but at other times it should be treated as a first-person, integrity-protecting commitment – with less extensive protection. Analysis of the limits of the discrimination framework, then, brings out the need to work with a differentiated, disaggregated conception of religion, as I argue in *Liberalism's Religion*.

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