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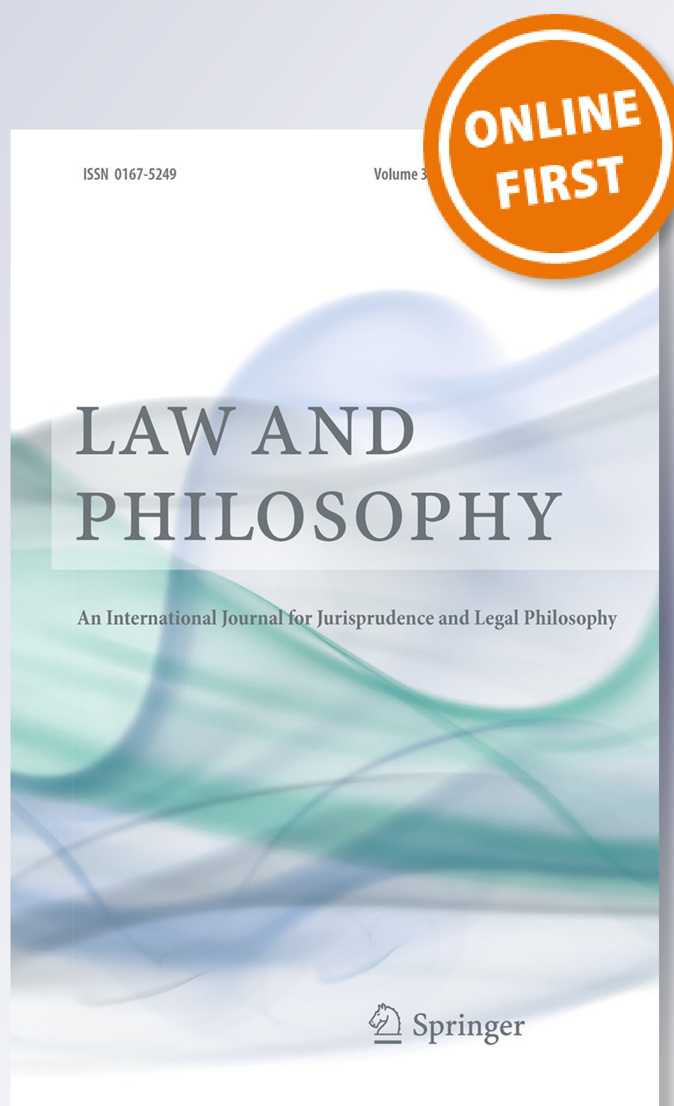

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KEVIN VALLIER

THE MORAL BASIS OF RELIGIOUS EXEMPTIONS*

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ABSTRACT. Justifying religious exemptions is a complicated matter. Citizens ask to not be subject to laws that everyone else must follow, raising worries about equal treatment. They ask to be exempted on a religious basis, a basis that secular citizens do not share, raising worries about the equal treatment of secular and religious citizens. And they ask governmental structures to create exceptions in the government's own laws, raising worries about procedural fairness and stability. We nonetheless think some religious exemptions are appropriate, and in some cases, that exemptions are morally required. So how are we to determine when religious exemptions are justified? This article employs a public reason framework to provide an answer. I show how to publicly justify religious exemptions. My thesis is that a citizen merits a religious exemption under four conditions: (a) if she has sufficient intelligible reason to oppose the law, (b) if the law imposes unique and substantial burdens on the integrity of those exempted that are not off-set by comparable benefits, (c) if the large majority of citizens have sufficient reason to endorse the law, and (d) if the exempted group does not impose significant costs on other parties that require redress. If these conditions are met, then legislative and/or judicial bodies should carve out an exemption for those requesting them.

Religious exemptions are big news in the United States, due largely to the Health and Human Services contraception mandate and the gradual legalization of gay marriage. Little Sisters of the Poor, a religious order devoted to hospice care, has requested an exemption both from financing contraception for their employees and from authorizing a third-party to do the same. Hobby Lobby, a nation-

* For helpful remarks on the paper, I thank Chad Van Schoelandt, Micah Schwartzman, Andy Koppelman, Ben Bryan, Jerry Gaus, John Thrasher, two anonymous referees, and a number of attendees at the 2015 Religion and Political Theory conference at University College London.

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wide trinket store run by the evangelical Christian Green family, in *Burwell v. Hobby Lobby,* has been granted an exemption from being forced to pay for four contraception medications that (the Greens believe) can be used to reliably abort early-term fetuses. Regarding same-sex marriage, wedding photographer and evangelical Christian Elaine Huguenin has been successfully sued for refusing to photograph a lesbian wedding and forced to pay $6,000 in attorney's fees and costs. Unless Huguenin alters her policy, she either cannot advertise to the public or must shut down her business. She too requested a religious exemption from a state law, this time the New Mexico law prohibiting discrimination based on sexual orientation.[1] The Indiana legislature has faced strong criticism for the reaffirming of its Religious Freedom Restoration Act (RFRA), putatively meant to guarantee legal standing to religious business owners to seek exemptions from serving gay and lesbian weddings. These cases are the latest in a long history of appeals for religious exemptions, including conscientious exemption from the military draft, drug prohibition laws, and participating in Social Security. In fact, allowing religious exemptions is a widely respected practice of American constitutional law as old as the United States.[2]

Despite their prominent place in American law, religious exemptions raise moral concerns. Individuals ask to not be subject to laws that everyone else must follow, raising worries about the equal treatment of burdened and exempted citizens. They ask to be exempted on a religious basis, raising worries about the equal treatment of secular and religious citizens. And they ask governmental structures to create exceptions in the government's own laws, raising worries about procedural fairness and stability. We nonetheless think at least some religious exemptions are justified. The purpose of this article is to use the public reason liberal framework to provide a method for carefully assessing exemption requests that takes these complex concerns into account. I will not argue in favor of religious exemptions for any particular group. Instead, I show how to *publicly justify* religious exemptions in general.

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[1] The Supreme Court denied certiorari in April 2014. See *Elane Photography v. Willock, 309 P.3d 53* (2013), cert. denied, 2014 WL 1343625.

[2] Kenneth Greenawalt, *Religion and the Constitution, Volume 1: Free Exercise and Fairness* (Princeton: Princeton University Press, 2006), Chap. 2.

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My thesis is that a citizen merits a religious exemption under four conditions: (a) if she has sufficient intelligible reason to oppose the law, (b) if the law imposes unique and substantial burdens on the integrity of those exempted that are not off-set by comparable benefits, (c) if the large majority of citizens have sufficient reason to endorse the law, and (d) if the exemption does not impose significant costs on other parties that require redress.[3] If these four conditions are met, then legislative and/or judicial bodies morally should carve out an exemption for those requesting them.[4]

I will vindicate my thesis in nine steps. In Section I, I briefly review the basic structure of public reason liberalism and how public justification occurs. In Section II, based on the ideal of public justification, I develop a *principle of intelligible exclusion* to determine when citizens have sufficient reason to reject a law. In Section III, I show that something like the US Constitution's Free Exercise Clause is required by the principle of intelligible exclusion, and so can be used as a basis for generating religious exemptions. Section IV explains condition (b) by developing conceptions of integrity and substantial burdens on free exercise. Section V explains condition (c), that is, how it could be that most citizens would have sufficient reason to endorse a law while a minority has sufficient reason to reject it, and condition (d) by demonstrating that imposing costs on those subject to the law can undermine the case for an exemption, in lieu of compensation. Section VI addresses what happens when these conditions are not met, namely when the law should stand or when it should be repealed. Here I will also forestall the objection that my view allows for too many exemptions to be practicable. Section VII addresses exemption-like cases where states make different legal arrangements available to different groups, and argues that in many cases such arrangements can be publicly justified. Section VIII argues that secular reasons can also merit exemptions, such that religious exemptions are not special. Section IX concludes. An Appendix follows that contains an exemption table, representing a decision procedure for determining when exemptions should be granted.

[3] It is also possible that the majority will endure the costs of the exemption without *wanting* compensation. I address this possibility below.

[4] I stress 'morally should' even if legal bodies have sufficient legal reason to follow judicial procedures that lead in another direction.

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I. PUBLIC JUSTIFICATION

The ideal of public justification affirmed by public reason liberals holds that state coercion must be justified for each reasonable point of view in a free society.[5] State coercion must be justified because it is imposed by free and equal persons on other free and equal persons. If such coercion is to be compatible with persons treating each other as free and equal, then the coercion must be such that those subject to it can endorse it. Otherwise, those imposing the coercion are forcibly directing or violating the wills of those they coerce. The ideal of public justification is generally rooted in respect for persons and the desire to avoid authoritarianism in politics.[6] It is sometimes rooted in the value of political community, where publicly justified laws are seen as the only ones compatible with civic friendship.[7] These moral foundations all attempt to capture, in one way or another, that it is wrong for free and equal persons to coerce one another unless each coerced party can consistently accept the law as binding and compatible with her broader moral and philosophical commitments.

For a law, policy, legal procedure or legal body to be publicly justified it must be justified *for each person subject* to the relevant coercion.[8] This is typically interpreted to mean that each person has *sufficient reason* of her own to endorse the coercion. The coercion must be justified to her on her own terms. In this way justificatory reasons within public reason liberalism are *internal* in that the person who has the reason can be made aware of this fact by reflecting on her rational commitments and values.[9] By appealing to internal reasons, the public reason liberal does not take a position on the

[5] Some supporters of public reason liberalism challenge the tight connection between public reason and coercion. See Andrew Lister, *Public Reason and Political Community* (Bloomsbury Academic, 2013), Chap. 3 and Chad Van Schoelandt, 'Justification, Coercion, and the Place of Public Reason', *Philosophical Studies* 172 (2014): pp. 1031–1050.

[6] Christopher Eberle, *Religious Conviction in Liberal Politics* (New York: Cambridge University Press, 2002), p. 68. Stephen Macedo, *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990), p. 78. Charles Larmore, *The Autonomy of Morality* (New York: Cambridge University Press, 2008). Gerald Gaus, *The Order of Public Reason* (New York: Cambridge University Press, 2011), p. xvi.

[7] Lister (2013, p. 105).

[8] Kevin Vallier, *Liberal Politics and Public Faith: Beyond Separation* (Routledge, 2014), pp. 24–25. There is some controversy about what is to be justified, laws or constitutional essentials. Quong and Gaus lean towards the former, Rawls towards the latter. Jonathan Quong, *Liberalism without Perfection* (New York: Oxford University Press, 2011), Chap. 9; Gaus (2011, pp. 495–497); John Rawls, *Political Liberalism* (2nd ed.) (New York: Columbia University Press, 2005), p. liii.

[9] Gaus (2011, p. 250).

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metaphysics of moral reasons. There may well be non-internal reasons, and internally accessible reasons could have a mind-independent metaphysical status. Public reason liberals make the more modest claim that only internally accessible reasons are *coercion-justifying*. To illustrate, suppose for the sake of argument that Roman Catholicism is a false religion. If so, do nuns have sufficient reason to keep their vows of poverty and chastity? In one sense, they obviously do not, given that they have a false religious view. But in another, quite plain sense, they *do* have such reasons, in virtue of the fact that they are deeply committed to Roman Catholic doctrine and practices. This latter sort of reason is the currency of public justification.

When public reason liberals say that someone has *sufficient* reason to endorse a law or policy, they typically mean that the balance of her justificatory reasons favors the policy. In epistemic terms, she lacks defeaters for her reasons to endorse the law.[10] She lacks sufficient reason to reject the law and has positive reason to endorse it as the best among the alternatives, or at least as better than no law at all. The question of sufficiency also has implications for the relevant comparison class of coercive proposals. Public reason liberals often say that a law can be publicly justified if it is superior to no law at all, as judged by each person's set of reasons. A corollary is that a law cannot be publicly justified if the balance of some persons' reasons favors no law at all over the proposed law.[11] To show that a law is *conclusively* publicly justified is to show that all alternative proposals are regarded as inferior to no law at all.[12] If multiple laws are regarded as superior to no law, however, some say that they are *inconclusively* justified, since the aforementioned law has competitors. In such cases, the reasons of the public cannot demonstrate that one legal proposal is regarded as best from the perspective of society. In this case, public reason liberals oftentimes appeal to decision procedures, like legislative voting rules or judicial systems, in order to select a member of the set of inconclusively justified proposals.[13] Decision procedures themselves must be publicly justified, as they

[10] Michael Sudduth, *Defeaters in Epistemology*. Internet Encyclopedia of Philosophy 2014 [cited March 20, 2014]. Available from http://www.iep.utm.edu/ep-defea/, Sec. 6 provides a nice taxonomy of defeaters in epistemology.

[11] Gaus (2011, p. 263).

[12] Gerald Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996), pp. 159–162.

[13] See *ibid*., Chaps. 13, 15.

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are forms of coercive power, but they are handy for selecting proposals that justificatory reasons alone do not decisively favor.

When determining citizens' justificatory reasons, public reason liberals typically engage in some form of *idealization*.[14] They ask which reasons citizens would endorse as their own if they were suitably rational and informed. Public reason liberals differ on how much idealization they appeal to, but they all agree that the set of a person's justificatory reasons and the set of reasons she endorses when asked are not identical. This is because the set of rationales an agent endorses in dialogue often have *faults* due to varying degrees of ignorance, irrationality or moral vice. Accordingly, in order to determine whether a law or policy is publicly justified for an agent, public reason liberals ascribe reasons to her based on what she *would endorse* under the right conditions.

Public reason liberals also differ in that some are prepared to circumscribe or restrict the set of justificatory reasons to either reasons that members of the public *share* at the right level of idealization or the reasons that they can *access* or regard as justified according to common evaluative standards.[15] Public reason liberals thereby endorse either a *shared reasons* requirement or an *accessible reasons* requirement. These restrictions are typically advanced based on the intuition that respectful citizens, when engaged in significant and public political activities, will only appeal to reasons that others can accept or at least that they can regard as justified for others. Shareability and accessibility requirements are presently the norm in the public reason literature, but a minority of theorists have developed a contrasting *convergence* view on which all of a citizens' rationally recognized reasons, at the right level of idealization, can count in favor or against the public justification of state coercion. Those who endorse shared and accessible reasons requirements are frequently called *consensus* theorists, in contrast. I favor a convergence approach, though I cannot defend that view here.[16]

The reason that those who endorse the ideal of public justification are referred to as public reason *liberals* is that they claim that a commitment to public justification will generate sound justifications for liberal institutions, such as constitutionally protected individual

[14] Vallier (2014, pp. 146–151) discusses conceptions of idealization in public reason.

[15] *Ibid*., pp. 104–111 reviews these standards of justificatory reasons.

[16] For a defense, see Vallier (2014, Chap. 4).

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liberties, like freedom of speech and freedom of religion, political rights like the right to vote, and procedural liberties like the right to a fair trial. Obviously we cannot review the derivations for reasons of space.[17]

II. THE PRINCIPLE OF INTELLIGIBLE EXCLUSION

Before I turn to religious exemptions, we must first draw, from the idea of public justification, a principle to determine when an individual has sufficient reason to demand that a law not apply to her, either via exemption or by repeal. This condition is satisfied when an individual has sufficient reason to reject the law, but we need a standard that is a bit more precise. I propose that we use what I have called the *principle of intelligible exclusion*.[18] I begin by explaining the idea of an intelligible reason that lies at its heart.

Fred D'Agostino and I define the notion of an intelligible reason as follows:

> *Intelligibility:* A's reason X is intelligible for members of the public if and only if members of the public regard X as epistemically justified for A according to A's evaluative standards.

This yields an intelligibility requirement on justificatory reasons, a restriction on the set of justificatory reasons:

> *Intelligibility Requirement:* A's reason X can justify coercing members of the public only if it is intelligible for them.[19]

Intelligible reasons are ones that members of the public can see as reasons for some agent even if they reject those reasons for themselves. Imagine, for instance, an atheist public trying to determine what reasons a member of a Muslim minority possesses. Given the widely understood commitment of public reason liberals to recognizing *reasonable pluralism*, the idea that reasonable and rational people can have a great many views about what is ultimately good and true, they can recognize Islamic belief as in some weak sense rational for many Muslim believers.[20] If so, they

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[17] Gaus (1996, Part III) and Gaus (2011, Chap. VI) remain the most detailed attempts.

[18] Vallier (2014, p. 184).

[19] Kevin Vallier and Fred D'Agostino, *Public Justification*. Stanford Encyclopedia of Philosophy 2012 [cited March 18, 2014]. Available from http://plato.stanford.edu/entries/justification-public/. I have worked out my own version of the standard in Vallier (2014, Chap. 1).

[20] Rawls (2005, p. xix).

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acknowledge that the Qur'an generates reasons for the Muslim in question, though it generates no reasons for atheists. Thus, a reason drawn from the Qur'an is intelligible if members of the public regard that reason as justifiably affirmed by the Muslim citizen at the right level of idealization. If the reason is intelligible, it can enter into public justification so long as members of the public regard the reason as having some epistemic credentials. The reason is not obviously defeated or undermined by some plain, common sense fact, as would belief in fairies or conspiracy theories, and the reason is held in a suitably sane and cool-headed manner.[21] Elsewhere I have argued that the intelligibility requirement does not imply that the public has a strong veto over the use of reasons by individuals, as they merely need to be able to ascribe epistemic credence to the reason for the one who has it.[22] They must insist on at least this level of epistemic pro-status. Otherwise, it is hard for them to determine whether a member of the public is offering a reason at all. Whether members of the public can see the reason as a reason will also depend on the level of idealization at work.

The reason must also be minimally moral. That is, it must either flow from or be compatible with one's moral convictions. Consequently, reasons to cause others pain for the pleasure of it, or reasons to kill one's competitors in a race, will not count as intelligible even if those have the requisite epistemic credentials. Thus, while Qur'an-based beliefs can generate moral reasons based on the Muslim citizen's evaluative standards (which include the Qur'an), the distinctive reasons of sociopaths and masochists cannot figure into public justifications. In developing this distinction, my aim is to navigate

[21] An anonymous referee wonders whether doctrines that members of the public see as logically incoherent can generate intelligible reasons. A dilemma suggests itself. If I allow logically incoherent doctrines to generate reasons, then the intelligibility requirement isn't an account of what we have reason to do, since we can't have reason to do X and not-X at the same time and in the same way. However, if I rule out logically incoherent doctrines, then it looks like some exemption claimants lack defeater reasons because their comprehensive doctrines are self-contradictory. In response, note first that cases of doctrinal contradiction are only pressing when a defeater is based on the contradiction in some direct way, which is seldom the case; most Christian objections, for instance, do not directly depend on the doctrine of the Trinity. My *general* answer to the dilemma varies depending on the nature of the contradiction and its location (central or peripheral) within a member of the public's web of belief. Central contradictions are reason-undermining, peripheral contradictions and distant contradictions (contradictions between, say, two far flung beliefs) are not reason-undermining. Martha Nussbaum discusses a similar concern in Martha Nussbaum, 'Introduction', in Martha Nussbaum and Thom Brooks (eds.), *Rawls's Political Liberalism* (New York: Columbia University Press, 2015), pp. 1–56, 24–26.

[22] See Vallier (2014, p. 106).

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between two threats: first, the threat that intelligibility allows plainly immoral reasons into public justification and, second, the threat that a thicker, more substantive moral restriction on reasons will run afoul of respect for reasonable pluralism. This is why I adopt a standard of 'minimal' morality, or that justificatory reasons must count as moral in content and at least broadly conform to our shared understanding of what makes for a moral reason.

With the idea of an intelligible reason in hand, we can now appeal to a formal definition of the principle of intelligible exclusion:

> *The Principle of Intelligible Exclusion:* law-making bodies must (i) only impose laws on members of the public that members of the public have sufficient intelligible reason to endorse and (ii) repeal or reform laws that members of the public have sufficient intelligible reason to reject.[23]

Intelligible Exclusion specifies when a state may impose a coercive law or policy on citizens in a publicly justified fashion. Lawmakers should not impose laws that cannot be publicly justified in terms of intelligible reasons rather than, say, the mainstream shared reasons view. Thus Intelligible Exclusion prohibits a legislative body from imposing laws on citizens that they have sufficient intelligible reason to reject. Notice that Intelligible Exclusion allows for a law to be repealed *or* reformed, so legislatures have options as to how to respond to publicly unjustified law. This will be critical in determining when and whether they should carve out religious exemptions.

An important caveat before I continue. By my own admission the intelligibility requirement is held by a small minority in the public reason literature. So why base an account of publicly justified exemptions upon it? One reason is that I think intelligibility is the correct standard, and that public reason liberals have failed to provide an adequate refutation of the view or address the significant criticisms of consensus alternatives. But another reason is that even consensus liberals will want to allow intelligible reasons to enter into public justification in at least some cases. For instance, if they regard a right to liberty of conscience as publicly justified based on shared reasons, they will probably want to flesh out this right by attuning it to the diverse, religious reasons of many citizens. Liberty of con-

[23] I develop this principle in Vallier (2014, p. 184). This essay will at times refer to the Principle of Intelligible Exclusion as 'Intelligible Exclusion'.

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science, then, is exercised not merely on the basis of shared or accessible reasons, but based on the diverse, intelligible reasons of citizens. That is to say, they will have a consensus justification for acknowledging the force of diverse, religious reasons in a particular legal domain, namely religious exemptions.

One might argue that consensus liberals can defend exemptions not by appealing citizens' *reasons* but rather to their convictions of conscience, regardless of how irrational those convictions turn out to be. I think this is mistaken, if for no other reason than we need some standard to determine whether someone affirms his or her conscientiously held convictions in a sane and sincere manner. While I cannot show as much here, the intelligibility requirement can determine whether convictions of conscience are sane and sincere, as they will be grounded in reasons that members of the public can see as justified for the person who offers them.[24]

III. THE JUSTIFICATION OF FREE EXERCISE

The religious exemptions I will discuss are loosely based on a right to the free exercise of one's religion. They do not fall under freedom of speech and do not raise questions concerning the establishment of religion, at least not directly. So these religious exemptions will not be requests to establish or disestablish religion or requests to have other rights respected.

Nearly all liberal democratic constitutions contain explicit protections for religious freedom. The American constitutional approach to religious exemptions is based largely on its own Free Exercise Clause of the First Amendment. The religion clauses read: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. The Free Exercise Clause is the latter clause, and bars Congress from using legal coercion to restrict various facets of religious belief and practice. The clause has been interpreted expansively, extending far beyond freedom of worship to protecting styles of dress in the workplace and facial hair in prison, exempting children from public school and adults from

[24] There may, however, be prudential reasons to exempt crazy and irrational individuals from legal burdens. I can think of two: first, we may not want legislative bodies to have the power to determine which requests are crazy and irrational and which aren't, as the determination power may be abused or mistakenly applied. Alternatively, we might think the mere fact that such individuals will experience psychological distress from the legal burden imposed on them is enough to merit accommodation.

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laws against using controlled substances. And when the courts have used the Free Exercise Clause to protect religious citizens from coercively imposed hardships that they suffer merely due to their religious beliefs and practices, we can see that it serves as a principle of *exclusion*: it bars the state from coercing citizens based on the importance of protecting a person's ability to act in accord with her deepest reasons of integrity, at least if such reasons are religious.[25] Legal bodies, then, acknowledge that core religious reasons sometimes serve as defeaters for coercion.[26]

I believe that a free exercise *principle* is publicly justified for most, if not all, constitutional democracies because citizens typically have sufficient intelligible reason to act in accordance with the religious teachings they endorse. For many citizens, religious activity is the primary source of purpose and meaning in their lives, and so religious commitment generates very strong reasons for action, such that intelligible reasons to engage in religious activity rise to the level of defeaters for legal coercion. As Kent Greenawalt has put it, a central goal of the Free Exercise Clause is to acknowledge the value that 'many people care deeply about their religious beliefs and practices, and they feel that their religious obligations supersede duties to the state if the two collide'.[27] Similarly, a free exercise principle is publicly justified based on the importance that citizens assign to their religious beliefs and practices. What's more, they typically regard the reasons to engage in religious practice and belief as stronger than their duties to their respective nation-states, which gives us further reason still to think that laws abridging free exercise cannot be publicly justified to them. Given the defeating power of intelligible reasons on the Principle of Intelligible Exclusion, then, intelligible religious reasons in many cases will provide defeaters for laws.

Importantly, to demonstrate that a law is defeated, one must also consider its benefits. In principle, it is possible that citizens lack sufficient reason to reject laws that burden their integrity because those laws have other compensating benefits. But for paradigmatic

[25] Though in legal practice it does not protect religiously motivated actions from laws that are not meant to discriminate on religious grounds. I thank Micah Schwartzman for this point. A publicly justified free exercise principle, in my view, would cover these cases as well.

[26] Though they acknowledge it as one factor to be weighed against others, whereas my principle is sufficient for defeat. Thanks to Chad Van Schoelandt for this point.

[27] Greenawalt (2006, p. 3).

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free exercise complaints, the objectors recognize no sufficiently compensating benefits.

IV. INTEGRITY AND SUBSTANTIAL BURDENS

We now have a suitable grasp of what it means for an individual member of the public to have sufficient intelligible reason to object to a law. So I next turn to flesh out and defend the second condition for warranting a religious exemption: whether the law in question imposes a unique and substantial burden on the integrity of religious citizens.

I take an individual to have integrity when she is true to her character, projects, plans and beliefs. On this view, which some call the 'identity' conception of integrity, 'integrity means fidelity to those projects and principles that are constitutive of one's core identity'.[28] By a 'principle' I mean belief in a comprehensive worldview or ideal, or some belief or practice entailed or implied by that worldview or ideal. 'Fidelity' to these ideals requires acting in concert with them and not violating them, at least not on a regular basis. Projects include further complexities. Loren Lomasky takes a project to have three features: (i) persistence, (ii) centrality and (iii) structure.[29] Projects are persistent because they extend over long time periods. Projects possess centrality when they 'help explain a life' or when those projects are the overall goals of a large number of sub-goals. A project's structure means that it produces 'stability' in an individual's life by uniting her actions.[30] One simple and extreme example of someone with integrity is Martin Luther, due to his willingness to die for his theological belief in 'justification by faith'. His belief constituted his core identity; it helps to explain who he was.

The law places a substantial burden on the integrity of religious citizens both when it directly compels someone to act against religious beliefs central to her integrity, and when it imposes indirect burdens. For our purposes, we can understand a substantial burden

[28] Cox, Damian, Marguerite La Caze, and Michael Levin. 2010. *Integrity*. Edward N. Zalta, August 13, 2010 2008 [cited October 22nd 2010]. Available from http://plato.stanford.edu/entries/integrity/, Sec. 2.

[29] Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), p. 26.

[30] *Ibid*.

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as any form of legal coercion that significantly sets back an individual's ability to live out her faith, either by direct compulsion or an *ex post* legal penalty. To explain, the notion of a 'substantial burden' here is related to the 'substantial burden' test in constitutional law.[31] The core illustration of a substantial burden, as the Supreme Court has understood it, is *Sherbert v. Verner* (1963). In this case, Adell Sherbert, a Seventh-Day Adventist, worked a job operating a textile mill. Two years following her conversion, her employer extended the work-week to include Saturday, which Seventh-Day Adventists treat as a Sabbath day, forbidding work. For this reason, Sherbert refused to work and was fired. She could not easily find other work and asked for unemployment compensation. The Employment Security Commission denied her claim and the South Carolina Supreme Court affirmed the commission's decision. The Supreme Court overturned the South Carolina Supreme Court's ruling by a 7-2 decision. Denying Sherbert's claim, the majority argued, imposed a substantial burden on the free exercise of Sherbert's religion. Justice Brennan wrote the following for the majority: 'to condition the availability of benefits upon their appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties'.[32]

I do not claim that we should still use the *Sherbert* test. In fact, the test has been modified, applied, restricted and reapplied at both the state and federal levels. My point is merely to illustrate what a substantial burden comes to and that such burdens take diverse forms. A publicly justified free exercise principle will employ a similar notion. I should also stress that the notion of a substantial burden is not based merely on what people find burdensome, annoying or difficult. Instead, a substantial burden is one that significantly sets back one's capacity to advance her interests and core ideals and doctrines, so long as those ideals and doctrines don't require the unjustified coercion of others. And I should also stress that the substantial burdens should not be outweighed by factors that the relevant members of the public regard as compensation for those burdens.

[31] Though it is not the same. I discuss the substantial burden test to help give content to the philosophical idea I'm appealing to. Note here the relationship to *Smith*, where Smith and Black were fired for their use of peyote and denied unemployment benefits.

[32] *Sherbert v. Verner*, 526 U.S. 240, p. 518 (1963).

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Finally, we should examine what it means for a law to impose a *unique* substantial burden on religious citizens. Obviously a unique burden is one that only applies to the person in question. But why should we restrict religious exemptions to unique burdens? The simple answer is that if the burden is not unique, or if a similar burden applies to a great many citizens, then the law in question should be *repealed* rather than selectively applied. In the case of the imposition of a broad substantial burden, for which there are no compensating benefits, and sufficiently many citizens have defeaters for the law, then the better course of action is to repeal it.[33]

We now have a sufficiently clear idea of what it means for a law to impose a unique and substantial burden on the integrity of some relatively small group of religious citizens. We should endorse the condition because it comports with the ideal of public justification. If we are to allow sufficient intelligible reasons to defeat the application of a law to an individual, we need a further condition to specify when someone has such reasons. When a law places a substantial burden on the integrity of an individual, then arguably the individual has sufficient intelligible reason to object to the law.[34] She rationally prefers no law restricting her liberty to having the restriction. Concern for integrity thereby specifies when someone has defeater reasons. This is because integrated persons endorse reasons issuing from their projects and principles that possess great normative weight and thereby generate strong claims to noninterference. Public reason liberalism requires formal recognition of these claims because citizens have the capacity to pursue a conception of the good and live up to their ideals. Consequently, public reason liberals must ascribe integrity serious moral weight and so allow reasons of integrity to play a justificatory role.[35]

I should be clear, before continuing, that I am merely outlining the case for religious exemptions. There are other good objections to laws, some of which are based on restricting liberties that are much less important. So I do not want to imply that objections to restricting other forms or more minor forms of liberty are publicly justified. Instead, I am simply circumscribing my subject matter.

[33] Below I will discuss some complicating factors for this point.

[34] I am here excluding an analysis of forms of integrity built around crazy or flatly irrational beliefs. I discuss those cases in Vallier (2014, pp. 57–66).

[35] Public reason liberals have frequently committed themselves to according integrity great reason-generating power. See *Ibid.*, pp. 86–89.

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V. MAJORITY ENDORSEMENT AND COSTS IMPOSED UPON OTHERS

I will now address when we should grant an exemption, as opposed to repealing (or not passing) a law that cannot be publicly justified to all members of the public. The brief explanation is that exemptions are appropriate only when the large majority of members of the public have sufficient intelligible reason to *endorse* the law. To put it another way, we should not deny the benefits of a law to the overwhelming majority of the populace based on the objections of the few *so long as* the minority group can be meaningfully exempted from the law. This is because the ideal of public justification is not meant merely to restrict coercion but to outline the conditions in which it is desirable, namely when members of the public see the law as advancing their evaluative standards. Laws are not always bad and many are good; so to allow a small, exemptible group of individuals to opt-out seems to be a much better solution than denying the benefits of the law to everyone. This is how we justify condition (c), which permits religious exemptions only in cases where the large majority of members of the public have sufficient reason to endorse the law. If citizens lack such reason, then we should repeal the law or prevent it from being passed in the first place.

Condition (d) is more complicated, as it employs the idea of imposing a negative externality on others, a cost that may require compensation.[36] To recall, condition (d) is satisfied when an exemption does not impose significant costs on other parties that require redress. The main reason for the condition is that the imposition of costs on non-exempted parties raises concerns about unfair treatment and unfair burdens.[37] To illustrate, first consider the innocuous case of the Sikh exemption from wearing motorcycle helmets in the UK. Sikhs on motorcycles are a sufficiently small number of individuals with sufficiently idiosyncratic preferences (always wearing headgear and carrying a *kirpan* among them) and therefore impose extremely low costs on other parties, if any. Consequently, almost no one resents this form of special treatment. Vaccine exemptions are an important contrast. Many parents resent the exemptions because exempted

[36] I focus here on 'material' costs like higher taxes, a greater risk of death in the military, and so on, rather than non-material costs, such as tolerating the exempted group's repellant odor. Since these exemptions raise special complications, I set them aside, though I am grateful to an anonymous referee for raising the concern.

[37] Condition (d) is not relevant when the exemption imposes no costs or trivial costs on the non-exempted portion of the public.

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parents impose a risk on the children of parents who vaccinate. Further, exempted parents benefit from the herd immunity of vaccinated children and adults, so they enjoy a benefit without paying the cost. This cost weakens the case for an exemption, both because the cost borne is non-trivial and because the cost borne is unequal. The majority must put up with the inequitable costs of exempting others.

Importantly, the mere fact that an exemption imposes costs on non-exempted persons is not sufficient to undermine the justification of the exemption. First, the government could compensate the majority in some fashion, such as a direct monetary transfer. Consider the exemption the Amish receive from Social Security taxes. Self-employed Amish do not have to pay Social Security taxes; however, they also do not receive Social Security, or unemployment or welfare funds. In this way, the cost of the exemption is neutralized. Second, as alluded to above, the majority may not mind the substantial or unequal burden placed on them. We can imagine exemptions for historically marginalized and oppressed minorities that require support from the dominant majority. The majority may not object to the exemption because they see the exemption as rectification for past injustices. Or the majority may not resent the exemption because they regard the exemption as integral to respecting freedom of religion. So long as the majority do not mind the burdens or harms imposed upon them, the case for the exemption remains intact.

But consider a case where condition (d) is arguably not satisfied: the exemption ultra-orthodox Haredim Jews have from the Israeli draft. Haredim Jews have, for sixty-five years, been exempt from serving in the Israeli army so long as they are studying full-time at a seminary, or yeshiva. Due to their growing numbers, spurred by their rather spectacular reproduction rates, the Haredim have faced increasing resentment because other Israelis bear the intense burden of protecting them under dangerous conditions. In light of this, the Knesset voted to end the exemption, which was intended to go into effect in 2017. Under the new law, the Haredim will have to either join the army or perform a civilian service.[38] The public reason liberal should regard this level of inequality as sufficiently significant

[38] *Al Jazeera*, 'Israel Passages Ultra-Orthodox Draft Law' (2014, March 12) Retrieved from http://www.aljazeera.com/news/middleeast/2014/03/israel-passes-ultra-orthodox-draft-law-2014312101340345116.html. At the time of this writing, the Knesset is considering whether to weaken the new restrictions.

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to justify ending the exemption by *either* repealing the draft entirely or imposing it equally, depending on which option is publicly justified. The costs borne by the majority are, in this case, high and unequal.[39]

Before continuing, I should address the concerns that, on my view, (i) citizens could receive exemptions based on animus and bigotry, and (ii) that they can use their exemptions to mistreat others. Consider a case that raises both issues: exemptions for bakers who wish to deny service to homosexual couples on religious grounds. The bakers may be able to abuse the exemption by denying services to homosexuals out of animus; further, their actions can stigmatize homosexual couples through their denial of service.

Fortunately, the conceptions of idealization and justificatory reasons within my account of public justification should defeat the reason-generating power of much, if not all, reasons derived from bigotry, racism, sexism, and the like. To merit an exemption, one must have a sufficient intelligible reason to object, and this reason must have minimal moral content. Further, a publicly justified exemption will have limits: if there is reason to suspect that an exemption is being abused to mistreat others, then that is ground for reevaluating its justification. But given the live possibility that some of these bakers are motivated by sincere religious conviction, then my account may require giving exemptions to some individuals in this very small group of religious business owners. Readers will likely balk, but if we recognize reasonable pluralism, we cannot simply insist that these business owners *could not possibly* have intelligible reason to object.

Progressive critics could respond by arguing that denials of service *harm* gay and lesbian couples by undermining the social bases of self-respect. If a denial of service counts as harmful in the eyes of the public, rather than a mere offence, then this could justify revoking the exemption. However, I should caution that the notion of harm deployed by progressives is a matter of considerable, and arguably

[39] Should Israel abolish its draft? It is possible that the Haredim, given that they are not pacifists, do not oppose the military policy generally, though it would come at a cost to them. So they may prefer the general application of the law to no law, which would require that they be subject to the draft. In that case, the draft might be publicly justified for them. Otherwise, the proper legal response would probably be to abolish the draft, save in the case where drafted Israelis prefer the exemption to abolishing the draft, given that they regard the draft as critical for national security. So the exemption may merely be permitted, but not required in this case. I thank Chad Van Schoelandt for this point.

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reasonable, contestation. Many members of the public see a denial of service as an *offense*, not as harm. On more traditional liberal views, a denial of service will not count as harmful because, in nearly all of the relevant cases, gay and lesbian couples have dozens of affordable alternative venues to purchase wedding cakes. If so, the conception of harm used to deny the exemptions may be sectarian, and therefore not a suitable basis for law.

VI. ALTERNATIVES TO EXEMPTIONS

To further defend my account of publicly justified religious exemptions, I should consider cases where a religious objection does not merit an exemption. That is, we should examine *alternatives* to exemptions. To begin, consider four approaches that we can take in response to requests for exemptions and religious accommodations. I use Kent Greenawalt's terms for the first three approaches: *neutral-restrictive, targeted accommodation* and *neutral accommodating*.[40] The neutral-restrictive approach maintains that the state has an overriding interest in securing uniform compliance with the law, such that all persons should bear the burdens of the law equally, religious or no. The targeted accommodation approach only allows those with specific religious objections to opt out of a law. The state's interest in equality takes a backseat to its duty to respect liberty of conscience. The neutral-accommodating approach provides a general opt-out provision for anyone to whom the law applies *who requests* an exemption. Citizens cannot opt out for any reason, and the exemption must be granted by request, but the exemption is not directed at a specific group or individual. The fourth approach to accommodation is to repeal objectionable laws due to the defeaters of religious citizens, or what I call the *repeal* approach.[41]

In general, the neutral-restrictive approach is the hardest to justify, as it threatens to impose defeated coercion on religious citizens. The state's interest in equal treatment and in imposing the law are seldom sufficiently strong enough to justify coercing people to whom the law cannot be publicly justified. I have defended condi-

[40] Greenawalt (2006, p. 166).

[41] Though in some ways the repeal approach is not an approach to accommodation *per se* but rather a response to an inability to produce particular accommodations.

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tions under which the targeted-accommodating approach is appropriate – conditions (a)–(d). But in cases where neither the neutral restriction nor the targeted accommodation are inappropriate, should we prefer neutral-accommodation or the repeal approach? I think the only sensible answer is that it depends. In cases where the group requesting the exemption is hard to target, but the benefits of the law are large, neutral accommodation is more appropriate. Consider, for instance, the neutral-accommodation offered to US draftees.[42] At present any conscientious objector, religious or not, can merit an exemption. If the draft can be publicly justified, then the neutral-accommodation approach seems appropriate, given all the varied doctrines that people raise to object to the draft. Targeting groups is difficult, so allowing individuals to opt-out based on their own personal views is perhaps the more effective approach to assigning exemptions.

But in cases where the group requesting the exemption is sufficiently large and the benefits of the law sufficiently modest, the law should be repealed. It is simply not worthwhile to impose a law whose benefits are limited but that cannot be justified to a large sector of the populace. Further, repeal may be appropriate when institutionalizing the exemption is too legislatively challenging.

One might reasonably worry that I allow for too many religious exemptions. This raises two objections: first, that my view threatens anarchy, and, second, that my view will create smaller, but still severe, pragmatic problems in creating and enforcing law. I have elsewhere addressed the question of whether the intelligibility requirement courts anarchy, but it's worth focusing on whether intelligibility will create pragmatic problems for religious exemptions in particular.[43]

Justice Scalia advanced a version of the anarchy objection in *Employment Division v. Smith*. If the state must always show a compelling interest to justifiably burden religious citizens, it would be 'courting anarchy' because it would commit itself to 'deeming *presumptively invalid*, … every regulation of conduct that does not protect an interest of the highest order'. The resulting prospect would generate exemptions from 'civic obligations of almost every

[42] I assume here, for the sake of argument, that the draft provides a considerable social benefit to the US, though I do not think this is a plausible position.

[43] See Vallier (2014, pp. 214–217).

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conceivable kind'.[44] But surely Scalia exaggerates. Judges often accommodate religious complaints, and while courts have not always articulated principled reasons for these accommodations, we need not worry about a sharp slippery slope even under our present institutions.[45] To add to this point, members of the public are often rationally committed to complying with decision procedures to settle their disputes, so we need not regard many accommodation requests as a threat given that they can be settled in publicly justified ways.

However, even if critics set aside the anarchy objection, they will likely claim that a regime of extensive accommodation would undermine the rule of law. Politics cannot be merely a matter of 'particularistic requests for exceptions' based on complaints of unfairness, for otherwise 'governance in even a moderately heterogeneous society would be impossible, and there would be no such thing as the rule of law'.[46] There are two practical problems here. First, on my view, the informational and adjudicative demands of assessing citizens' diverse and dispersed claims may significantly burden judges and legislators. When accommodations are confined to small groups like the Amish, these judicial and legislative burdens are low. But one can argue that my view substantially increases these burdens. Second, the cumulative effect of religious accommodations may undermine the rule of law because coercive laws will need so many exceptions that legislatures lose their ability to provide clear and general behavioral guidelines.

I offer two replies. First, these problems assume that religious exemptions are largely granted during or following the legislative process. But the Principle of Intelligible Exclusion permits almost any institutional solution that prevents citizens from being unjustifiably coerced. The drawbacks of legislative and judicial tinkering should lead us to support institutions that reliably avoid imposing problematic laws on the populace in the first place. The costs of ex post accommodation require that our institutions be less friendly to the use of coercion in general. For instance, *Smith* involved a religious exemption from the penalties of breaking federal anti-drug laws, in

[44] *Smith*, 110 Sup. Ct. 1595 (1990), p. 1605. Cited in Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge: Harvard University Press, 2000a), pp. 192–193.

[45] Even Stephen Macedo, a consensus liberal, thinks Scalia exaggerates. With expansive exemptions, 'we are not on a quick slide into the abyss' (*Ibid*., p. 195).

[46] Macedo (2000a, pp. 204–205).

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this case laws restricting the use of peyote. But if the U.S. government was less interested in prosecuting a paternalistic drug war of questionable efficacy, then the use of peyote would never have been regulated in the first place, such that *Smith* would not have arisen.[47] A more limited government could avoid the pragmatic problems associated with extensive exemptions.

A second, more moderate option would be for legislatures to more clearly articulate principles on which religious exemptions are based. With clear principles, it would be easier for legislators to fashion legislation that would avoid raising concerns about religious exemptions. Furthermore, judges could more easily evaluate religious complaints. For example, judicial arguments about exemptions often seem to be in tension with one another, as in some cases conscientious objections are ruled to override the state's interest and in other cases the opposite occurs. A more consistent approach could alleviate the problems associated with our piecemeal practice. Arguably we've already moved in this direction with the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. Judges have had legal guidelines for administering exemptions for many years.

VII. MULTICULTURAL ARRANGEMENTS

In order to illustrate the power of the theory I have developed, I would like to examine the public justification of legal arrangements in cases where diverse legal rules are imposed on people depending upon their religious affiliation. Consider the division of marriage and divorce law in India, where separate statutes govern Hindus, Muslims, and Christians, and other religious groups.[48] Indian Muslim law, for instance, is partly based upon the Sharia. The contours of these codified legal systems have varied considerably over the centuries, and since Indian independence, there have been attempts to harmonize these laws, but differences remain. In the case of Indian family law, it is not helpful to describe the variability of the laws in

[47] Of course, Smith and Black's employer may still have fired them, but Oregon would have had no grounds on which to deny them unemployment benefits.

[48] These laws have been specified under various Indian laws, such as the Hindu Marriage Act of 1955, the Special Marriage Act of 1954, the Foreign Marriage Act of 1969, the Muslim Personal Law Application Act of 1937, The Dissolution of Muslim Marriages Act of 1939, the Muslim Women Act of 1986 and the Christian Marriage Act of 1872.

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terms of exemptions, as the laws are indexed to different religions, none of which are practiced by the overwhelming majority of the populace. We are instead focused on multicultural arrangements.

The principle of intelligible exclusion has no problem with multicultural legal arrangements, at least not in principle.[49] The justification or defeat of such laws will depend on the reasons of the various populations, and given the interest various religious groups have in living in accord with their own laws and not generating civil strife between different religious populations, there is a good case to be made for varying legal regimes. In these cases, condition (c) can be dispensed with, as there may be no majority view about which laws should apply. If each group gets their preferred system, then few costs should be imposed on the others, so condition (d) will be met. The main question, then, is whether each group has sufficient reason to endorse a set of laws that apply to them and that the laws do not substantially burden the integrity of any of those groups. In the case of polycentric marital statues, these conditions appear to be met. Persons can self-sort based on their religious commitments, such that they both have sufficient reason to endorse the marriage law that applies to them and experience no burden at all on their integrity, as the burdens of marital law are not integrity-violating burdens. Thus, polycentric arrangements of this sort can be publicly justified under some conditions. At this stage, we cannot say anything definitive, but it is worth pointing out that the principle of intelligible exclusion permits these arrangements.

VIII. RELIGION IS NOT SPECIAL[50]

While liberal political theory tends to favor secular citizens, liberal political practice tends to favor *religious* citizens. The Constitution protects the free exercise of *religion* and not secular moral philosophies. Commonly cited examples are the panoply of exemptions given to the Amish. The courts would not protect secular persons who offered similar objections.[51]

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[49] So long, of course, that the marriage law is not systematically abused, such as using the law to shield men from exploiting young women through early marriage.

[50] Some of the following section is covered in Vallier (2014, pp. 217–219).

[51] Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013), p. 3.

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Some argue that by giving special preference to religion, U.S. constitutional law establishes an inequitable privilege for religious over secular forms of life. But this preferential treatment of religion is inconsistent with the Equal Protection clause of the Fourteenth Amendment. We can illustrate with a prominent counterexample – conscientious objections to the military draft. For a significant stretch of U.S. history, conscientious exemptions were only given to pacifist Christian denominations. In the 1940s, conscientious objector status was extended to all theistic religions.[52] Two decades later, conscientious objector status was extended to nontheistic religions and finally to nonreligious, moral doctrines.[53] American lawmakers often resisted this broad extension of conscientious objector status on the grounds that such an extension would permit too many exemptions and encourage deception on the part of objectors. But equal treatment won out and few legislative problems manifested themselves.[54]

Several legal theorists have argued that preferential treatment of religion is morally unjustified. Michael Perry has defended a right of 'moral freedom' that is symmetrical with the presently recognized right of religious freedom.[55] If he is correct, the reasons that count in favor of the legal protection of religious conscience apply no less forcefully to moral conscience: the features that make religion worthy of protection (such as its central role in structuring values and practices) apply to moral doctrines as well. Greenawalt has countered that a number of practical, legal and moral reasons appropriately motivate courts to give religion a special status. For instance, many judges may have trouble distinguishing sincere conscientious objections from less important moral objections unless they use religion as a standard of demarcation.[56] Legal tradition itself might provide reason to protect religion's special treatment as well. And in comparison to nonreligious moral claims, the standard true

[52] See *United States v. Kauten* (1943) and *Berman v. United States* (1946).

[53] In *United States v. Seeger* (1965) and *Welsh v. United States* (1970) respectively.

[54] Though there are other practical problems, such as the difficulties faced by conscientious objectors that are atheists. For a discussion of problems, such as those raised by *Welsh v. United States*, see Andrew Koppleman, 'The Story of *Welsh v. United States*: Elliott Welsh's Two Religious Tests', in Richard Garnett and Andrew Koppleman (eds.), *First Amendment Stories* (Foundation Press, 2011).

[55] Michael Perry, 'From Religious Freedom to Moral Freedom', *San Diego Law Review* 47(4) (2010): pp. 993–1013, p. 996. The literature on this question is rather large and I cannot adequately review it here. For a helpful overview, see Micah Schwartzman, 'What if Religion Isn't Special?', *University of Chicago Law Review* 79(4) (2012): pp. 1351–1427. I raise the issue of whether religion is special to illustrate how my theory approaches the issue.

[56] Greenawalt (2006, p. 906).

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believer seems to have more at stake, because 'God may punish wrongdoers when this life is over'.[57] But even Greenawalt eventually admits that if nonreligious claims of conscience are sufficiently similar to religious claims, and if there are no overriding independent concerns, the Equal Protection Clause combined with the Establishment Clause should be read as requiring that religious and moral claims be treated symmetrically.[58] Because intelligible defeaters can be either religious or secular, I draw no morally relevant distinction between the two. It follows that asymmetric treatment of religion and morality in the law is unjustified.

It will be useful to contrast my view with Brian Leiter's recent argument that religion should not receive special legal treatment.[59] Leiter contends that religion does not deserve special treatment because there is no feature essential to religious belief that requires the sort of respect that would justify special treatment. In particular, religion is not worthy of 'affirmative' respect, where religious belief is respected based on some virtue or merit of people who typically hold such beliefs.[60] Instead, religious belief merely requires 'recognition' respect, understood as the simple toleration of religious belief. This is because most contemporary religious beliefs are 'culpably false', given the force of Enlightenment critiques of religion.[61] Religious belief is culpably false belief in part because religious belief, by its very nature, does 'not answer ultimately … to *evidence* and *reasons,* as these are understood in other domains concerned with knowledge of the world'.[62] Since, plainly, there is no reason to affirmatively respect culpably false belief that is essentially insulated from evidence and reason, there is little reason for the law to give religion special treatment. In part because Leiter seeks to *downgrade* respect for religious belief, he takes what Greenawalt terms the neutral-restrictive approach, where there is no presumption on behalf of protecting claims of conscience.[63] Religious belief is not to be singled out and 'there should not be exemptions to general laws with

[57] *Ibid.*, p. 914.
[58] *Ibid.*, p. 917.
[59] Leiter (2013).
[60] *Ibid.*, pp. 77–85.
[61] *Ibid.*, p. 77.
[62] *Ibid.*, p. 34.
[63] *Ibid.*, p. 130.

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neutral purposes, unless those exemptions do not shift burdens or risks onto others'.[64]

My view stands in stark contrast to Leiter's. I seek to *upgrade* respect for nonreligious comprehensive and moral belief to the level presently extended to religious belief. Following Rawls, I extend reasonable pluralism to cover most forms of religious belief and deny that political theory should proceed based on the assumption that religious belief is culpably false. Leiter assumes without argument that even contemporary analytic philosophical views like reformed epistemology or Thomistic natural law ethics are culpably *post hoc* attempts to defend religious belief in the face of counterevidence.[65] In contrast, the epistemology appropriate to political theory allows that at the right level of idealization, members of the public will *non-culpably* affirm such views, despite the purported force of Enlightenment critiques of religion.[66] If we hold that even philosophically sophisticated members of the public have culpably false views, then we deny reasonable pluralism, a foundational assumption of public reason liberalism.

It is no surprise, then, that Leiter views Rawls's political turn as 'unfortunate' because political liberalism does not permit dismissing as culpably false (half of) the views that instigate the religion and politics debate.[67] Because Leiter does not recognize reasonable pluralism in this robust sense, it is natural for people of faith to find his view off-putting, a demerit of his position. Given Leiter's rejection of reasonable pluralism, then, we should reject his neutral-restrictive approach.

IX. THE IMPORTANCE OF STANDARDS IN TIMES OF CONTROVERSY

With the HHS contraception mandate and the progress of marriage equality, the question of the scope of religious liberty has become a timely, critical and unfortunately partisan issue. Elaine Huguenin, the Green Family, and Little Sisters of the Poor ask to be exempt

[64] *Ibid*., p. 4.

[65] *Ibid*., pp. 81, 90.

[66] See Vallier (2014, pp. 158–160) for an argument to this effect. Convergence-based public reason liberals do not extend this respect to religious belief *simply because it is religious*, but rather because on a convergence account of justificatory reasons, religious reasons will almost certainly count as justificatory in a great many cases.

[67] Leiter (2013, p. xviii).

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from the legal institutionalization of progressive ideals of sexual morality; opposition and support for their requests are often ferocious. To cut through the controversy, we need philosophically attractive and non-partisan methods of determining whether they merit exemptions on moral grounds. For this reason, my aim has been to develop such a standard for judging when a liberal society morally must grant groups and individuals religious exemptions from laws. My claim is that within public reason liberalism, we should adopt a principle of intelligible exclusion, which holds that coercive laws that persons have sufficient intelligible reason to reject should not be imposed upon those objectors. In the presence of intelligible defeaters, individuals and groups should be exempt from laws that impose unique and substantial burdens on their integrity, in cases where the large majority of other citizens have sufficient reason to endorse the law, and if the costs of the exemption paid by the rest of the public are non-trivial or compensated for. Otherwise, the laws in question must be repealed or no exemption may be granted. I have also argued that religious reasons are not unique in justifying exemptions. Secular reasons must be accorded similar normative power.

Given the recognition of reasonable pluralism and the vast panoply of defeater reasons allowed into public justification by the intelligibility requirement, religious exemptions will be publicly justified in a wide array of cases.

X. APPENDIX: EXEMPTION TABLE

I've included this appendix to determine when an exemption is permitted or required (if there is to be a law at all, for no law is always permissible on a public reason view). The table below generates an answer based on the rankings of laws, exemptions, and no law for both the minority requesting the exemption and the majority population. That is, whether an exemption is permitted or required (and even whether there may be a law) is a *function* of (a) the ranking of three options by (b) two groups, the majority and the minority. Define 'L' as the law, an exemption as 'E', with 'L + E' counting as implementing the law in conjunction with the exemption. I will label 'no law' as '∼L' whereas 'L' implies a law without the exemption. The minority populace is designated α and the remaining populace

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as φ such that α and φ will rank L, ~L and L + E. All the relations are ones of strict preference (A $\succ$ B or A $\prec$ B). There are no indifference relations (A $\doteq$ B) or weak preference relations (A $\succcurlyeq$ B or A $\preccurlyeq$ B). We are left with six preference permutations for both α and φ:

{L, ~L, L + E}
{L, L + E, ~L}
{~L, L, L + E}
{~L, L + E, L}
{L + E, L, ~L}
{L + E, ~L, L}

Notice: when ~L is preferred to L, L is defeated. In fact, that is what it means for a law to be defeated – that the evaluative standards of members of the public regard no law as superior to the law. When both parties rank two options higher than ~L then those options form an *eligible set* where public reason permits the state to impose either option without disrespect or authoritarianism. This will mean that in some cases, such as when both parties have {L, L + E, ~L} as a left-to-right ranking, an exemption is permitted but not required.

Given all the possible rankings, we'll end up with 36 options, but we can forgo charting obvious cases.[68] We can exclude all cases when φ ranks ~L highest, as it generates repeal, which sets 12 options aside. However, when the minority α ranks ~L highest, this generates L + E as the appropriate social alternative. Remember that since E applies to α, L + E does not affect them. So α does not rank L + E, just as a citizen of the United States does not rank French laws.[69] We only rank laws that apply to us. This will condense the remaining 24 options into 8 that I have placed in the following table:

[68] In these cases, I'm assuming that the law will be imposed on the majority, if it is imposed at all. I addressed cases where the law may be applied only to minorities in Section VII.

[69] One might argue that we have an interest in others being treated properly. Perhaps so, but public reason liberalism need not address this problem by allowing people to rank laws that would impose no coercion on them. Instead, their concerns can be treated as evidence that the people coerced have defeaters. If the coerced group lacks a defeater, however, the objector group cannot defeat the law.

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φ Ranking	α Ranking	Eligible Outcomes (Note: ~L is always permitted)
{L, ~L, L + E}	{L, ~L}	Law Applied Uniformly
{L, ~L, L + E}	{~L, L}	Exemption Required
{L, L + E, ~L}	{L, ~L}	Law Applied Uniformly or Exemption
{L, L + E, ~L}	{~L, L}	Exemption Required
{L + E, L, ~L}	{L, ~L}	Law Applied Uniformly or Exemption
{L + E, L, ~L}	{~L, L}	Exemption Required
{L + E, ~L, L}	{L, ~L}	Either Exemption Required or Repeal
{L + E, ~L, L}	{~L, L}	Exemption Required

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