NEGOTIATING RELIGIOUS EXEMPTIONS: A PUBLIC REASON PERSPECTIVE

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ABSTRACT

In this thesis I elaborate on three reasons why religious exemptions from generally applicable laws are not publicly justifiable in a liberal democratic society. First, mere claims of the form “God says so and my conscience requires that I obey” do not explicate the rationale behind the legal provisions that they are expected to support. Therefore, such claims cannot be regarded even as *pro tanto* justificatory reasons for any legal provisions, be it laws or exemptions. Second, no matter how elaborate they are, reasons based on religious faith cannot be allowed in public justification of exemptions because such reasons involve non-negotiable claims about final values, which is incompatible with respect for fellow citizens as equal co-legislators. Third, even if religious arguments are allowed in public justification, carving out religious exemptions from generally applicable laws is still impermissible because it arbitrarily bends the sovereign will of the people to the dictate of religious doctrines.

RESUMEN

En esta tesis explico tres razones por las cuales las exenciones religiosas de las leyes de aplicación general no son públicamente justificables en una sociedad democrática liberal. Primero, las meras afirmaciones de la forma "Dios lo dice y mi conciencia requiere que obedezco" no explican las razones detrás de las disposiciones legales que se espera que respalden. Por lo tanto, tales reclamos no pueden considerarse incluso como razones justificativas *pro tanto* de ninguna disposición legal, ya sean leyes o exenciones. En segundo lugar, no importa cuán elaborados sean, las razones basadas en la fe religiosa no pueden admitirse en la justificación pública de las exenciones porque tales motivos implican reclamos no negociables sobre los valores finales, lo que es incompatible con el respeto de los conciudadanos como colegisladores iguales. En tercer lugar, incluso si los argumentos religiosos son permitidos en la justificación pública, dar las exenciones religiosas de las leyes de aplicación general sigue siendo inadmisible, porque cede arbitrariamente la voluntad soberana del pueblo al dictado de las doctrinas religiosas.

INTRODUCTION

Liberal democracies protect individuals' freedom of conscience and religion. This implies that discrimination against citizens on the grounds of their religion is illegitimate. However, laws that are not intended to regulate anyone's exercise of religion may happen to contradict some citizens' religious convictions. Sometimes in these situations religious citizens succeed in getting legal exemptions.

For example, in Britain turban wearing Sikhs are exempt from the requirement to wear a protective helmet while riding a motorbike (*Road Traffic Act 1988,* Section 16). In the U.S.A. Indian religious practitioners are exempt from laws that ban the use of peyote (*American Indian Religious Freedom Act Amendments of 1994*). Also in the U.S.A. closely held for-profit corporations whose owners have religious objections against abortion are exempt from parts of the *Affordable Care Act* that require employers to cover certain contraceptives in their female employees' medical insurance plans (*Burwell v. Hobby Lobby Stores Inc.*).

Unsurprisingly, there is hardly any case of religious exemption that does not spark controversy. In the Canadian province of Ontario Sikhs have been lobbying for the helmet exemption since 2008, and they still have not succeeded, while in British Columbia and Manitoba the exemption exists (*CanadaMotoGuide* 2016). The peyote exemption was initially denied by the U.S. Supreme Court decision in *Employment Division v. Smith*, but it was carved out after the Congress passed the *Religious Freedom Restoration Act* (RFRA). The latter ensures that a person's free exercise of religion may be substantially burdened only if it is the least restrictive means of furthering a compelling governmental interest. The RFRA figured prominently in the debate on *Burwell v. Hobby Lobby,* in which case, however, only a narrow majority of 5 out of 9 Supreme Court Justices voted for the exemption.

There are two opposite theoretical views on how liberal democratic states should respond to demands for religious exemptions from generally applicable laws.

The most prominent liberal opponent of religious exemptions was Brian Barry who rejected them on the grounds that either the case for a law is strong enough to rule out exemptions, or there should be no law anyway (2001, 39). Ronald Dworkin argued that religious freedom is part of general ethical independence, not a special right to a particular liberty, like the right to free speech or the right to due process and fair trial (2013,

130–37). Accordingly, he endorsed the Supreme Court's decision in *Employment Division v. Smith* and was critical of the RFRA. In his view, the government cannot forbid drug use just because it is shameful, but drugs may well be banned merely because their use "threatens general damage to the community." The fact that some people use drugs for religious reasons does not make it necessary to give any special or additional "compelling" justification (Ibid., 135).

Such views are criticized for failing to show equal respect for the conscience of believers, especially of those who adhere to minority religions (Nussbaum 2008, Chapter 4; Ceva 2011; Ead. 2017; Cooke 2017). Proponents of religious exemptions argue that, even if religion is not special as compared to non-religious moral and philosophical doctrines (Bedi 2007, Schwartzman 2012b, Leiter 2013, May 2017), religious convictions are not mere preferences. They are the "yield of conscience" (Perry 2010, 91), which is "a precious internal faculty… for searching for life's ethical basis" (Nussbaum 2007, 342) that produces "core meaning-giving beliefs and commitments" (Maclure and Taylor 2011, 75–80). Living in accordance with their religion is a matter of individuals' identity (Eisenberg 2016), their moral integrity (Bou-Habib 2006, Vallier 2012), their moral rights (Ceva 2011), and basic interests (Shorten 2010, Seglow 2017).

So, the standard liberal egalitarian approach to religious exemptions is much more permissive than Barry and Dworkin would allow: free religious exercise may be protected by legal exemptions insofar as they do not infringe on anyone else's rights. In other words, claims of religious exemptions should be balanced against the countervailing claims of rights and legitimate interests of other citizens (Quong 2006; Maclure and Taylor 2011, 65–75, 100–1; Cohen 2016, 141–4; Vallier 2016b; Billingham 2017; Patten 2017a,b; Pearson 2017, 68–75; Laborde 2017, 221–9).

I will argue that the standard approach is extremely inconclusive (see Sections 1.1 and 3.1–3.3). Under the conditions of deep moral and ideological disagreement (Ferrara 2014, Chapter 4) the balancing procedure struggles to deliver unequivocal results. As a brief example, think of the controversy around religious refusals of services related to same-sex weddings,[1] which I discuss in detail further in this thesis. A civil registrar re-

[1] E.g. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* decided by the U.S. Supreme Court in 2018 and *Eweida and Others v. United Kingdom* decided by the European Court of Human Rights in 2013.

fuses to issue marriage licenses for same-sex couples, a baker would not bake a wedding-cake, a florist would not make flower arrangements, and a photographer would not make pictures of same-sex wedding ceremonies. In all these cases same-sex couples accuse religious individuals of discrimination on the basis of sexual orientation. Their opponents respond with counter-accusations of infringement on the free exercise of religion and demand exemptions from those anti-discrimination laws that go against their religious commitments. In order to strike the right balance between these contradicting claims it has to be decided whether following the precepts of one's religion freely is more or less important than openly expressing one's sexuality without being stigmatized by others. I think that for those liberals who are neither religious, nor gay pride enthusiasts answering this question is at best enormously difficult, but most likely simply impossible.

Certainly, proponents of the standard approach to religious exemptions are aware of such deadlocks of conflicting claims derived from incompatible value systems. They are also well aware of the diversity of religious doctrines, practices, and experiences that may defy conventional views and rules of conduct in multiple ways. So, in order to fulfil the commitment to reasonable pluralism in the face of this diversity liberal egalitarians try to avoid making judgments about the truth of religious views and moral appropriateness of the practices that the claimants seek to protect. To this end the actual arguments by which religious citizens could justify their demands for exemptions are substituted with one generic argument on their behalf: "I believe that my God commands that I do *X*, and as the state is committed to free religious exercise, it should allow me to do *X*" (Laborde 2013, 181). As a result the standard approach becomes all the more vague and incapable of providing guidelines towards principled solutions in concrete cases. It affirms an abstract principle of liberty of conscience, but gives no clue of how to assess its value in relation to other rights and liberties or what to do when incompatible "claims of conscience" clash with one another.

Apparently, liberal egalitarians do not consider such vagueness a serious flaw. Some of them readily acknowledge that actual solutions are too complex to be reached by algorithms (Seglow 2017, 189). In each particular case, they say, decisions should depend "upon a context-sensitive judgment of the balance of interests" (Billingham 2017, 20; also see: Beatty 2002, Chapter 2; Pearson 2013). The most striking confession on what to expect from the standard approach belongs to Peter Jones. He writes: "…Legal exemptions, both religious and non-religious, are better conceived as exercises in adhock-

ery. <...> We need not suppose that a case for an exemption must be grounded in justice. Nor need we suppose that exemptions should relate only to matters of great moment. It should be enough that an exemption constitutes a 'defensible' or 'reasonable' arrangement in all of the relevant circumstances" (Jones 2017, 173).

To my ear this sounds like recognition of a failure to develop a reliable method of addressing demands for religious exemptions. I think, it results largely from the avoidance of critical engagement with the arguments by which religious citizens do or could support their demands, including the abovementioned generic argument "My God commands that I do *X*..." Thereby, the question of exemptions, indeed, remains a "blind spot" in liberal political theory (Stoeckl 2017, 40–1). My approach will be opposite to the standard one: I will suggest a principled generalized account of demands for religious exemptions based on direct engagement with the arguments that are used to support them. The subject matter of these arguments, their epistemic characteristics, and their political significance is what I will focus on in the three articles that make up this thesis.

As a method I suggest that we look at religious exemptions from the perspective of public reason. Public reason is "the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution" (Rawls 2005, 214). Given this broad definition, "the perspective of public reason" refers to an integral part of any rational approach to democratic politics. It implies that members of the public do not merely voice the opinions about their preferred legal provisions, but try to justify these opinions to one another by arguments that others can at least understand.

Hence the main question of this thesis: Are religious exemptions from generally applicable laws publicly justifiable in a liberal democratic society?

The content of public reason has two parts: one is constituted by the "substantive principles of justice for the basic structure [of society]"; the other includes "principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them" (Ibid., 224). So, generally speaking, my aim is to find out whether or not arguments by which religious citizens support their demands for exemptions are appropriate for public justification of legal provisions, and whether or not these arguments are consistent with the principles of justice in a modern constitutional democracy.

Specifically, the three articles in this thesis address the following three questions:

1) Given the fact that sometimes individuals struggle to provide rational motivation for rules and practices they adhere to, it makes sense to ask: Do those arguments by which religious citizens justify their demands for exemptions make proper *reasons*?

I will argue that claims of the form "God says so and my conscience requires that I obey" do not explain the rationale behind the practices that the claimants seek to protect by legal exemptions. These arguments are what Francis Bacon called *idola fori* — "idols of the marketplace" — conventional justifications that are deemed self-evident, while in fact they are not. Despite their apparent persuasiveness, religious claims of conscience do not meet even the most inclusive standards of public justification — they are not reasons.

However, I do not intend to deny that religious doctrines can provide elaborate rational explications of problems that the public may be concerned with. Arguments against abortion that invoke the Bible together with philosophical reflections on ensoulment and human existence make a good example (e. g. Ford 1991, Haldane and Lee 2003). Such arguments fully deserve to be called *reasons,* hence the second question.

2) Given the fact of deep moral and ideological disagreement among the citizens in contemporary liberal democracies, it makes sense to ask: Do religious reasons make proper *public* reasons?

I will argue that insofar as religious reasons are based on faith — an unconditional fidelity to God — they involve making non-negotiable claims, and making non-negotiable claims in public justification of laws and exemptions is incompatible with respect for fellow citizens as free and equal co-legislators. Therefore, reasons based on religious faith do not make proper public reasons.

However, I recognize that currently the moral and ideological disagreement in contemporary liberal democracies is deep enough to raise doubts whether any attempt to exclude religious arguments from public justification is feasible. Therefore, although my negative answer to the second question makes it logically redundant, for polemical purposes it still makes sense to search for additional arguments that could support my opposition to religious exemptions. Hence the third question.

3) Are those arguments — whether reasonable or not — by which religious citizens justify their demands for exemptions consistent with the basic principles of modern constitutional democracy?

I will argue that it is possible to consider demands for religious exemptions respectfully, without even challenging the way they are justified, but still reject them for principled reasons — namely, because these demands cannot be met without arbitrarily bending popular sovereignty to the dictate of religious doctrines.

So, my answer to the main question will be negative: religious exemptions from generally applicable laws are not publicly justifiable in a liberal democratic society. I will elaborate on this general answer in the Conclusion.

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1. RELIGIOUS EXEMPTIONS, CLAIMS OF CONSCIENCE, AND *IDOLA FORI*

Abstract

According to the standard liberal egalitarian approach, religious exemptions from generally applicable laws can be justified on the grounds of equal respect for each citizen's conscience. I contend that religious claims of conscience cannot justify demands for exemptions, since they do not meet even the most inclusive standards of public justification. Arguments of the form "God says so and my conscience requires that I obey" do not explicate the rationale behind the practices that the claimants seek to protect by legal exemptions. Such arguments are not reasons. Rather, they are what Francis Bacon called *idola fori* — "idols of the marketplace" — conventional explanations that are deemed rational and even self-evident, while in fact they are not.

Religious freedom is protected by international conventions and constitutions of liberal states. However, generally applicable laws that are not aimed at regulating anyone's exercise of religion may happen to contradict some citizens' religious convictions. Should liberal democracies exempt religious citizens from these laws?

The standard liberal egalitarian approach to religious exemptions justifies them on the grounds of equal respect for each citizen's conscience (Ceva 2011; Maclure and Taylor 2011, Part 2; Nussbaum 2012, Chapter 3). The aim is to give maximum protection of liberty of conscience in general and religious liberty in particular that is compatible with the same protection of other rights and liberties (Pearson 2017, 69). To this end the demands of religious citizens ought to be balanced against the countervailing claims of others (Bou-Habib 2006, 122–4; Ceva 2011, 22; Maclure and Taylor 2011, 100–5; Vallier 2016b, 15–8; Billingham 2017, 19–20; Laborde 2017, 221–9; Patten 2017a, 212–7; *Id.* 2017b, 21–4).

Recent cases of religious refusals to provide services for same-sex weddings (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, State v. Arlene's Flowers, Miller v. Davis, Elane Photography v. Willock*) call into question whether the idea of balancing claims of religious conscience against the countervailing claims of rights and liberties leads to any clear solutions. In all these cases same-sex couples accuse devout

believers of discrimination on the basis of sexual orientation; their opponents respond with counter-accusations of infringement on the right to free exercise of religion. Apparently, it is hard to determine whose accusations are "heavier."

As I will argue in Section 1.1, this is not only an apparent difficulty of the standard approach, but a genuine impasse. When parties in dispute over a legal provision accuse each other of infringement on their rights and liberties the only way to resolve the standoff between them is to decide whose take on the problematic issue is better justified. But justification of contradictory claims on the formal grounds of respect for the claimants' conscience is too vague to provide an uncontroversial basis for such a decision.

In Section 1.2 I will argue that claims of conscience, including those of religious individuals, do not constitute even *pro tanto* justificatory reasons for carving out exemptions from publicly justified generally applicable laws. Arguments of the form "God says so and my conscience requires that I obey" do not explicate the rationale behind the practices and rules of conduct that the claimants seek to protect by legal exemptions. Such arguments do not meet even the most inclusive standards of public justification. Claims of conscience that devout believers present as their justificatory "reasons" are hardly worthy of the name. Rather, they are what Francis Bacon (2000 (1620)) called *idola fori* — traditionally translated as "idols of the marketplace" — conventional explanations that are deemed rational and even self-evident, while in fact they are not.

Finally, I will respond to three major objections against my criticism of religious claims of conscience in Section 1.3 and spell out the key policy implication of my theoretical argument in the conclusion.

1.1. The elusiveness of the standard approach

An uncomfortable question

By now *Masterpiece Cakeshop v. Colorado Civil Rights Commission* is the only case of a religious refusal of services for same-sex weddings that has been decided by the U.S. Supreme Court. In this case Jack Phillips, a devout Christian and expert baker from Colorado, refused to create a cake for the wedding celebration of Charlie Craig and Dave Mullins because of a sincere religious opposition to same-sex marriage. The Colorado Civil Rights Commission found that Phillips had violated the Colorado Anti-Discrimination Act, which prohibits discrimination based on sexual orientation in places

of business that provide services to the public. In 2015 the Colorado Court of Appeals affirmed the Commission's order and ruled in favor of the couple.

The U.S. Supreme Court reversed the decision on the grounds of the Commission's failure to treat Jack Phillips's case impartially. Firstly, the Court pointed out that in at least three other cases the State Civil Rights Division supported bakers who declined to create cakes with messages directed against gay persons and same-sex marriage. Secondly, the Court drew attention to a comment by one of the Commission's members who argued that "freedom of religion and religion has been used to justify all kinds of discrimination throughout history" and called it "one of the most despicable pieces of rhetoric that people can use <…> to hurt others" (*Masterpiece Cakeshop Ltd. v. Colorado…,* 13). The fact that other commissioners did not object against these comments strengthened the Court's opinion that their treatment of Jack Phillips's case "showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection" (Ibid., 2). However, writing for the majority, Justice Kennedy withheld a principled judgment on whether or not in this and similar cases the claims of religious individuals have more weight than the claims of same-sex couples. He concluded that "the outcome of cases like this in other circumstances must await further elaboration in the courts" (Ibid., 18).

Let us consider how the elaboration on cases similar to *Masterpiece Cakeshop* might proceed if the courts adopted the standard liberal egalitarian approach. As I have already mentioned, this approach utilizes a common sense idea that everyone's rights and liberties must be correlated with those of others. The case for exemption emerges when a *prima facie* neutral legal provision makes it disproportionately burdensome for some citizens to follow the precepts of their religion. The exemption is due, however, only if it does not infringe on the rights of others (Maclure and Taylor 2011, 100–1).

The latter clause is problematic. It is insufficient to justify a denial of a religious exemption by saying that otherwise some citizens' rights and liberties will be violated. From the claimants' point of view, some citizens' rights and liberties are being violated already — namely, their own right to free exercise of religion is violated by the law they seek to be exempted from. Therefore, in order to deny an exemption under this clause, it is necessary to demonstrate that the claimants' religious freedom deserves less protection than those rights and liberties of others that will be violated if the exemption is allowed. It is correct to say that in cases like *Masterpiece Cakeshop* the government has a compelling

interest in protecting citizens from discrimination on the basis of sexual orientation, but it is just as correct to say that the government has a compelling interest in protecting the citizens' religious freedom. So, whose rights are more important — same-sex couples' right to non-discrimination, or small business owners' right to free exercise of religion?

This question feels uncomfortable, for it potentially leads to an even more puzzling question of whether following the precepts of one's religion freely is more or less important than openly expressing one's sexuality without the fear of being stigmatized by others. But there is a version of the standard approach that tries to bypass this kind of potentially intractable problems.

Avoiding uncomfortable questions

Recently Alan Patten has suggested that we analyze the issue of religious exemptions in terms of "fair opportunity for self-determination." On this account, whether a burden on a religious practice is fair must be determined in accordance with the following principle: "Each individual has a legitimate claim on the most extensive opportunity to pursue his or her ends that is justifiable given the reasonable claims of others." Consequently, "while a restriction on rights-violating religious conduct does constitute a limit on the opportunity of the religious believer, it does not deny such a person fair opportunity, since the restriction is justifiable with reference to the reasonable claims of those who would suffer rights violations" (Patten 2017b, 145, 151).

At this point we are still facing the clash of religious liberty with the right to non-discrimination. Phillips's opponents think that anti-discrimination laws impose a reasonable limitation on his free exercise of religion, while allowing him an exemption would mean violation of the rights of LGBTQ+ individuals. On the contrary, in Phillips's view, the exemption would impose a reasonable limitation on the protections from discrimination that LGBTQ+ individuals may demand, while a uniform application of anti-discrimination laws would mean violation of the rights of religious people.

However, Patten's approach promises a way out of this predicament, because self-determination has multiple aspects. It involves not only individuals' religious convictions and marital status, but also their choices of occupation, career, membership in communities and organizations etc. In order to decide whether the exemptions in cases like *Masterpiece Cakeshop* are fair, it is necessary and helpful to consider "the importance of economic freedom to fair opportunity for self-determination <…>, the availability of

alternative employment for affected employees and alternative business providers for affected consumers, and whether a private business practice contributes to a general pattern of stigmatization and exclusion from which people have a reasonable claim to be free" (Ibid., 153).

Apparently, addressing these issues moves the conversation forward. Individuals may have different reasonable perspectives on how to exercise a profession or handle a business. It is fair to accommodate as much of them as possible. Therefore, it is desirable that religion and other aspects of one's culture do not constitute an unsubstantial and yet insurmountable impediment to entering and keeping a profession. As Jonathan Quong puts it, "in the original position, participants would prefer a system of rules that enabled them to combine these [cultural] opportunities with those of employment and education over a system of rules that required some individuals to make stark choices between religious or family pursuits and the opportunities of employment and education" (2006, 66). So, on the one hand, without the exemption people like Jack Phillips will have to either act against their conscience or pay high penalties, loose their businesses, and quit their jobs. It does not seem reasonable that a religious objection against creating cakes for one very specific type of occasion must preclude an individual from working as a baker. On the other hand, if the exemption exists, all that same-sex couples will have to do is visit another bakery, contact another florist or wedding photographer, and, at worst, take a drive to a neighboring county clerk's office to get their marriage license there.

These pragmatic considerations make the case for exempting people like Jack Philips from the anti-discrimination provisions that protect same-sex couples. Nevertheless, some might reject them following the Washington Supreme Court's argument in a similar case of a florist's refusal to create flower arrangements for a same-sex wedding: "[Such cases are] no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches" (*State v. Arlene's Flowers*, 52). The Court's phrasing echoes the words quoted in *Heart of Atlanta Motel, Inc. v. U.S.*: "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color" (*Heart of Atlanta…,* 292), or — as in *Masterpiece Cakeshop* and similar cases — because of his or her sexual orientation. Thereby, one may give preference to a logic according to which considerations about individuals' vocational options, access to goods and services etc. play only a secondary

role in deciding upon cases of discrimination. Discriminatory refusals of jobs and services are relevant first and foremost as symbolic expressions of a bigoted and hurtful misrecognition of certain identities.

Those who defend the exemptions for Phillips et al. argue that in cases like *Masterpiece Cakeshop* it is important not to overemphasize the apparent analogy with laws and policies of racial segregation. In their view, the current cultural situation in the United States is unlikely to produce a widespread systemic stigmatization and exclusion of same-sex couples. As Andrew Koppelman puts it, "the gay rights movement has won. It will not be stopped by a few exemptions. It should be magnanimous in victory" (2015, 628). Seeking to exploit the unsettling reminiscence of the segregationist past to the benefit of same-sex couples, Douglas Laycock (2008, 198–9) suggests that business-owners must be required to make notes of their discriminatory policy on their websites and signs outside their premises. He assumes that this might deter many of the shop-keepers from using the exemption, because they would fear loosing potential non-LGBTQ+ customers who disapprove of their discriminatory policies.

This counterargument inadvertently exposes the very limited significance of the requirement to account for the "general patterns of stigmatization and exclusion" that may exist in the society. The requirement misses the simple fact that first and foremost derogatory attitudes affect not groups, but individuals in person. These attitudes are damaging without being widespread and systemic. Every single case of offence and undeserved humiliation of a person is harmful, and citizens are in full right to seek protection from such things, regardless of how frequently they happen. If the issue of "humiliation, frustration, and embarrassment" experienced by a same-sex couple could be downplayed under the pretext that it is rather occasional than systemic, then it would be possible to extend Koppelman's call for magnanimity to multiple cases. For instance, we could say that the civil rights movement has won, and it will not be stopped by a few exemptions. So, why not allow a racially segregated restaurant, a movie theatre, or maybe, a school here and there? There are many desegregated ones anyway.

Although fair business opportunities for Jack Phillips and access to the market for Charlie Craig and Dave Mullins are important, they are not what was primarily at stake in *Masterpiece Cakeshop.* Maintaining fairness with regard to these opportunities would not compensate for what the litigants on both sides interpreted as lack of public recognition and legal protection of their deeply held commitments and identities. Even if Craig and

Mullins could get their cake next door to Phillips's shop, it would not remedy the embarrassment of having to choose cautiously the "right door for their kind," as if they were some kind of deplorables. From the opposite point of view, even if Phillips happened to be the only baker in town, being compelled on these grounds to design a cake for a same-sex couple's wedding would not feel less of a shame to him. Ultimately, accounting for multiple aspects of individuals self-determination may seem to offer a definite solution, but it does so at the cost of veiling the key problem, which is a struggle for recognition between individuals who defend the commitments and identities that do not fit well together.

Balancing contradictory answers

Some scholars do not shy away from the task of balancing contradictory claims of rights, identities, and deeply held commitments in order to protect the integrity of those citizens whose exercise of religion happens to be burdened by certain generally applicable laws. Recently Cécile Laborde (2017, Chapter 6) has proposed a detailed account of how the balancing procedure can be applied to demands for religious exemptions. In her view, a demand for exemption is *pro tanto* justified if it "can be inserted into one or other conception of liberal justice" (Ibid., 212) and is grounded in the claimant's "integrity-protecting commitment (IPC)," which is "a commitment, manifested in a practice, ritual, or action (or refusal to act), that allows an individual to live in accordance with how she thinks she ought to live" (Ibid., 203–4). Accordingly, morally abhorrent claims — such as those of Nazis and fundamentalist terrorists, as well as demands to "perform infant sacrifice, stone 'dishonorable' women, attack physicians performing abortions" (Ibid., 209) — cannot be accommodated even if they are based on individuals' sincere and deeply held convictions. Also, not mere preferences, but only strong commitments that "cannot be sacrificed without feelings of remorse, shame, or guilt" are candidates for exemptions (Ibid., 204).

IPCs that meet these two necessary conditions are subject to a balancing test that is supposed to assess whether it is possible to relieve the claimants of the burden without an excessive cost. In Laborde's model four criteria are relevant to the overall balance of considerations: "1. How direct is the burden? 2. How severe is the burden? 3. How proportionate is it to the aim pursued by the law? 4. Can it be alleviated without excessive cost-shifting?" (Ibid., 221).

As Laborde notes, it is the condition (3) that gives rise to most of the controversy around religious exemptions (Ibid., 227). Her account of how to assess the proportionality of a burden on a person's integrity in relation to the aim of the law involves two parameters. The first one is whether a particular law is demanded or only permitted by justice. The second one is whether or not a law requires universal and uniform compliance for its effectiveness (Ibid., 225).

How might we assess the first parameter in *Masterpiece Cakeshop* and similar cases? Non-discrimination on the grounds of sexual orientation is required by egalitarian justice, as well as free exercise of religion by all. We may use Laborde's exact phrasing and ask "how tightly" does the Colorado Anti-Discrimination Act, on the one hand, and the First Amendment's free exercise clause, on the other hand, "promote a goal of egalitarian justice"? (Ibid.). This brings us right back to the uncomfortable question that we have been trying to grapple with from the very beginning: Is Phillips's love of God more or less important for egalitarian justice than Craig's and Mullin's love of one another?

We cannot resolve this predicament by "bracketing" the contradictory claims as if they were equally important. Each of the opposite parties has no doubt that its own claim weighs more, therefore treating their weights as equal requires some special justification. However, to demonstrate in a neutral and pluralistic way that the spiritual love of God is just as important as the earthly love between two human beings is no easier than to demonstrate that the former is more important than the latter or vice versa. So, "we" — insofar as we are committed to reasonable pluralism — genuinely struggle to determine whose claim is more important. Meanwhile, Jack Phillips is sure that he must not be forced to pay any costs in order to accommodate the claims of marrying same-sex couples. Similarly, Charlie Craig and Dave Mullins definitely do not think that they must tolerate discrimination from devout believers. To hold the weight of their claims as equal in order to tackle the uncomfortable incommensurability issue is to assume away the problem. As I have demonstrated in the previous sub-section, this leads to strikingly controversial solutions, like the one proposed by Koppelman and Laycock.

A direct conflict of values with no plausible solution anywhere on the horizon is not a predicament specific to *Masterpiece Cakeshop* and similar cases. Laws that protect the equal right to free exercise of religion are part of egalitarian justice like other generally applicable laws aimed at protecting the rights and liberties that all citizens are equally entitled to. Therefore, in order to balance a claim of a particular right against a counter-

vailing claim of some other right it is necessary to know what Robert Alexy calls the "abstract weight" of a right or a principle "relative to other principles independently of the circumstances of any cases" (2003, 440). The balancing procedure is incomplete if it does not involve the assessment of this parameter, but the latter can be determined only insofar as various rights and legislative principles are placed on a clear scale of importance. Given the liberal commitment to reasonable pluralism, it is unlikely that an unequivocal and sufficiently detailed version of such a scale can be adopted by the state. At best it would be possible to establish some trivial estimations in order to exclude those grotesque claims that in Laborde's model are rejected at the outset as morally abhorrent. Apart from such extremes there are no ideologically neutral answers to questions about whose or which kinds of rights and liberties are more important. This predicament becomes apparent in cases like *Masterpiece Cakeshop,* but it feeds the controversy over virtually every case of religious exemption.

Laborde offers her response to religious refusals of services for same-sex weddings in the form of an opinion statement: "On the interpretation I favor, justice requires robust protection of the rights of women, children, and sexual minorities. IPCs that involve denying those rights should, in my view, be defeated…, because of the paramount importance of these rights" (2017, 227). Although Laborde immediately acknowledges that there may be other reasonable interpretations (Ibid.), she says nothing about how she would defend her favored interpretation against those alternative ones.

To summarize, one strategy within the standard approach to religious exemptions promises relatively unequivocal solutions insofar as it glosses over the heart of the problem — i.e. the struggle for recognition between incompatible claims of rights, identities, and deeply held commitments (e.g. Patten 2017b; Letsas 2016; Quong 2006). The other strategy either offers principled solutions to puzzling examples like *Masterpiece Cakeshop* as a matter of mere opinion (e.g. Laborde 2017, 227), or sometimes it simply declines to offer them at all on the grounds that balancing contradictory claims is not as much an application of algorithms as it is an "exercise in adhockery" (Jones 2017, 173; also see Seglow 2017, 189).

What is the right question?

The elusiveness of the standard approach to religious exemptions is exacerbated by its tendency to take a peculiarly adjusted perspective on the point of contention in every

case that it tries to solve. The discussion is always focused in such a way that first and foremost it is the conscience of religious citizens that is at issue. But it is just as true that the case of *Masterpiece Cakeshop* is a matter of conscience for Craig and Mullins. It is a matter of their conscientious struggle for the full and unequivocal recognition of LGBTQ+ individuals in the society. Advocates of religious exemptions rightfully argue that devout believers demand them in order to maintain their integrity, i.e. the ability to follow their sincerely held convictions about how they ought to live. But generally applicable laws may just as well be grounded in claims of conscience, i.e. in their proponents' sincerely held convictions about how everyone ought to live. Thereby, to discuss religious exemptions as if they were primarily about the conscience of those who demand them is to take a rather one-sided perspective.

I think, in response most liberal advocates of religious exemptions will readily agree that the perspective of those who argue for uniform compliance with laws is no less important. This perspective is inevitably taken into account, since the aim of a disputed law is always subject to scrutiny in the debate over exemptions from it. The conscience of the proponents of the law is expressed in the aim of the law, while the conscience of dissenters is expressed in their demand for exemption.

All this is quite unproblematic indeed, but why present the problem as a strange dilemma between the *aim* of a law and the *conscience* of a dissenter? Strangeness consists here in opposing a concrete and substantive explication of why a certain law is good (i.e. "this law serves such and such purpose") to rejection of this law on the grounds that are abstract and formal (i.e. "it is against my conscience"). If the aim of a disputed law is not to interfere with any citizen's conscience, then it is hard to get rid of a suspicion that the dilemma involves categorical inaccuracy of some sort. Would not it be more correct to oppose the aim of a law to the aim of making a particular exception from it?

Within the standard approach, however, the question is always whether or not the conscience of religious dissenters is important enough to carve out an exemption. Instead, I would offer what in my view is a more intelligible way of formulating the problem. I suggest that we always ask two simple questions: "What is so good about this particular practice that everyone must engage in or at least tolerate it?" and "What is so bad about this particular practice that these particular individuals should be exempt from it?" Accordingly, the issue in *Masterpiece Cakeshop* is not whether religious conscience is important enough to justify discrimination against marrying same-sex couples. The relevant

intelligible questions here are: “What is so good about same sex marriage that requires its unequivocal public recognition?” and “What is so bad about same-sex marriage that religious business owners must be allowed to discriminate against marrying same-sex couples?” It is reasons for and against the recognition of same-sex marriage that must be assessed, not contradicting claims of conscience against each other, nor claims of conscience against the aim of the anti-discrimination law.

But should not we consider claims of conscience themselves as justificatory reasons in public deliberation on laws and exemptions? I will argue that we should not.

1.2. Claims of religious conscience as *idola fori*

To put it in relatively well-established terms, I suggest that we look at the puzzle of *Masterpiece Cakeshop* from the perspective of public reason. The latter is “the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution” (Rawls 2005, 214). At the center of public reason liberalism is the principle of public justification (Vallier 2018). In its most general formulation the principle says that in order to be legitimate legal provisions must be publicly justified. What constitutes a proper public justification is widely debated among public reason liberals (for an overview see Ungureanu and Monti 2018, Chapter 2). For John Rawls, to give a public justification is to provide reasons that all may reasonably be expected to endorse (Rawls 2005, 137, 217, 243, 393). This requirement may be questioned as to which types of reasons meet it and whether or not the potential for being universally accepted is the right criterion of publicity at all. Some public reason theorists insist that proper public, as opposed to non-public, reasons must be shareable (Quong 2011, 256–73; Schwartzman 2011, 378–82) — i.e. all members of the public must be epistemically entitled to hold them according to the public’s common evaluative standard. Their opponents argue that this requirement is too restrictive and exclusionary, and it is enough for proper public reasons to be merely intelligible — i.e. only reason-givers themselves, but not necessarily all members of the public must be epistemically entitled to hold these reasons according to the reason-givers’ own evaluative standards (Gaus and Vallier 2009, 56–8; Vallier 2016a). On the shareable reasons view, public justification is aimed at consensus on at least one justificatory reason in favor of a disputed legal provision. On the intelligible reasons view, the aim is convergence on a legal provision from separate points of view (D’Agostino 1996, 30).

I will not take sides in this debate here, because I will defend the view that claims of conscience, by which devout believers attempt to justify their demands for exemptions, do not meet even the most permissive standards of public justification. I will argue that justifications of the type "God says so and my conscience requires that I obey" do not constitute intelligible reasons by which legal provisions can be publicly justified. The problem is not that the general public cannot be reasonably expected to endorse these claims. The problem is a more basic one — they are not reasons.

Certainly, every such argument is at risk of degrading into a definitial fiat: one can exploit the ambiguities of language in order to come up with a definition that is just narrow enough to exclude certain unwelcome entities. In order to avoid this scheme as far as possible, I suggest that, instead of searching for "the most correct" definition of reason, we reflect on what kind of response do we normally expect when we ask why does someone support or oppose a legal provision. Furthermore, since this latter question is still abstract enough to admit of too many ways of approaching it, I will continue to use the case of *Masterpiece Cakeshop* as a concrete point of reference and a guideline for the discussion.

So, with regard to any controversy around legal provisions, public reason liberals focus on how members of the public justify their claims to one another. Under the least restrictive criteria of proper public reasoning, citizens' preferred legal provisions must be supported by sufficient intelligible reasons. Accordingly, it makes sense to consider exempting a citizen from a generally applicable law that is supported by sufficient intelligible reasons only if the citizen has a sufficient intelligible reason to oppose the law (Vallier 2016b, 3).

In the case of *Masterpiece Cakeshop* there is a sufficient intelligible reason to prohibit discrimination against marrying same-sex couples. It is the same reason by which the U.S. Supreme Court justified its decision to legalize same-sex marriage throughout the United States (*Obergefell v. Hodges*). Writing for the majority, Justice Kennedy argued extensively that the highest ideals of love, fidelity, devotion, sacrifice, and family embodied in marriage are pertinent to personal relationships between human individuals, not necessarily between human individuals of the opposite sexes. Therefore, derogatory, stigmatizing, exclusionary behavior towards marrying same-sex couples is undeserved, and LGBTQ+ individuals must be protected from it. To put it bluntly, discrimination

hurts and there are no good reasons for discrimination on the basis of sexual orientation, therefore it must be banned.

Jack Phillips disagrees, at least when it comes to those individuals who want to celebrate a same-sex wedding. As a Christian, he believes that contributing in any possible way to a celebration of same-sex marriage is "displeasing to God" (*Masterpiece Cakeshop Ltd. v. Colorado…,* Petition, 276a). So, why do people like Phillips oppose the laws that protect marrying same-sex couples? — Because these laws require religious individuals to do what they believe is prohibited by God and their conscience requires them to do as God says.

An unsettling thing about this answer is that it is applicable to an indefinite diversity of cases. Everything from one's diet and clothing to one's relations with parents can be a matter of conscience and religion. Everything from charity to plunder can be presented as something that is done at the behest of conscience and by God's command. "Conscience" and "religion" are empty forms that can be filled with all kinds of content. Therefore, mere reference to one's religious conscience does not explain the rationale for a controversial practice or rule of conduct and, consequently, it is far from clear how such reference is supposed to justify anything. Phillips refused to design a cake for Craig and Mullins's wedding because he did not want to displease God. But further questions inevitably arise here. Why does God forbid same-sex marriage, given all the goods and virtues associated with marriage as such? Why should others tolerate Phillips's behavior despite feeling deeply offended by it?

One might contend that the mere possibility of such questions is not sufficient to say that religious claims of conscience neither explain nor justify anything.

Consider *the explanatory aspect* first. Advocates of religious reasons would argue that same-sex marriage is wrong precisely because it is forbidden by God — the authority whose commands devout believers are willing to obey even when they cannot explicate the rationale behind the conduct that is commanded to them. Such "reasoning from testimony by a moral authority" is not uncommon, and it is accessible even to non-believers (Vallier 2011, 380–5). Certainly, further questions may arise, such as: Why recognize this authority and not another? Why make this recognition part of one's foundational commitments and not a matter of some temporary conditional contract? However, the argument may continue, the fact that further questions arise does not make reference to

religious conscience less of a reason. Most, if not all, of our reasons are partial and incomplete, since they admit of further questions that ultimately reach a point when a respondent is unable to give a further explanation. Consequently, claims of religious conscience, as their advocates might conclude, are quite acceptable as explanations of why people do or do not do certain things.

Consider now *the aspect of justification.* Advocates of religious reasons could argue that when such reasons are presented in the form of claims of conscience it is precisely this form that turns them into proper public justifications. It gives individuals an opportunity to appeal to their fundamental commitments grounded in comprehensive doctrines of the good without directly invoking the doctrines themselves. The reason why God detests same-sex marriage may seem obscure to the general public, but Jack Phillips's claim that acting in accordance with this belief is very important to his commitments as a Christian does not require others to accept reasons that are dependent on some eccentric evaluative standards. Everyone knows what it means to have deep commitments that are central to one's sense of identity. Therefore, Phillips's demand for exemption — the advocates of religious reasons might conclude — is justified in a way that is not merely intelligible, but shareable among all (see Quong 2002).

Similarly, Laborde points out that the basic argument behind every demand for religious exemption has the following form:

> "I believe that my God commands that I do *X,* and as the state is committed to free religious exercise, it should allow me to do *X*" (2013, 181).

This argument does not draw on any comprehensive doctrines of the good that might be inaccessible to the general public, since "the believer does not require that others believe or even understand *X,* but simply that they accept that their public commitment to free religious exercise may require them to allow her (the believer) to do *X*…" (Ibid.).

A usual follow up is that "of course, claims of conscience by themselves cannot trump all other values" (Ibid., 182), they are only *pro tanto* reasons for exemptions, not their full justifications. This common sense caveat refers to a simple consideration that, of course, it is always necessary to make sure that the law really imposes a disproportionate burden on the claimant's integrity, that the exemption does not infringe on the rights of others, that the aim of the law will still be attained without excessive cost-shifting etc. However, the more one explores the multiple "terms and conditions" which may apply, the more it

seems that the latter, but not the initial claim of conscience, constitute the actual argument for exemption.

I think, this is not a mere impression. In order to see that Laborde's formula does not provide even *pro tanto* reasons for exemptions, consider what an analogous formula for liberty claims in general might look like. It might be the following:

> "I am committed to do *X,* and as the state is committed to respect my personal liberty, it should allow me to do *X*."

Probably, many will agree that this claim seems somewhat voluntaristic and not quite well-founded. Now let us imagine what might be the opposite claim on behalf of the state. Is it just

> "You are not allowed to do *X,*"

or is it rather

> "You are not allowed to do *X* because doing *X* is bad in such and such way"?

Obviously, it is the latter, not the former sentence that can serve as a formula for a rational argument. Accordingly, a claim of any kind of liberty against a law that prohibits doing *X* constitutes a rational argument insofar as it explains why being left to do *X* is better, or at least not as bad as it is presented in the justification for the law. So, a correct formula for a *pro tanto* reason for exemption from a generally applicable law would be:

> "Individuals *I* are committed to do *X,* and it will not be as bad as the justification for the law implies if under the conditions *C* they are allowed to do *X.* As the state is committed to respect everyone's personal liberty, it should make an exception."

Unlike this one, Laborde's formula obscures the fact that once the rationale for a particular law is explained, any reasonable objection must address this rationale and demonstrate what is wrong with it. Mere insistence of some citizens on being committed to do *X* in contradiction to what the law requires cannot be even a *pro tanto* justification for exemption.

This remains true even with regard to paternalistic prohibitions, which look most vulnerable to objections on the grounds of personal liberties, including the liberty of con-

science. Imagine someone suggesting a total ban on tobacco on the grounds that "God says so" and "This is what conscience demands." It does not sound like a reasonable legislative offer. Reasonable legislative offers explain how citizens are supposed to benefit from the legal provision being offered. So, a reasonable suggestion would be something like: "Let us ban tobacco, because its consumption has such and such bad effect on people's health."

In its own turn, a reasonable objection to a reasonable legislative offer must be supported by a relevant explanation of why citizens will loose, or at least not gain sufficiently from what is being offered to them. Thereby, such claims as "Cigars are God-given!" and "My conscience makes me smoke!" are at least too vague, if not totally irrelevant, to constitute reasonable objections. We would rather expect something like: "The bad effect of tobacco on overall health is no worse than that of alcohol and junk food. Shall we bury half of our food and beverage industry next?" or "It would be a hasty ban, because alternative studies show that the bad effect is exaggerated" etc.

Finally, a reasonable demand for exemption from a publicly justified generally applicable law must explain how precisely the unified application of the law fails to achieve its purpose or, maybe, leads to previously unconsidered bad consequences for some individuals. For example: "Recent studies have shown that on average, under the constant stress of dealing with the deepest problems of humanity and universe, non-smoking philosophy professors go completely insane 5,3 years earlier than their smoking colleagues. Therefore, the appropriate exemptions should be carved out in order to protect the mental health of our philosophy professionals who do the important job of…" etc.

To summarize, claims of conscience — religious or secular — do not explain the rationale behind the practices and rules of conduct that the claimants seek to protect by legal exemptions. Such claims do not explain why everyone else should welcome or at least tolerate those rules and practices. Of course, references to a divine authority and/or a claimant's conscience unequivocally express that a certain issue is very important to the claimant, but they hardly communicate anything else. Certainly, we should listen to what our fellow members of the public have to say. Probably, we should care about what is important to them. But we are not obligated to accept a claim or meet a demand just because it is labelled "divine," "conscientious," or simply "important." Those who rely on claims of conscience in order to justify their preferred legal provisions — be it laws or

exemptions — do not actually explain why their opponents should agree with them, but giving such explanation is the minimal requirement of a reasonable debate.

The self-validating and at the same time extremely shallow character of attempts to present claims of conscience as justificatory reasons in public deliberation can be grasped by Francis Bacon's metaphor of *idola fori* (traditionally translated as "idols of the marketplace"). Bacon used this expression to refer to illusions emerging from "a poor and unskillful code of words" that are "either names of things that do not exist… or they are the names of things which exist but are confused and badly defined, being abstracted from things rashly and unevenly" (2000 (1620), Book I, XLIII, LX). Idols are images that bear the symbolic attributes of gods, but they cease to be truly sacred the moment people take them for gods themselves. The idols' ability to stand above the crowd is no greater than the height of their pedestals erected in vain by their misguided worshippers. Likewise, conventional words and popular expressions can buy everyone's understanding and even agreement, which does not at all guarantee that members of the public know what they are talking about. The strength of these words is like the value of a currency, which is no greater than the traders' trust in it. By analogy, such arguments as "God says so and my conscience requires that I obey" are referred to as "reasons," but there is not that much reasonable in them, except for the name that they do not deserve. The public gives strength to claims of conscience insofar as it credits them with much importance without going into detail about how can they actually justify legal provisions. Under a closer scrutiny such justifications deflate rapidly, as their emptiness gets revealed.

There is one thing about religious claims of conscience that everybody understands — they express confidence and resolution. However, the rationale behind the rules and practices that devout believers are so resolute about is too often quite obscure. We know that Jack Phillips refuses to bake cakes for same-sex weddings because he is "a follower of Jesus" and "a man who desires to be obedient to the teaching of the Bible" (*Masterpiece Cakeshop Ltd. v. Colorado…,* Petition, 287a). We know his motivation, and yet we hardly know the *reasons* for his conduct, since we hardly know what is so wrong with same-sex marriage that it can make people detestable in the eyes of Christ and justify discrimination against them. Jack Phillips definitely has something to say about the motives of his demand for exemption, but his claims are not reasons.

1.3. Sorting through the yield of conscience

In this section I will respond to three major objections against my account of religious claims of conscience in public justification of legal provisions.

Objection 1: There are other standards of reasoning

First of all, one might contend that I assess religious claims of conscience according to my preferred — markedly profane — evaluative standard and unjustifiedly dismiss any alternative evaluative standard according to which they may well pass as good reasons. Meanwhile, there is an original evaluative standard according to which arguments of the form "God says so and my conscience requires that I obey" are reasons. This standard does not make it necessary for the reason-givers to explicate the rationale behind those rules and practices that they are trying to justify. Without denying the importance of such explication, the standard accepts mere reference to a moral authority as a proper way of justification that provides sufficient reasons in favor or against a certain rule, practice, or particular act (see Vallier 2011, 380–5).

According to the Christian version of this standard, if the Bible prohibits certain things, e.g. same-sex relationships, it is a sufficient reason for a Christian to denounce them, even if he or she does not understand why God detests these things. Furthermore, it is not true that those who rely on testimony by a moral authority are unable to explain why they think that others should agree with them. Christians may say that the Bible is right on all basic moral issues — like do not kill, do not steal etc. — and it is not too hard to explain the rationale behind these parts of the Biblical moral doctrine. The Bible's being explicably right on the basic moral issues is a reason to agree that it is likely to be right on many other moral issues as well, although, perhaps, there will never be a sufficient explanation for each of those other issues. Consequently, if one acknowledges that the Bible is explicably right on the basic moral issues, one should acknowledge that it is likely to be right on the morality of same-sex relationships as well, although, strictly speaking, the rationale behind the Biblical view on this issue remains unexplained.

So, at best, my requirement to explicate the rationale behind the rules and practices that citizens seek to enforce and protect by legal provisions may be a plausible candidate for a common evaluative standard shared by the general public. Therefore, perhaps, I have succeeded in demonstrating that religious claims of conscience do not constitute reasons

that are accessible from the general public's perspective — reason-givers are not epistemically entitled to hold them according to the common evaluative standard. But it is a far cry from showing that religious claims of conscience are not reasons at all. The convergence model of public justification will even treat these claims as proper *public* reasons, if the reason-givers are epistemically entitled to hold them according to their own — e.g. Christian — evaluative standard.

In response to Objection 1

Despite the simple logic of the first objection, I must contend that the Christian evaluative standard pushes its adherents to make a very brave leap, which is rather a leap of faith than a leap of reason — if reason admits of any leaps whatsoever.

According to this presumably original standard, the mere fact that the Bible passes a moral judgment on same-sex relationships constitutes a *reason* for treating this judgment as correct, regardless of whether or not the judgment in question is explained. My contention is that the Bible's judgment on same-sex relationships is definitely a *motive* for believers to abstain from them, but not necessarily a *reason* to do so. Not all reports on one's motives represent reasons, because not all motives are reasonable. If all moral judgments and commandments found in the Bible were totally inexplicable, we would say that those who accept them do it solely on the grounds of faith, but not reason.

Thereby, if one deems it reasonable to follow the Bible's judgment on same-sex relationships because the Bible is explicably right on basic moral issues, then all the work of reasoning that supports the Bible's judgment on same-sex relationships is done by the arguments that explicate the rationale behind its judgments on those other issues. Those previous explanations — insofar as one agrees with them — are the reasons why the Bible's judgment on same-sex relationships is likely to be right. Nothing is added to this likelihood by the mere fact that the Bible makes the judgment.

So, in the concept of "reasoning from testimony by moral authority" "reasoning" refers to the authority's explained judgments, not just to its testimony. That is why when a reason-giver appeals to a moral authority it does not mean that he or she adopts some original standard of reasoning that is substantially different from the one that I defend in this article. It turns out that even the Christian standard of reasoning, with its reliance on the divine authority, is not totally independent of the requirement to explicate the rationale

for at least some of the moral judgments found in the Bible. It would be totally unreasonable to recognize a moral authority that makes only inexplicable claims.

A step from a moral authority being explicably right on certain moral issues to it being surely — but inexplicably — right on some other moral issues takes a leap of faith. This move may be "intelligible" in a sense that all those who know anything about faith, trust, or religion can understand it. They can associate it with a specific kind of intellectual and emotional experience, or at least with some descriptions of such experience. But this move does not mean a step in reasoning, because it does not outline a concrete trajectory that others can follow in order to arrive from given premises to a particular conclusion. Leaps of faith do not produce intelligible reasons.

The best that can be said about Jack Phillips's demand for exemption is that it *might* be justified, since he relates it to a doctrine that many people consider explicably right on basic moral issues. But his demand cannot be subject to a reasonable discussion until he supports it by explanations of what is actually wrong with same-sex marriage. A religious claim of conscience, by which Phillips justifies his demand, is just a declaration on behalf of the divine authority, not a reason in favor of the demand. To think otherwise, to treat a claim on behalf of a moral authority as a reasonable argument in its own favor is to worship the idols of the marketplace.

Objection 2: Not only reasons deserve respect

Advocates of religious claims of conscience in public justification may refuse to accept my analysis of the source of the Bible's moral authority. From a religious perspective, I trivialize the moral consciousness of devout believers when I say that Christians think the Bible is right on same-sex relationships because they think it is explicably right on many other moral issues. By doing so I only beg the question to make my opponents agree that "religious reasons" are based on what I myself prefer to call "reasons." Meanwhile, the Bible's moral authority is not based on easily explicable platitudes about killing and stealing. The Bible, like other religious teachings, acquires its great moral authority insofar as it puts forward much more complicated moral commands and ideals, such as "do not judge" (*Matthew* 7:1), "love your enemies" (*Matthew* 5:44), or "become like little children" (*Matthew* 18:3). People embrace these commands and ideals — that are often quite paradoxical — not due to some pragmatic calculations of how it might make their everyday life better, but because the Biblical message resonates strongly, although some-

times inexplicably, with their conscience. The Bible does not always communicate moral truths to people by way of unequivocal statements and primitive prescriptions. The issue of same-sex marriage provides a good example of this complexity.

Leviticus 20:13 says that sexual relationships between men are detestable and those who engage in them "are to be put to death." In *Ephesians* 5:21–33 proper relations between husband and wife, who are referred to as "he" and "she," are represented by means of an analogy with the relations between Christ and the church. Remarkably, in *Ephesians* it is the relation between Christ and the church that explains the meaning of marriage, not vice versa. So, Jack Phillips makes a good point when he invokes *Ephesians* 5:21–32 as a source of his belief that "God's intention for marriage is that it should be the union of one man and one woman" (*Masterpiece Cakeshop v. Colorado…,* Petition, 274a). But does he understand the Bible's message correctly?

Galatians 3:28 says that "there is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus." If marriage is to be understood by analogy with Christ's relations with the church, then same-sex and opposite-sex marriages must be equal, since there is no male and female in these relations. Accordingly, "husband" and "wife" in *Ephesians* 5:21–33 refer to spouses who may happen to be "he" and "she," male and female, but not necessarily so. On this interpretation, the Bible provides a religious ground for doing away with the age-old idea that only opposite-sex couples have the right to marry.

For devout believers this conflict of interpretations does not mean that the Bible simply contradicts itself on same-sex marriage and, therefore, Christians are left here with no guidance. Rather, the discrepancy between *Leviticus* and *Galatians* that becomes visible through the prism of the doctrine of marriage revealed in *Ephesians* is meant to stimulate God's faithful to think deeper about the complicated dialectical relations between the Old and the New Testament, which, perhaps, is the key to an adequate understanding of Christ's moral message. The Holy Scripture gives a special kind of guidance that instigates its readers to exercise their capacity for moral judgment to the fullest. It makes individuals, so to say, "rise above themselves" in a spiritual effort to break the vicious circle of everyday moral controversies. The transcending effort, however, does not lead to cheap ready-made answers that would easily satisfy everyone. The answers themselves may turn out highly controversial, for "I did not come to bring peace, but a sword" (*Matthew* 10:34).

Deep sincere commitments of religious individuals are sometimes based on intuitions that cannot be fully open for pragmatic scrutiny and rationalistic explication. These commitments may result from "direct appreciation" (Ebels-Duggan 2017) of the moral value of the Bible. The grounds of such commitments are "inarticulable," since they "cannot be grasped prior to or independent of direct experience" of the value in question — the kind of experience that we have when we come to value the beauty of poetry or fall in love (Ibid., 2–5). Direct appreciation of the Biblical message grounds the intuition of devout believers that they have very strong reasons to act and treat others in certain ways, although the believers themselves are not always able to articulate those reasons. It is, of course, a defensible view that "having a reason" necessarily means being able to articulate it. But it is definitely not necessary that the "yield of conscience," as Michael Perry calls it (2010, 91), be delivered in the form of a transparent pragmatic argumentation, which I demand here incessantly.

Conscience is a "precious internal faculty (which we might call an internal capability!) for searching for life's ethical basis and its ultimate meaning" (Nussbaum 2007, 342). Given its goal, the work of conscience is too complex and multifaceted to be reduced to reasoning, much less to reasoning in accordance with one particular evaluative standard. The search for life's ethical basis and ultimate being is not a matter of following an established procedure. On the contrary, conscience is "a dynamic movement, in which a fluid set of ethical norms or guidelines is produced by the self for the self by way of an internal process of ethical reflection" (Cooke 2017, 297). So, respect for conscience means respect for each individual's continuous effort in the face of ethical challenges that have no ready-made answers at hand. Equal respect for the conscience of citizens means that everyone of them has the yield of his or her conscience accounted for in the process of democratic deliberation on legal provisions. Equal respect for conscience requires, thereby, that "appropriate procedural provisions be made in order for citizens to air the demands of their consciences (including those belonging to the sphere of religion) in such a way that allows them to regard themselves as the co-authors, and not just as the addressees, of the (more or less tolerant) social, political, and legal arrangements that are binding on them" (Ceva 2017, 333).

To insist, as I do, that claims of the form "God says so and my conscience requires that I obey" are not reasons — meaning practically that they should not be considered on a par with other types of arguments in public justification of legal provisions — is to deliber-

ately marginalize religious citizens in the public square. It is to treat their conscience as if it had no value. This attitude stands in a striking contradiction with the foundations of liberal democracy.

In response to Objection 2

In response to the second objection I must stress that I absolutely do not intend to deny, diminish, or even question the value of anyone's conscience and moral integrity. Living in accordance with one's sincere beliefs about how one ought to live is, no doubt, valuable, and it is the kind of value that liberal democracies recognize when they commit themselves to protect their citizens' personal liberty. What I am discussing though, is how to account for this value in public deliberation on legal provisions, especially under the conditions of deep disagreement, such as the one that we face in *Masterpiece Cakeshop.*

That being said, I would like to distance myself from the two specific ways of questioning the role of conscience in public deliberation. The first way is to do it on the grounds that references to conscience must not be morally privileged over other kinds of arguments for and against legal provisions (Arneson 2010, 1023–6). The second way is to do it on the grounds that claims of conscience are valuable only if they refer to beliefs that are not mistaken (Ibid., 1033–6), or if they are related to "morally attractive" doctrines, such as pacifism, or if they are made on behalf of belief systems whose positive value is widely recognized, e.g. religion in general (Koppelman 2009, 244). I agree with Patrick Lenta's Rawlsian criticism of Arneson's and Koppelman's arguments on the grounds that under the conditions of deep moral disagreement attempts to sort out the true and morally attractive demands of conscience from the mistaken and morally unattractive ones will often be at odds with the commitment to reasonable pluralism (Lenta 2016, 256–7).

Most importantly, I am not in the business of measuring the weight of claims of conscience against the weight of other kinds of argumentation. Much less do I try to say anything about the value of "conscience" as compared to the value of "reason." Rather, my interpretation of "respect for conscience" can be rendered in terms of difference between recognition and appraisal respect (Darwall 1977).

Everything in the yield of conscience brought to the public square deserves equal *recognition*. By this I mean a default assumption that every claim in the process of public deliberation is made in good faith and reflects the claimant's sincere beliefs about the issue

that is being debated. In practice it requires that every argument — no matter how controversial — be taken at face value and not rejected from the outset as a mere cover-up for one's stubborn prejudice, bigotry, or narrowly egoistic interest. For instance, recognition respect for Jack Phillips's conscience implies that he makes his claim because he loves God, not because he loves to hate gays or seeks to benefit from placing himself at the forefront of a conservative political agenda.

At the same time not everything in the yield of conscience can be subject to *appraisal.* There is a substantial difference between *(a)* claims supported by explanations of how a certain legal provision promotes or undermines the well-being of citizens and *(b)* claims that simply reiterate the demands of one's conscience or one's favored moral authority. Explanations of rationale are not mere supplements to claims of conscience that can add more or less value to them. Rather, explanations of rationale actually turn claims of conscience into articulate arguments that can be assessed both in themselves and in comparison with one another. Without such explanations claims of conscience are incommensurable and unavailable for rational evaluation. That is why I argued in the previous section that only *(a)* and not *(b)* are actual reasons, and that *(b)* cannot be taken as relevant arguments in favor of legal provisions, nor can they serve as relevant counterarguments to *(a).* I do not say that claims of conscience have less weight than the explanations of rationale behind practices and rules of conduct. I say that it would be wrong to weigh the former against the latter in the first place.

Paradoxically, to treat claims of conscience as justificatory reasons in democratic deliberation or to argue that at least they should be accounted for on a par with such reasons is against the norm of equal respect for everyone's conscience. Indeed, to argue that a demand coming from my conscience or from a moral authority that I worship is (on a par with) a *reason* why everyone must abide by a certain rule is to imply that my conscience or my moral authority are so surely above those of others that it is not even necessary to explain the rationale for the law that I propose. Likewise, to argue that a demand coming from my conscience or from a moral authority that I worship is (on a par with) a *reason* why I must be exempt from a publicly justified generally applicable law is to imply that my conscience or my moral authority are so surely above those of others that it is not even necessary to discuss what precisely is wrong with the rationale behind the law that I oppose. Thereby, justification of exemptions from publicly justified laws by means of claims of conscience is not only empty — for such claims do not address the rationale

behind the laws in question — but it is also inappropriate, because this kind of justification violates the very norm of equal respect for conscience that it appeals to.

There is only one type of cases in which claims of conscience constitute sound and appropriate arguments against legal provisions. It is when an argument in favor of a legal provision is itself nothing else but a claim of conscience. For example, if someone argues that his or her Christian conscience demands that the common day of rest be on Sunday, it is quite appropriate to opt out on the grounds that one's Jewish conscience demands that the day of rest be on Saturday. However, this is just an obvious case of a badly justified law, not a case of a well-justified exemption (cf. Laborde 2017, 229–38; Hartley and Watson 2018, 114). Unless both sides try to explain the rationale behind God's views on which day of the week is best for pausing to praise Him, they do not give reasons to one another. Instead, they compete in praising their idols of the marketplace.

Objection 3: Claims of conscience are "shortcuts" to actual reasons

The third major objection to my account of claims of conscience in public justification of exemptions might concede that, perhaps, such claims are not reasons in a full and strict sense of the word, but they can function as "shortcuts" to actual reasons. Like shortcuts on a computer screen lead to documents that can be opened by clicking on them, claims of conscience "lead to" those rational arguments that justify the demands of conscientious objectors.

For instance, when Jack Phillips invokes the Bible he, among other things, quotes *Romans* 1:32. The verse speaks of death as due punishment for engaging in same-sex relationships, which in that same chapter are called *"unnatural"* (*Romans* 1:26). This provides a "link" to a whole battery of widely known arguments against same-sex marriage all the way up to the most refined ones formulated within the framework of natural law theory by John Finnis (2008). When Jack Phillips et al. demand exemptions from anti-discrimination laws *as Christians,* it may be a concise way of saying that, in their view, same-sex marriage must not be recognized on a par with opposite-sex marriage because only the latter realizes the "intrinsic goods of monogamous intimate commitment, procreation, childrearing by biological parents" and serves as a deterrent from promiscuous sexual relationships, which lack the "unitive" aspect of marital sex and, therefore, are immoral and degrading. (Here I borrowed from Andrew Lister's (2013, 141–4) helpful summary of Finnis's argument.)

This is one and not the only way to justify the opposition to same-sex marriage on behalf of Phillips et al. that meets the demand to explain the rationale behind their claims of conscience. There is absolutely no reason to assume that claims of conscience in multiple other cases are not linked in a similar way to rational explanations, which may be unfamiliar to the general public, but exist and can be provided. So, any underestimation of claims of conscience impoverishes the public discourse and, consequently, "blocks the flow into public life of ethical commitments and convictions necessary for the on-going construction of multiple common goods by members of social institutions" (Cooke 2017, 298).

In response to Objection 3

My response to the third objection is twofold. First, even if we grant the reading of claims of conscience as mere "shortcuts" to actual reasons, it hardly adds anything substantial to their significance in public justification of exemptions. That is because the reasons that these claims allegedly refer to have already turned out to be not sufficiently convincing, which is reflected precisely in those laws and judicial rulings that the claimants oppose. Arguments about the "unnatural" character of same-sex marriage did not convince the majority in *Obergefell v. Hodges* that same-sex marriage should not be recognized in the United States. Apparently, they are even less likely to convince that some individuals must be allowed to discriminate against marrying same-sex couples in places of business that provide services to the public.

Second, it is worth noting that in cases like *Masterpiece Cakeshop* religious claimants do not actually resort to the kind of natural law arguments that I have mentioned above. Instead, they confine themselves to quoting the Bible. Perhaps, this is not by accident. Maybe, Jack Phillips et al. do not think that natural law arguments are correct. Or maybe, they understand that it is far from clear how these arguments can justify exemptions from anti-discrimination laws. Probably, devout believers also understand quite well that the more one actually explicates the rationale behind a certain practice, the less dependent it becomes on God's authority. Such demystification of practical reasons strips them of whatever moral pathos and urgency might still be associated with religious claims of conscience today. Arguments that are religious by their rhetorical form rather than by actual content become more fit for reasonable democratic discussion. But simultaneously they become less fit for justifying exemptions from generally applicable laws. That is

because it is highly doubtful that reasonable democratic disagreement leaves any *logical* space for such exemptions. Rather, it obeys a simple principle formulated by Brian Barry: "Either the case for the law is strong enough to rule out exemptions, or there should be no law anyway" (2001, 39).

So, it would not be a surprise if devout believers objected to reading their claims of conscience as references to any particular explanations and emphasized that these claims come from their simple faith that is unaccustomed to the intricacies of public reason. This might even bring them more success in winning the public opinion than the attempts to rationalize their position. It becomes possible insofar as emotionally charged claims based on faith play up to the public idolatry of "conscience" and "moral integrity." I do not think, however, that the quality of public discourse improves or public life becomes richer when this argumentative strategy is allowed to flourish.

All this is not to say that there can be no such things as religious reasons. There may be religious arguments that avoid the extremes of demystification on the one hand and complicity in praising the idols of the marketplace on the other. Religious doctrines can provide elaborate rational explications of problems that the public may be concerned with. Arguments against abortion that invoke the Bible together with philosophical reflections on ensoulment and human existence make a good and, alas, a rare example (e.g. Ford 1991). Such arguments fully deserve to be called *reasons,* but mere declarations of obedience to God's will and one's own conscience do not.

Conclusion

My main point in this article was that religious claims of conscience do not make even *pro tanto* public justifications for exemptions from generally applicable laws.

Arguments of the form "God says so and my conscience requires that I obey" indicate that certain practices and rules are very important to the claimants, but these arguments do not explicate the rationale of the practices and rules in question. That is why I argued that religious claims of conscience are not reasons. Rather, they are Baconian "idols of the marketplace" — conventional justifications that are supposed to be accepted as self-evident, while in fact they are not. Not every intelligible statement about one's motives deserves to be treated as an intelligible reason. Motives may be unreasonable and even irrational when people act on the grounds of unconditional religious faith.

I did not deny that everyone's conscience — religious or secular — must have equal significance. But this makes sense only as a default assumption that everyone's contribution in the process of public deliberation is made in accordance with one's sincere beliefs. Speaking allegorically, everyone's conscience must be conceived of as an empty plate attached to the scales of justice where the weights of reasons are placed. It is not itself a weight on the scale that can be used to change the balance. In order to justify a legal provision, be it a law, an exemption, or a judicial ruling, it must never be enough just to say that one's conscience dictates something. At best, such claims can express moral concerns, but they do not provide reasons.

In a "well-ordered society" that embraces the ideal of public reason (Rawls 2005, 252) demands for religious exemptions should not be heard in court or voted in parliament, unless they are supported by arguments that explicate the rationale behind the practices and rules that the claimants seek to protect.

Whether or not explications derived from religious doctrines should be treated as proper *public* reasons is another question. I did not address it in this article. Here I argued that the problem with arguments of the form "God says so and my conscience requires that I obey" is even more fundamental — they are not *reasons* at all.

2. RELIGIOUS FAITH AND THE FALLIBILITY OF PUBLIC REASONS

Abstract

The duty of civility, as defined in John Rawls's *Political Liberalism,* requires that citizens justify their preferred legal provisions on the grounds of reasons that "all may reasonably be expected to endorse." Liberals struggle to determine whether it entails restraint from using religious reasons in public justification. I argue that such restraint is necessary insofar as public justification of legal provisions on the grounds of religious faith involves making non-negotiable claims, which is incompatible with respect for fellow citizens as free and equal co-legislators. However, the notion of "reasons that all may reasonably be expected to endorse" does not stand in a clear opposition to non-negotiable claims in the public square. Therefore, I reformulate the duty of civility in fallibilistic terms: citizens should publicly justify their preferred legal provisions only on the grounds of reasons that they themselves may reasonably be expected to reject.

Should religious arguments be allowed in public justification of legal provisions in liberal democracies?

Today a standard answer to this question is likely to be ambiguous. On the one hand, liberals scarcely think it is appropriate to justify coercive laws on the grounds that "God says so…" On the other hand, they are ready to discuss religious exemptions from generally applicable laws and regulations. For example, the official procedural posture of the US Supreme Court's case *Burwell v. Hobby Lobby* reads: "Plaintiff owners of closely held corporations with sincere religious beliefs about contraception sued arguing that regulations requiring them to provide health insurance coverage for certain contraception violated the Religious Freedom Restoration Act of 1993…"

Like in numerous other disputes about religious exemptions, in *Burwell v. Hobby Lobby* the claimants object against a legal provision that is not intended to regulate anyone's exercise of religion and is justified on the grounds of reasons that are not derived from any religious or anti-religious claims. However, the Court considered a religious belief that human life begins at conception to be a relevant argument against the Affordable Care Act's (ACA) contraceptive mandate. Moreover, five out of nine Supreme Court

Justices agreed that those who adhere to this belief must be exempt from the requirement to cover the contraceptives commonly known as "morning after" pills in their employees' insurance plans. Indeed, it is debatable whether or not the ACA's contraceptive mandate puts a fair financial burden on corporations, but how can it be fair to make people subsidize what they believe to be murder of unborn babies? In a similar case *Little Sisters of the Poor* — a Catholic non-profit organization that provides care to elderly people — sued refusing even to submit the official form that prompts the government to cover their employees' birth-control plans (*Zubik v. Burwell*). In the plaintiffs' view, putting one's name on a paper that facilitates access to birth-control is not that much different from signing a pact with the Devil.

Stark moral predicaments that religious people face in such situations provide emotionally engaging justifications for claims of religious exemptions. But does this way of opposing publicly justified generally applicable laws remain within the confines of reasonable disagreement?

Some think that the answer is negative. For them, "the duty of civility" (Rawls 2005, 226) requires that citizens do not support a legal provision if they can justify it only on the grounds of reasons derived directly from a religious or some other comprehensive doctrine of the good.

In Section 2.1 I will review the main argument for restraint in public justification together with three objections that seriously undermine it. Then I will defend the requirement of restraint against these objections. I will argue that reasoning on the basis of religious faith involves making non-negotiable claims (Section 2.2), which is incompatible with respect for fellow citizens as free and equal co-legislators (Section 2.3). My suggestion will be that citizens do not resort to justificatory reasons that they themselves may not be reasonably expected to reject. Finally, I will argue that an unequivocal distinguishing feature of such reasons is their invocation of final values (Section 2.4).

2.1. Growing up to the fact of pluralism

Democracy means that all subject to the exercise of political power have a say in it. Democratic citizens are co-authors of their own laws (Bird 2014). In John Rawls's view, it implies that in a liberal democracy coercive laws are legitimate insofar as they are supported by reasons that "all may reasonably be expected to endorse" (2005, 137, 217, 243, 393). Finding reasons that everyone might endorse is a complicated mission, especially

when citizens hold different conceptions of the good based on diverse religious, philosophical, and moral doctrines that may be mutually incompatible. Given this fact of pluralism, Rawls suggests that in public justification of their preferred coercive laws citizens avoid drawing on comprehensive doctrines of the good. Instead, they should appeal to an idea of politically reasonable addressed to citizens as citizens (Ibid., 441). In other words, the duty of civility requires that citizens do not publicly support a legal provision if the only justification they can provide for it is derived directly from a comprehensive doctrine, be it a religious teaching, like Christianity or Islam, a philosophical conception, like Hegel's or a Marx's view of history, or a moral doctrine, like Kantianism or utilitarianism.

The main argument for restraint is based on the requirement of respect for one's fellow citizens as equal partners in democratic deliberation. As James W. Boettcher has put it: "…To demand that other citizens adopt the standpoint of a comprehensive doctrine in order to avail themselves of the justifying reasons for answers to fundamental political questions is to disregard their status as free citizens. It is to disregard their moral power freely to endorse a rival doctrine and conception of the good" (2007, 232). Given the profound disagreement about comprehensive doctrines, we should not demand too much acceptance from our opponents in a democratic dispute. It is hardly reasonable to expect atheists to abide by a certain law on the grounds that God says so, just as it is unreasonable to oppose this kind of justification by claiming that God does not exist. Respect for fellow citizens as free and equal co-legislators demands "fairmindedness in deciding when accommodations to their views should reasonably be made" (Rawls 2005, 217).

There are three main objections against restraint in public justification. The first one was formulated on behalf of religious citizens by Nicholas Wolterstorff: "…It belongs to the religious convictions of a good many religious people in our society that they ought to base their decisions concerning fundamental issues of justice on their religious convictions. They do not view it as an option whether or not to do it" (1997, 105). For devout believers living up to their religious convictions is a matter of moral integrity (Vallier 2012, 155–60), so, the objection goes, it is wrong when religious citizens' most important reasons are claimed invalid for public justification of laws these same citizens are supposed to enact and obey.

However, what is exactly wrong in this situation is far from clear. The requirement of restraint excludes all comprehensive doctrines. So, religious citizens cannot complain of

being subject to *unfair* restrictions, unless they are ready to claim that religious beliefs are more important than any other beliefs whatsoever. Perhaps, most religious individuals are ready to make exactly this claim, despite multiple arguments to the contrary (see Bedi 2007, Schwartzman 2012b, Leiter 2013). Still, by doing so they rather express a trivial fact that individuals' own convictions are usually most important to them. But mere *importance* of a certain belief *to me* does not by itself turn it into a good argument for those who do not share the belief in question. They may have opposite beliefs that are no less important to them. Devout believers' wish to pass religiously justified legal provisions is understandable, but it is not yet a reasonable argument against restraint. Reference to moral integrity is definitely an *objection* against restraint, but it does not by itself provide a *reason* that can override the norm of equal respect for fellow citizens as co-legislators. I think, Stephen Macedo made quite a precise statement when he simply called the opponents of restraint to "grow up" (1997, 21). His message, as I understand it, is not that respect for others is somehow obviously more important than one's own moral integrity, but respect for fellow citizens under the conditions of deep ideological disagreement makes restraint in public justification necessary, whether we like it or not.

The second objection against the requirement of restraint challenges this latter statement. Christopher Eberle (2002) acknowledges that respect demands a good deal of self-criticism, but it does not require that members of the public plunge into a kind of self-denial and withhold arguments based on their most deeply held convictions just because they are not shared by others. In Eberle's view, a citizen only "ought to withhold her support from any coercive law for which she lacks a high degree of rational justification; she ought to pursue [but not necessarily succeed in — Ibid., 69–70] public justification for any coercive law she supports; she ought to be willing to learn from her compatriots regarding the moral propriety of the coercive laws she supports, and thus must be willing to consider the possibility that her favored coercive laws are in fact morally indefensible" (Ibid., 19). So, for Eberle, the "doctrine of restraint" must give way to what he calls the "ideal of conscientious engagement": a citizen should be able to take her justificatory reasons directly from a comprehensive doctrine, provided she "puts her compatriots in a position to change her mind as to the soundness of her rationale for her favored coercive laws" (Ibid., 106).

Together the first two objections make a strong argument against the requirement of restraint from using comprehensive doctrines in public justification. If it is true that respect

for fellow citizens does not make such restraint necessary, then advocates of restraint have to find some other justification for burdening the moral integrity of liberal democratic citizens.

The third objection against the requirement of restraint denies the mere possibility of making a sound distinction between public and non-public reasons. In standard interpretations Rawls's "reasons that all may reasonably be expected to endorse" are understood as reasons that are accessible to all members of the public, which means that these reasons are based on common evaluative standards (Vallier 2018). To take the most primitive example, reasons based on the claim of the supreme authority of the New Testament are inaccessible to those who do not recognize this authority and, thereby, do not share the same evaluative standards with Christians.

As the objection goes, the notion of "common evaluative standards" hides within itself the key predicament. Insofar as theories of public reason and public justification aspire to be normative theories, "common evaluative standards" cannot simply refer to those beliefs and values that members of the public happen to share here and now. Instead, a normative theory of public reason is supposed to determine which evaluative standards the public ought to accept as common, and accordingly, which reasons all should treat as accessible. In other words, in a normative theory of public reason it is never some actual public that is taken into account, but an idealized public, a public that is reasonable, rational, coherently motivated, and informed to the right degree. But what is the right degree of idealization?

For example, Kevin Vallier (2011) offers a simple argument that allows to present religious reasons as accessible to virtually all members of the public. Given that there is a rich theological tradition that tries to demonstrate the truth of theistic beliefs by appealing to natural reason, a public that is not fully ignorant of or prejudiced against theology would be able to access religious reasons (Ibid., 375–80). It also would not be too hard for the same public to acknowledge that reliance on authoritative sources (parents, priests, friends etc.) plays an important role in grounding people's moral beliefs, which makes religious testimony "epistemically symmetrical" to moral testimony. So, in Vallier's view, those who accept moral testimony should acknowledge that religious testimony meets their evaluative standard as well (Ibid., 380–5).

Does this argument imply the right degree of idealization? On the one hand, I can easily imagine someone say that being able to appreciate the rationality of theological disputes is too demanding. Therefore, Vallier overidealizes the general public. On the other hand, I could say that, in my view, people should quit "reasoning from testimony by a moral authority" by the time they finish high school. Therefore, to my taste, Vallier's account of the general public is not idealized enough.

Nevertheless, I think that Vallier has definitely succeeded in demonstrating that the borderline between accessible and inaccessible reasons is quite elusive. Vallier himself derives a radical conclusion from this critique and claims provocatively that "a successful public justification may entirely consist of reasons that are unacceptable to all but the agent who offers them" (Vallier 2016a, 597). It is a kind of reversed Macedo's message: since public and non-public reasons cannot be clearly defined in a way that all may reasonably be expected to endorse, advocates of restraint in public justification should better grow up.

In the remaining sections I will defend the doctrine of restraint against these three objections. My primary aim is to confront the second objection head on and demonstrate that reasons based on religious faith possess a certain feature — namely, non-negotiability — that makes their use in public justification of legal provisions incompatible with respect for fellow citizens as co-legislators. Then I will argue that arguments from faith share this feature with the whole set of arguments that draw on final values, which unequivocally marks them as non-negotiable, non-public reasons. Thereby, I will escape the radical conclusion of the third objection by showing that it is quite possible to make a clear distinction between public and non-public reasons without even touching upon the vague notion of accessibility. If these arguments are correct, the first objection remains nothing more than an expression of a concern related to the idea of justificatory restraint and the duty of civility, it does not constitute a reasonable argument against them.

2.2. Faith and negotiability

Advocates of religious reasoning in the public square routinely downplay its dogmatism. Dogmatism has a lot to do with what Brian Leiter describes as "insulat[ion] from ordinary standards of evidence and rational justification" (2013, 34). However, how exactly does this characteristic apply to religious discourse needs closer scrutiny. Leiter writes that religious belief is insulated from evidence "not only in the sense that it does not an-

swer to empirical evidence but also in the sense that it does not even aspire to answer to such evidence" (Ibid., 47). This creates an impression that religion is radically disengaged from the profane world in favor of the "ultimate metaphysical reality." In my view, this impression is somewhat misleading.

Consider the issue at stake in *Burwell v. Hobby Lobby*. Contemporary Christian views on ensoulment are even more radical than the standard Medieval view. Today Christians oppose the "morning after pills" on the grounds that ensoulment happens at conception, while Aquinas, following Aristotle, believed that it happens for males only on the 40th and for females on the 90th day since conception (Haldane and Lee 2003, 266). Notably this change in the religious doctrine occurred in the late 19th century due to the development of scientific embryology that discovered the process of fertilization (Ibid., 263). Aristotelians thought that human life was only gradually infused in the mixture of a nonliving, purely material female menstrual blood with a life-giving male semen, the bearer of formative "animal spirit." But then the scientific notion of a fertilized ovum, which is at the beginning of individual human life, lead to the idea that the principle of human formative development — "the human soul" — is already immanent to the embryo.

Religion is surely a way to interpret and understand the real world, not just replace it with some transcendent alternative. Just like philosophy, religion boldly appeals to metaphysical ideas, but it does not necessarily mean disregard of all things mundane. Religious thought constantly oscillates between the profane and the sacred in order to understand both, in this sense it connects rather than insulates them from one another.

Religious dogmatism does not mean mere reluctance to consider new contradicting evidence, rather, it is a specific way of responding to it. Dogmatism is not just a lack of engagement with opponents, it is a special way of engaging with them. To understand what dogmatism means it is useful to think of how much "reasonable pluralism" might be possible in a theocratic state. For instance, could atheists possibly be exempt from a religiously justified ban on abortion?

I think that no "atheistic exemptions" would be possible even if devout believers did not want to burden atheists with prohibitions justified by reasons that atheists do not share. How can a believer explicitly agree to others disobeying God? Priests have the authority of remittance, but they can apply it only to repentant sinners, not to those who deny the

mere existence of the One in whose name the remittance can only be given. Exempting atheists from religiously justified laws would be in stark contradiction not just with religious citizens' beliefs, but with their *faith.*

The Bible defines faith as "confidence in what we hope for and assurance about what we do not see" (*Heb.* 11:1). According to Aquinas, faith is "a mean between science and opinion" (Aquinas. *ST,* 2nd part of Part II, Question 1, Article 1). On the one hand, a devout believer firmly holds something as true, which makes religious belief similar to scientific knowledge and understanding. But on the other hand, since "matters of faith surpass natural reason" (Ibid., Question 2, Article 6), a believer's knowledge "does not attain the perfection of clear sight," which makes believing similar to having an opinion (Ibid., Article 1). Thereby, the unfolding of the matters of faith is the result of the Divine revelation (Ibid., Article 6), and reasons employed in rational defense and justification of religious creed are drawn from the authority of Holy Writ (Ibid., Question 1, Article 5).

For Aquinas the authority of Holy Writ arises not out of some theoretical and empirical assessment of its probability, but from a special experience of reading it. Readers of the Holy Scripture come to believe in its truths in virtue of "the inward instinct of the Divine invitation" (Ibid., Question 2, Article 9). Alvin Plantinga calls this basic component of religious experience "the Divine instigation." It makes the Scripture self-authenticating, so that "upon reading or hearing a given teaching — a given item from the great things of the gospel — the Holy Spirit teaches us, causes us to believe that that teaching is both true and comes from God" (2000, 260).

The Divine invitation is not an ordinary everyday experience and not the type of experience taken into account in modern science. The latter relies on occurrences that are reproducible. No matter how rare or even unique they are, it is possible to determine the probability of having a certain experience under given conditions. The Divine invitation is not like that. On the one hand, it is already given to everyone, insofar as God loves all human beings. But on the other hand, it makes no sense to count the probability of "hearing" the invitation in any particular act of praying or reading the Scripture, because when and how exactly God is going to invite you depends entirely on His own will. The Divine invitation is open to everyone, but it depends on each and every individual to seek it, be ready to accept it, and keep it in one's heart once it is actually "heard." In this sense faith is voluntary: "The act of believing is an act of the intellect assenting to the Divine truth at

the command of the will moved by the grace of God" (Aquinas. *ST*, 2nd part of Part II, Question 2, Article 9).

In virtue of this grateful voluntary aspiration to follow God's word, religious faith is essentially an exercise in fidelity, and this fidelity is supposed to be mutual. God expresses it in promises — testaments, gospels, precepts, threats. Human beings respond to them in prayers and vows — the assurances of trust and obedience. Faith as fidelity is largely a matter of perseverance: "You need to persevere so that when you have done the will of God, you will receive what he has promised. For, 'In just a little while, he who is coming will come and will not delay.' And, 'But my righteous one will live by faith. And I take no pleasure in the one who shrinks back'" (*Heb.* 10:36–38). The idea of faith as fidelity inspires Paul's analogy between marriage and the relation in which Christ stands to the church (*Eph.* 5:21–23). Martin Luther developed it into an even more sentimental metaphor of faith as marriage in which a believer's soul is a bride and Jesus Christ is a bridegroom (1970, 286).

Religious reasoning, thereby, is a means of fidelity, a way of keeping the faith. At the same time, it would be unfair to accuse devout believers of a faint-hearted avoidance of doubt. The whole tradition of rational theology speaks against it. But still, religious reasoning denounces any hint of deliberate cultivation of doubt. Skepticism is theology's worst enemy, insofar as theology is meant to disperse the clouds of uncertainty and let the light of truth shine through. That is why, when faith itself is at stake, religious reasoning goes beyond or even disposes of rationality in its scientific and common sense understanding. While "ordinary" human rationality tries to escape contradiction by any means possible, religious thought turns towards contradiction and, with due fear and trembling, fully accepts it as the core of any genuine theological comprehension.

There is no shortage of well-known examples to illustrate this point. One is how Origen justified the apparent impossibilities and irrationality of certain things in the Scripture as signs that it does not originate from the mind of a human. He also suggested that we treat those impossibilities as "stumble-blocks" scattered in the text to divert us from a narrowly literal reading of the Holy Writ (Origen 1885, Book 4, Chapter 1). Another example is Nicolas of Cusa's treatment of contradiction as the most adequate representation of the Divine infinity in the finite human mind, which "attain[s] unto it in no other way than incomprehensibly" (Nicholas of Cusa 1990, Book 1, Chapter 4: 11). And of course, there is a famous paraphrase of Tertullian's statements from his treatise *On the Flesh of Christ*

(1885, 525): *"Creo quia absurdum,"* which may be interpreted as "it only befits God to do the incredible, so, when incredible things are told about God one cannot but believe in them." Contemporary religious epistemology reproduces the same old structure of embracing contradictions and stepping beyond the "ordinary" rationality. Plantinga, following Aquinas and Calvin, refers directly to special cognitive faculties, such as *sensus divinitatis* and responsiveness to the "internal instigation of the Holy Spirit" (Plantinga 2000, 170–86, 249–52). The exercise of these faculties allows to justify one's belief in the Scripture regardless of the inconsistencies that may be found in it.

Whether an objection to a belief is able to defeat it depends on the noetic structure within which the belief is contested, i.e. "on what other beliefs I have, how firmly I hold them, and the like" (Ibid., 360). What distinguishes the noetic structure of a devout believer is that he or she is determined to hold on to the gifts of the Divine grace delivered through *sensus divinitatis* and the internal instigation of the Holy Spirit. First and foremost, a devout believer is the one who is determined to keep the faith. That is why, for instance, a picture of enormous suffering and evil in this world is not a defeater of Christian belief. According to Plantinga, someone in whom *sensus divinitatis* "was functioning properly" might ask herself why God permits all this evil, "but the idea that perhaps there just wasn't any such person as God would no doubt not so much as cross her mind." Moreover, "if she finds no answer, she will no doubt conclude that God has a reason that is beyond her ken" (Ibid., 485).

Faith that makes one aspire to meet the ideal of flawless belief compensates for the weakness of *sensus divinitatis* caused by the original sin. In virtue of faith the noetic structure of a religious person is dominated by dogma to the extent that hardly any objection to them can be seriously considered as a possible defeater. Indeed, what can defeat a belief in the Scripture within a noetic structure in which the infallibility of the Scripture is the basic tenet? And what in the world can damage a noetic structure whose basic tenets are protected by "learned ignorance"? While opponents of religion constantly look for new arguments against it, religious people do not really have to invent anything new in response. They already have all the necessary counterarguments written in their hearts, faith itself is its own best defense and justification.

Plantinga goes to the end in this direction and argues that our conventional understanding of rationality, which is at odds with religious ways of reasoning, is just not quite correct: "Contrary to a sort of ethos induced by classical foundationalism, it is not the case that

the way to demonstrate rationality is to believe as little as possible; withholding, failure to believe, agnosticism, is not always, from the point of view of rationality, the safest and best path. In some contexts it is instead a sign of serious irrationality" (Ibid., 186). This is almost trivially true for well established scientific theories that are taught at school and for factual judgements supported by an accessible empirical evidence. But the context that Plantinga has in mind is the one in which we deal with things "we hope for" and "do not see." So, in religion "rationality" becomes quite different from what it is taken to be in science and most of everyday social interactions.

Unlike scientists and "ordinary" rational subjects, religious people must not suspend their beliefs even in the absence of sufficient proof and despite the abundance of arguments and evidence that these beliefs are likely to be false. Religious beliefs are not something that one can just have, they are something to keep one's faith in. Religious reasoning is about being tough, not flexible. Aquinas teaches that it is sinful to engage in a dispute with an intention to probe your religious beliefs with arguments. "One ought to dispute about matters of faith, not as though one doubted about them, but in order to make the truth known, and to confute errors" (Aquinas. *ST,* 2nd part of Part II, Question 10, Article 7). Religious reasoning is not aimed at the quest for truth as "the right measure" or a "golden mean" between contradictory claims; it is aimed at the apology of dogma in the face of objections. Despite its humble name, religious apology is not about apologizing and searching for compromise. Aquinas offers no arguments *to* gentiles, but he has the whole *Summa* of arguments *against* them. Regardless of how persuasive such things as rational proofs of God's existence might be, a devout believer's attitude to the truths of religion does not depend on these proofs' success or failure. In Plantinga's religious epistemology it is not always rational to suspend a belief until you can rationally prove it, and that is perfectly in tune with the words of the Bible: "The fool says in his heart: 'There is no God'" (*Ps.* 14:1). These words are often presented as the final conclusion of religious reasoning, but they are also its first premise.

What we can learn about faith from its ancient fathers and its most prominent contemporary advocates makes it far from obvious that true believers can adhere to Eberle's ideal of conscientious engagement. A conscientiously engaged religious citizen may, indeed, pay close attention to what her opponents have to say. But how can she keep her faith and at the same time "[put] her compatriots in a position to change her mind as to the soundness of her rationale for her favored coercive laws" (Eberle 2002, 106)? Is not it

true that the appeal to faith, which is part and parcel of religious reasons, makes them *non-negotiable?*

Advocates of religious reasons in the public square may contend that only a small part of such reasons is really non-negotiable. Not all religious arguments merely reiterate articles of faith and invoke unequivocal God's commandments, such as "I am the Lord your God" and "You shall have no other Gods before me" (*Ex.* 20:2–3). Many religious arguments are conclusions from articles of faith. These conclusions are derived from interpretations of sacred texts sometimes mediated and supplemented by philosophical ideas that do not even have to be theistic. The Christian view on abortion is a good example. Its Biblical underpinnings are found in verses that refer to individuals as being formed in their mothers' wombs by God who personally knows every individual even before the formation takes place, e.g. "Before I formed you in the womb I knew you, before you were born I set you apart" (*Jer.* 1:5). The rest of what might be called the "Christian discourse against abortion" consists of theologo-philosophical reflections on the value of human life, the meaning of personhood, and the process of its constitution. The latter, as I have already mentioned, may be described in Aristotelian terms informed by the latest findings in scientific embryology. Such religious reasons — as their advocates might argue — are negotiable, since it may be questioned whether or not a certain interpretation of an article of faith is correct. Another thing that may be negotiable about religious reasons is whether or not a certain commandment must become part of state legislation. For instance, God has commanded clearly that one shall not have any other Gods before him, but it is debatable whether or not heresy and apostasy shall be subject to criminal prosecution.

I am not going to deny that conclusions derived from articles of faith are negotiable. There are at least three cases in which a believer may be persuaded to "change her mind as to the soundness of her rationale" concerning the interpretation of a sacred text: (a) an alternative interpretation proves to be more plausible given the facts about the world and/or the believer's everyday experience; (b) the believer is convinced that she has made a mistake in her inference from the premises to the conclusion; (c) the believer is convinced that she has missed some relevant premises that eventually alter the conclusion.

All this being said, I must note that in order to present an argument in the form of a negotiable interpretation of articles of faith, one has to present the argument's premises, i.e.

the articles of faith, which are non-negotiable. So, making faith-based arguments, however negotiable their conclusions might be, inevitably involves making non-negotiable claims about their premises. Surely, the plaintiffs in *Burwell v. Hobby Lobby* could engage in a debate on what exactly does *Jer.* 1:5 mean for the legitimacy of ACA's contraceptive mandate, but I am afraid they were not there to discuss whether the verse is true or meaningful. This part of their argument was non-negotiable.

Thereby, the admissibility of reasons based on religious faith in public justification of laws and exemptions depends on whether or not liberal democratic citizens should be allowed to make non-negotiable claims when they publicly justify their preferred legal provisions to one another.

Are non-negotiable claims acceptable in democratic deliberation?

2.3. Negotiability and respect

Those who make non-negotiable claims can do it quite humbly and say that others are free to reject them. The problem is that they deny the same freedom for themselves.

Democratic deliberation is an exchange, a "give-and-take" of reasons aimed at a consensus or at least a compromise on laws and policies that would balance the competing interests. In this "exercise of common critical rationality," as Thomas Nagel has described it, we are supposed to explicate the grounds of our beliefs to others so that "they have what you have" (1987, 232). Speaking of reasons, religious people are always ready to share what they have with others, and they are not always reluctant to take a look at what others have. But in fact, they are never ready to *take* anything from those who question their premises. No matter what you give them, devout believers must *keep* their faith — this is where their engagement with opponents conscientiously stops. In fact, those who address the public with non-negotiable claims make announcements and declarations, but they do not engage in the public exchange of reasons. Why do it if all the best reasons, thank God, are already in the possession of those who share the articles of my faith?

To say the least, it is extremely hard to find a place for non-negotiable claims in the public square. What finally reveals their utter inappropriateness is that using non-negotiable claims in order to justify one's favored legal provisions is incompatible with respect for opponents as equal partners in democratic deliberation. To treat one's opponents in a debate as equals is to think of them as capable of winning the debate, just as one thinks of

oneself. But religious people simply cannot do it. They cannot allow themselves to think of those who oppose their articles of faith as capable of winning. Devout believers must keep their faith, which means that they cannot recognize the superiority of views that contradict their religious commitments. Those who make non-negotiable claims — like "such is the will of the Lord" — are not free to give them up even in the face of an overwhelming superiority of rival arguments. The whole practice of demanding religious exemptions is inspired and invigorated by the idea that the opponents of true believers cannot prevail — at least in the eyes of the only true Judge, if not in the eyes of an ignorant crowd. It does not matter if a law that contradicts our religious beliefs has been reasonably justified and democratically enacted, since God is on our side, we fully deserve to be exempted!

To justify one's preferred legal provisions by non-negotiable claims is to deny the possibility of being defeated in a debate on them, which is hardly a way to respect one's opponents as equals. But such respect is necessary insofar as liberal democratic citizens are supposed to view one another as free and equal co-legislators. That is why non-negotiable claims are inappropriate for public justification of legal provisions in liberal democracies.

Rawls aimed to rule out inappropriate arguments by demanding that citizens fulfil their "duty of civility." He required that they justify their preferred legal provisions to one another on the grounds of reasons that "all may reasonably be expected to endorse" (Rawls 2005, 137, 217, 243, 393). However, this formulation does not allow to grapple sufficiently with non-negotiable claims. Given Rawls's definition of reasonableness (Ibid., 49, 375), reasons that pass the test of reasonable acceptability are those that help to maintain fair terms of cooperation and do not imply that their addressees disregard the burdens of judgment. There is a relatively simple way to meet these requirements while advancing non-negotiable sectarian justifications for one's preferred policies. The trick is to present the adherence to a controversial practice or a rule as part of one's identity and call in a quasi-postmodernist fashion for the openness towards "the otherness of the Other." The implication here is that, regardless of the specific content of the demand, "everyone knows what it means to have something central to his or her sense of self. <…> In Rawls's terms, it is a reason that others can not only understand, but also one we might reasonably expect that others could accept" (Quong 2002, 314). It is difficult to find anything that cannot be fitted into this identitarian package certified for use by any Other.

Therefore, in order to tackle non-negotiable claims in public justification, I suggest that the duty of civility be reformulated in fallibilistic terms:

> Citizens should publicly justify their preferred legal provisions only on the grounds of reasons that they themselves may reasonably be expected to reject.

A reason-giver may be reasonably expected to reject one's own argument if the argument can be subject to reasonable criticism. Again, given Rawls's definition of reasonableness, criticism is reasonable when it recognizes the burdens of judgment and helps to maintain fair terms of cooperation. What does it mean for arguments based on religious faith?

Firstly, let us think whether or not reasonable criticism of articles of faith is possible. Apparently, there are two options here. One is to criticize the articles of faith on the basis of science and everyday experience. This critique would be reasonable, but irrelevant because faith transcends it by definition, as I have argued extensively in the previous section. Another option is to criticize the articles of faith by drawing on the articles of some other faith. If we assume that it takes a prophet to refute a prophet, such criticism might be relevant. But at the same time it would be unreasonable, because assertion of articles of faith means rejection of the burdens of judgment. So, articles of faith cannot be subject to reasonable criticism and their direct invocations do not make reasons that the reason-givers themselves may reasonably be expected to reject.

Secondly, is reasonable criticism of conclusions from articles of faith possible? This question requires a more elaborate answer.

As we have just found out, a critique that challenges the premises of conclusions from articles of faith — i.e. challenges the articles of faith themselves — is not an option. However, it is possible to criticize these conclusions by means of what Rawls has called "reasoning from conjecture" (2005, 465–66). This type of critique does not challenge the articles of faith, but shows that either the disputed conclusions do not follow from them or there are other, more plausible conclusions. The question is: would it count as reasonable criticism?

While reasoning from conjecture, one does not have to actually accept the premises of the arguments that one criticizes. The critique takes the form of a conditional: "*If* such and such premises are true…" Therefore, it is compatible with recognition of the burdens

of judgment. It also seems that such critique can be reconciled with the considerations of fairness. The premises of faith-based arguments are insulated from reasonable criticism, unlike the premises of arguments based on science, non-dogmatic philosophy, and everyday experience. But we can have public discussion of conclusions from articles of faith on fair terms if, in order to compensate for the argumentative disbalance, we agree to insulate from criticism all basic premises that play a similar foundational role in their own relevant discourses. We might agree that in public deliberation on legal provisions it would be just as inappropriate to challenge the basics of Kantian and utilitarian ethics, Hegelian and Marxist view of history, thermodynamics and theory of evolution, as it would be inappropriate to challenge the Bible or the Quran. It is curious to see how this arrangement might work.

Under this arrangement, Catholics would be able to argue that abortion must be regarded by law as murder because in the eyes of God all human individuals become persons even before their formation in the womb. Given the inviolability of the Scriptural premises of this justification, in order to criticize it publicly its opponents will have to demonstrate that what the Bible says about the prenatal stages of individual development does not necessarily entail that abortion is murder. Otherwise, they will have to acknowledge that they have no reasonable counterarguments. However, there would be another option for those who oppose the criminalization of abortion. Atheistic materialists could say that they do not mean to disrespect Catholics or challenge their articles of faith, but abortion must be legal because neither gods, nor souls exist. Given the inviolability of premises, in order to publicly criticize this perspective Catholics will have to demonstrate that atheism and materialism do not necessarily entail that abortion is not murder. Otherwise, they will have to acknowledge that they have no reasonable counterarguments.

If atheists fail to provide any Scriptural or at least Scripturally informed arguments for the permissibility of abortion, and Catholics find no materialistic arguments against it, this means a situation in which there are reasonable arguments in favor of two contradictory legal perspectives on a certain public issue (abortion), but at the same time no reasonable counterarguments against them. Even if we read the Catholic view as an argument *against the legalization* of abortion and the materialist view as an argument *against the criminalization* of abortion, given the inviolability of premises, these arguments do not constitute reasonable arguments *against one another*. Whether this situation is genuinely paradoxical or just superficially weird is not that important. The important thing is

that when all foundational premises are made inviolable and reasoning from conjecture remains the only legitimate method of public criticism, the opponents in democratic deliberation are allowed and practically encouraged to speak past each other.

Conclusions from non-negotiable sectarian premises are hardly convincing to anyone outside one's own sect. But when arguing as if these premises were true is the only legitimate method of critical engagement with them, many members of the public will prefer another fair response — namely, to strike back with a countervailing sectarian reason, while paying lip service to the values of open dialog, civility, and respect. Even if insulation of foundational premises from criticism establishes fair terms of public deliberation, these are hardly terms of *cooperation* in the process of such deliberation, as well as in public life governed by laws that might result from it. Rather, they are fair terms of the struggle for domination. Fairness consists here in equal opportunity to advance arguments that are aimed not to convince one's opponents, but to dumbfound them and block the conversation.

Under such rules of public justification the majority vote would mean almost everything and public deliberation almost nothing. The most plausible way to realize the commitment to "reasonable" pluralism in such a society would be to adopt an intricate system of legal exemptions for every group whose comprehensive doctrine of the good diverges from that of the majority. The resulting society would be a loose aggregation of large and small sects obsessed with protecting themselves from influence by the outsiders and suppressing internal dissent.

So, conclusions from articles of faith can be subject to criticism that recognizes the burdens of judgment and is exercised on fair terms. The latter, however, are not the terms of cooperation. Therefore, conclusions from articles of faith cannot be subject to reasonable criticism, they do not make reasons that the reason-givers themselves may reasonably be expected to reject. It turns out that no arguments that involve non-negotiable claims are compatible with the duty of civility formulated in fallibilistic terms. Not only direct invocations of articles of faith, but also conclusions from them should be excluded from public justification of legal provisions.

Does it mean that all religious arguments should be excluded? Do all religious arguments necessarily involve non-negotiable claims? What makes a claim non-negotiable in the first place?

2.4. Negotiable reasons and final values

How is it possible to know whether an individual can reasonably be expected to reject his or her reasons in the face of strong counterarguments? Isn't it just a matter of one's inner disposition to be truly self-critical and sincerely respectful towards opponents? If respect for opponents is only a matter of inner attitude to one's own reasons and not of their structure or content, then, at best, the norms of public justification can determine *how* members of the public should present their reasons to one another, not *what* kinds of reasons they should be allowed to present.

This is largely the position of James Bohman and Henry Richardson. In their view, by and of themselves reasons cannot be more or less respectful and revisable. Therefore, a better approach is to "use these ideas of respectfulness and revisability adverbially, to characterize the manner in which one offers arguments and reasons in public debate" (2009, 269). Accordingly, the duty of civility "requires that each interlocutor be willing to suppose that the other is willing to treat any reason or tenet as revisable, should they have reason to do so" (Ibid., 270).

Some think that even religious arguments can be presented in such a form and manner that they would be consistent with the duty of civility. Andrew March argues that in fact "there is no single such thing as a religious argument" (2013, 528). Arguments that we call "religious" may appeal to a revealed text or personal mystical experience, but they may as well refer to practical wisdom and moral insight found in traditions of religious thought. Would not it be overly demanding to exclude references to religious traditions from public justification of legal provisions?

I agree that an appeal to a tradition may sound not as peremptory as a direct invocation of a sacred text. Nevertheless, I suggest that we take a closer look at what appealing to a "religious tradition" in the process of democratic deliberation might mean. Despite the difficulties of defining religion (Wilson 1998), I think that for the purposes of the current discussion it would be sufficient to proceed from common parlance in which religion generally has to do something with faith in God (or gods). Moreover, let us concede that an argument is religious if at least one component, either faith or God (gods), is present in it.

Firstly, if "religious tradition" in justification of a legal provision means "our ancient faith in God," then we are still dealing with a non-negotiable claim, which in a certain

sense is even more pressing. That is because it is not just some individual's idiosyncratic belief being invoked, but the faith in God consecrated by generations of ancestors and shared by the whole community. Secondly, if "religious tradition" signifies "faith" without "God"— a sort of strong adherence to a community's tradition as such — then it is debatable whether or not this kind of faith makes much sense, but still, insofar as there is faith, there is non-negotiability. Finally, if by appealing to a "religious tradition" the reason-givers refer to "God" but do not mean "faith," then they, indeed, make a claim that is not non-negotiable. However, from the standard theistic point of view, it would be precisely the case of "tak[ing] the name of the Lord in vain" (*Ex.* 20:7). I guess, it is not the sense in which "religion" is invoked by believers, and it is not the way of using God's name that they want to secure for themselves in the public square. So, in the context of democratic deliberation religious claims remain non-negotiable, regardless of whether they draw on divine revelation or just on "religious tradition." I can think of only one exception to this.

There is one way to invoke God without faith and at the same time avoid taking God's name in vain. It is possible when a believer's relation with a divine authority does not imply unconditional fidelity, but is based on a contract resulting from some sort of negotiation. Imagine a businessman who requests a tax break every four years on the grounds of having an agreement with Hermes, according to which for the greater glory of the Greek god on every February 29 the businessman burns the amount of goods equivalent to a quarter of his corporation's yearly income. In exchange Hermes guarantees him constant luck in all business transactions. Here I do not intend to discuss whether or not Hermetic Merchants should get their tax breaks. Obviously this case leaves much room for negotiation. For instance, the Merchants might consider whether they would be better off by paying consignment insurance fees instead of making huge sacrifices to Hermes. So, my point is that the religious and yet negotiable justification for their request must be admitted into the process of democratic deliberation, because this justification meets the rejectability requirement. The duty of civility is not aimed against reasons that are eccentric, it is aimed against reasons that are knowingly insulated from reasonable criticism. The key difference between the claims of Hermetic Merchants asking for tax breaks and the claims of Christians asking for exemption from the ACA's contraceptive mandate is that the former are negotiable and the latter are not.

This example suggests that non-negotiability of certain religious reasons is not grounded in the believers' ontological commitments: Hermetic Merchants believe in the existence of supernatural spiritual powers just like Christians do. It is not a matter of epistemology either: the Merchants believe in their contracts with Hermes just like Christians believe in the Bible, the adherents of both religions think that their beliefs are infallibly true. The key difference that is relevant for the public justification of their claims is axiological. Faith is not only — and even mainly — an epistemic attitude, first and foremost it is an evaluative attitude. Hermetic Merchants have trust, but not faith in Hermes, their relations with the Greek god are contractual and conditional. Merchants make sacrifices to Hermes insofar as he helps to maximize their profits. Christians have faith in God, their fidelity to Him is unconditional, and they treat God this way because He is the Greatest. Hermes is good insofar as he brings good luck; God is just good, or to be precise, he is *the Good.* For Merchants the value of relations with Hermes is relative and instrumental. For Christians the value of relations with God is absolute and final, for them God is the final value.

Final values can be defined simply as things that are valued for themselves and not for the sake of any other things. Final values are "ends-in-themselves," they are not means to any other ends. They stand in contrast to instrumental values that are valued insofar as they give access to things other than themselves (Korsgaard 1983, 170). As *ends*-in-themselves, final values have *no exchange value.* They are not valued because they give access to or can be exchanged for something else; they are not meant for exchange at all. As ends-*in-themselves,* they are not values *for* anyone, meaning that they are not at anyone's disposal or service. On the contrary, it would be more correct to say that it is the individuals who serve their final values, not vice versa. To be loved by someone is not to serve the lover, rather it is the lover who serves. To be an object of affection is not to be affected, but to affect. It means that final values as objects of love and unconditional fidelity have *no consumer value.* If they give anything resembling pleasure, it happens not as a result of being consumed by those who pursue them. The moment when a person gets access to a final value is not that of consumption, rather it would be more properly defined as "consummation" — an old-fashioned word for a moment when the fulfillment of a lover's wish is at one with his or her duty.

The pursuit of values that are meant neither for exchange nor for consumption cannot be subject to bargaining and negotiation. Incommensurable final values can be praised and

denounced, but adherence to them cannot result from a calculation of gains and losses. Keeping a faith, falling in love, becoming a revolutionary or even a cold-hearted money chaser is not a matter of balancing reasons *pro* and *contra*. Accordingly, we do not bring up our final values in a debate in order to put them under scrutiny and see whether or not we should dump them and turn to new ones. Claims of religious faith are pledges of allegiance to final values — devout believers do not hold them as hypotheses or bargaining chips. The same is true of appeals to moral and philosophical doctrines (e.g. Kantianism and utilitarianism, Hegel's and Marx's view on the purpose of human history) insofar as they involve claims about final values. Such claims are necessarily, structurally non-negotiable.

Certainly, philosophers, priests, and intellectuals of all sorts often engage in public debates about final values. However, it is highly doubtful that such debates are reasonable. First of all, an attempt to make a non-voluntaristic choice of a final value would be circular (see Frankfurt 2004, 24–6). For if we ask: "Which things are worthy of being treated as final values?" the answer is something like: "It is those things that by themselves make life worthy of living, regardless of whether or not they can give access to any other things." But if life that can be conceptualized in terms of being *worthy* of living is a life that consists in the pursuit of values, then what makes life worthy of living is the pursuit of things that are valuable, which means things that are worthy of being treated either as instrumental or as final values. The former are things that can give access to other things, and the latter are things that by themselves make life worthy of living… The inquiry into the nature of final values has come full circle. Thereby, a choice among final values is essentially voluntaristic, it is an act of will par excellence. Accordingly, any public apology of a final value in the face of an alternative one is essentially a clash of wills, not reasons.

Furthermore, it is readiness to revise one's declared final values, not perseverance in upholding them that strikes us as a sign of moral corruption and, perhaps, irredeemable irrationality. It sounds either hypocritical or depressingly ignorant when someone claims readiness to give up one's belief in a Holy Writ if only you give him or her sufficient rational arguments and empirical evidence against it. Likewise, it would be something deeply perverse and slavish if one could fall in love upon a reasonable advice from a well-wisher. Tell a priest you have something to make one doubt whether God is really worthy of devoting one's whole life to Him. If the priest does not laugh back at you, then

you will probably think that he is not among the most faithful of God's servants. Tell a lover that you know someone who could make her doubt whether her beloved is really a person worthy of spending her life with. If she does not turn away in scorn, then you will probably think that she is an amazingly frivolous woman.

When people invoke their final values in a debate, they either intend to stop the conversation (Rorty 1999, 168–74), or, I am afraid, they do not know what they are talking about. When I argue that reasons that refer to God as a final value are non-negotiable I do not doubt that devout believers are capable of formulating their arguments in a "secular" language, nor do I make any assumptions about whether or not they intend to be disrespectful to others (cf. Winandy 2015). I could even agree that, as Maeve Cooke puts it, "there is no conflict in principle between non-authoritarian reasoning and an orientation towards some 'otherworldly', transcendent source of validity" (2007, 235). What I argue though, is that negotiability is not an option that exists for all such sources, especially for those sources that Cooke points out — namely, "God or the good" (Ibid.) If an argument draws on a final value, which is accessed primarily by means of faith, then "authoritarianism" is not merely a mode of reasoning that can be detached from the argument's substance and replaced with a "liberal" mode at the discretion of the reason-giver. Insofar as claims of religion are inspired by faith in final values their whole structure is dogmatic — not only with regard to the claimants' theoretical beliefs, but with regard to their practical commitments as well. This may be called "the dogmatism of practical reason," which is the kind of dogmatism that cannot express itself in negotiable, non-authoritarian justifications. In this sense religious dogmatism, unless we are talking about the pragmatic religious dogmatism of Hermetic Merchants, is problematic in the context of democratic deliberation (see Bardon 2016, 282–3).

To give the ultimate example, there is only one non-authoritarian way to say "I am the way and the truth and the life" (*John* 14:6) — it is to add "My kingdom is not of this world" (*John* 18:36). Jesus had no doubt that he was the source of salvation for the whole humanity, but he acknowledged that it did not make him anybody's king. He did not aspire to enact laws and collect taxes by the right of his divine origin. Instead, he taught that people should "give back to Caesar what is Caesar's, and to God what is God's" (*Matthew* 22:21). Of all human beings that ever lived Jesus felt like he was the closest to the divine truths about justice, but still he did not think that it was appropriate to invoke

these truths in a debate over imperial taxes. In other words, when it came to public justification of state laws, Jesus adhered to the doctrine of restraint.

One might contend that Jesus did and suffered many things that could hardly be reasonably expected from ordinary people. In particular, one could say that by requiring individuals to distance themselves from the comprehensive doctrines that shape their identities justificatory restraint "imposes an unacceptable psychological burden on the inhabitants of liberal democratic orders" (Cooke 2007, 232).

My response is that in practice the exercise of justificatory restraint does not have to be as psychologically burdensome as its opponents describe. The immediate purpose of justificatory restraint is not persecution of authoritarian reasoning and speech. Contrary to how Rawls imagined it (2005, 445), I even think that the duty of civility can be turned into a legal duty without violating anyone's freedom of expression. The exercise of justificatory restraint can be ensured through legal checks on enacting laws and executing judicial rulings that have no other justifications, except for those based on non-negotiable claims about final values. The relevant constitutional arrangement would be a general principle of ideological non-establishment, analogous to the principle of religious non-establishment extended to all comprehensive doctrines, secular and religious. Under this arrangement, ordinary citizens and even state officials at parliament and in court will remain free to support their opinions by arguments of all sorts (cf. Habermas 2006, Bonotti 2015). For example, members of the parliament will be able to propose and openly defend laws against abortion on religious grounds. But their opponents will rightfully remind them that the proposal cannot be put to vote unless it is supported by proper public reasons. Even if this dogmatically justified law somehow gets pushed through the parliament, there remain good chances that it will be struck down by the judiciary as unconstitutional. (Camil Ungureanu has put forward similar suggestions (2008, 415–6). However, I find overreaching his idea to declare unconstitutional the advocacy of religious platforms during elections.)

Justificatory restraint is not meant to prevent people from saying anything in public, but it is supposed to make sure that not everything that people say can become law. Commitment to a final value may well serve as an explanation of why one is concerned about a given legal provision. There is nothing particularly authoritarian in informing fellow citizens about it. But to present one's commitment to a final value as a reason why the coercive power of the state must be used in order to make everyone else engage in or at

least tolerate the pursuit of this final value is authoritarian by definition. There is no need to silence any of the concerns that citizens may wish to express in a debate over a piece of legislation. What is necessary to ensure though, is that no legal provision is enacted unless it has a justification that does not draw on dogmatic claims about final values.

The doctrine of justificatory restraint can be a very modest doctrine. It is not meant to penetrate into individuals' deepest convictions in order to eradicate authoritarian reasoning. But it is definitely meant to curtail authoritarian law making and adjudication. The fallibilistic public reason is a modest political reason, it is not aimed at governing the morality of the people.

Conclusion

I have argued that liberal democratic citizens should publicly justify their preferred legal provisions only on the grounds of reasons that they themselves may reasonably be expected to reject. It means that in public justification of their preferred policies citizens should not address each other with reasons that appeal to their favored final values. The latter are incommensurable ends-in-themselves, and reasons that refer to them inevitably take the form of non-negotiable claims. Non-negotiable claims about final values can be made to *inform* others of important concerns that motivate an offer or a rejection of a law, but it is inappropriate to use such claims in order to *justify* one's preferred legislative provisions to others. To present non-negotiable claims as reasons why all must endorse or tolerate a certain policy is incompatible with respect for fellow citizens as free and equal co-legislators. Reasons based on religious faith that implies unyielding adherence to revealed dogma and unconditional obedience to God's will are exemplary of non-negotiable claims that draw on final values. Certainly, in liberal democracies religious arguments must not be prohibited in public discussions of concerns related to legal provisions, but these arguments should not be used in the official public justification of laws and exemptions from them.

In an ideal "well-ordered" society — where at least state officials fulfil their duty of civility — cases like *Hobby Lobby* and *Little Sisters* are unlikely to emerge, since hardly any court would agree to hear a demand for religious exemption. Contemporary liberal democracies are not ideal, so the Greens and Little Sisters have taken their cases to the US Supreme Court and won them. But it is still possible to criticize religious justifications from the perspective of public reason even in these non-ideal circumstances. Speak-

ing of *Hobby Lobby* and *Little Sisters* in particular, one can point out that religious arguments against abortion are not epistemically better or worse than philosophical arguments for its moral permissibility, such as those discussed by Peter Singer (2011). Both sides derive their conclusions from metaphysical speculations on what makes a moral subject, and they do not even agree on what might serve as a crucial test for their conflicting "hypotheses." Ultimately, the controversy is rooted in the disagreement on how seriously one must take certain passages from the Bible, such as "Before I formed you in the womb I knew you" (*Jer.* 1:5). For devout believers these words are something to keep their faith in, while for philosophers like Singer such dogmatism is absolutely unwarranted. Since this controversy touches upon final values, neither priests nor philosophers can be said to have better public reasons for their views on the morality of birth control.

Politically it means that every woman must be left free to decide which methods of birth control she deems appropriate. By including these methods into the insurance plans that employers are required to provide for their employees the state secures a real and effective opportunity for working women to make free decisions about their parenthood. The state protects these women's right to make their choice, just like it protects the right of devout believers to run pro-life public campaigns and give all kinds of arguments against abortion, including religious ones. Still, campaigning in order to deliver a certain moral message to the general public is one thing, but seeking to opt out of a law on the grounds that are knowingly insulated from reasonable discussion is quite another. If the former is definitely a way of engaging with fellow citizens, the latter — which is the case of claiming religious exemption — is rather the opposite. It is a violation of the duty of civility. As I have argued here, this duty implies that there should be no way for citizens to exempt themselves from negotiating their favored legal provisions in a reasonable debate with one another.

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3. SHOULD ABRAHAM GET A RELIGIOUS EXEMPTION?

Abstract

The standard liberal egalitarian approach to religious exemptions from generally applicable laws implies that such exemptions may be necessary in the name of equal respect for each citizen's conscience. In each particular case this approach requires balancing the claims of devout believers against the countervailing claims of other citizens. I contend, firstly, that under the conditions of deep moral and ideological disagreement the balancing procedure proves to be extremely inconclusive. It does not provide an unequivocal solution even in the imaginary case based on the Biblical story of Abraham's sacrifice, not to speak of real-life cases that are far less suggestive. Secondly, I argue that it is possible to consider demands for religious exemptions respectfully, without even challenging the way they are justified, but still reject them for principled reasons — namely, because these demands cannot be met without arbitrarily bending popular sovereignty to the dictate of religious doctrines.

Imagine that the Biblical story of Abraham, who was told by God to sacrifice his own son (*Genesis* 22), took place today in a liberal democratic society. Should the patriarch get a religious exemption and be acquitted of attempted murder?

The problem — if it is a problem at all — has an immediate solution for those who think that in secular liberal democracies religious reasons are inappropriate for public justification of legal provisions, be it laws, exemptions, or judicial rulings.

Arguments against using religious reasons in public justification abound. Religious discourse is characterized by claims of an infallible supreme authority, a tendency to condemn opponents, and an aspiration to maintain religiously motivated practices as mandatory to all citizens (Audi 2000, 100–103). It does not fit well with the idea of a respectful dialog between free and equal citizens (Laborde 2013, Bardon 2016). Not everyone accepts the infallibility of some particular scripture as the basic premise of all argumentation, therefore religious reasons are inaccessible to the general public — they are not the ones that "all may reasonably be expected to endorse" (Rawls 2005, 137, 217, 243, 393). Finally, one may argue that liberal citizens are not required to regard strictly religious reasons as internal to their political role as citizens (Talisse 2015, 64). That is why even

if strictly religious reasons for legal provisions can be allowed in public deliberation, they can never override counterarguments that are "properly political," i.e. "based on those political values and ideals that are the very condition of possibility for a democracy: the ideal of treating citizens as free and equal, and of society as a fair scheme of cooperation" (Lafont 2017, 278).

Consequently, no exemption can be carved out for Abraham, because he demands it on religious grounds, which is either totally inappropriate or, at least, overridden by a "properly political" public reason — the state's compelling interest in protecting the life and well-being of its citizens.

However, the restriction on using religious reasons in the public square faces multiple objections. It prohibits devout believers from supporting their decisions on fundamental issues of justice by their most deeply held convictions, which threatens the believers' moral integrity (Wolterstorff 1997; Vallier 2012). Furthermore, some advocates of religion insist that devout believers are not inherently authoritarian. They can be rational and reasonable enough to embrace the "ideal of conscientious engagement," which, among other things, requires that they be "willing to consider the possibility that [their] favored coercive laws are in fact morally indefensible" (Eberle 2002, 19). Others argue that the commitment to reasonable pluralism does not mean that proper public reasons must abide by some universally accepted evaluative standard. It is enough if reason-givers sincerely believe that the government would be justified in adopting the measures they propose (Weithman 2002, 121). And their justifications do not have to be more than merely intelligible to the public — it is enough if the reason-givers are considered epistemically entitled to hold their reasons according to their own evaluative standards (Gaus and Vallier 2009, Vallier 2016a). Moreover, religious reasons can potentially be "translated" into a secular language of moral values that would make these reasons fully accessible to non-religious citizens (Habermas 2008, 130–40; Waldron 2012). Finally, one can note that devout believers justify their demands for exemptions by invoking the right to free exercise of religion, which is not a religious, but a "properly political" public reason (Laborde 2013, 181).

Here I will not take sides on any aspect of this controversy and simply acknowledge that the solution I proposed on behalf of public reason liberals is not available for immediate application, because its central premise — the inappropriateness of religious reasons for public justification of exemptions — is widely contested even among public reason liber-

als themselves. But if the idea to restrict religious argumentation in the public square is suspended, one has to admit that for the sake of "equal respect for conscience" (Nussbaum 2012, Chapter 3) even the most eccentric religious claims must be considered on a par with all others. Still, it may seem not that much of a problem, because, apparently, it is easy to reject Abraham's shocking demand on moral grounds.

I will contend in Section 3.1 that, in fact, once the restrictions on using claims of religion in the public square are removed, the ready-made moralistic solution to Abraham's case is no longer available. Then I will argue that the standard liberal approach that assumes the possibility of "balancing" the demands for religious exemptions against the countervailing claims of others fails to provide an unequivocal solution even in Abraham's case (Section 3.2), not to speak of real-life cases that are far less suggestive (Section 3.3). Finally, I will propose a principled solution to the problem of religious exemptions (Section 3.4). The proposal will be focused on the tension between the concept of religious exemption and the idea of popular sovereignty.

3.1. Against the moralistic solution

There seems to be a simple moralistic solution to Abraham's case. As Kevin Vallier puts it, demands for religious exemptions must meet a standard of "minimal morality." Justificatory reasons for exemptions "must count as moral in content and at least broadly conform to our shared understanding of what makes for a moral reason" (2016b, 9), therefore "the distinctive reasons of sociopaths and masochists cannot figure into public justifications" (Ibid., 8). On this account, Abraham cannot be excused. He deliberately stepped over the most widely shared moral norms for the sake of a very peculiar understanding of religious faith, which many people consider deeply erroneous.

The moralistic solution rests on a number of presuppositions that are widely accepted, but still problematic. To begin with, the solution presents Abraham as a perfectly self-confident person and *a priori* rejects any possible ambiguity in the patriarch's attitude to his own actions. Then it presupposes that there is some universal ethical rule that unequivocally applies to Abraham's situation and leads to a clear verdict that he should not have done what he tried to do. Finally, the moralistic solution presupposes that there is a way to understand religious faith and God's commandments that is knowingly more correct than Abraham's. All these presuppositions can be put in doubt not only in an ex-

tremely abstract and futile manner, but also in a concrete and substantive way, as it was done by Søren Kierkegaard in *Fear and Trembling.*

There is no doubt that Abraham's understanding of religious faith is radical and exceptional, but it is only adequate to the situation he found himself in. The situation itself is exceptional in the strict sense of the word. Abraham's relation to God is not like that of Moses. God did not choose Abraham to save his people or to deliver some universal moral law. Told by God to sacrifice his own beloved son, Abraham "knows that he is walking a lonesome path and that he is accomplishing nothing for the universal but is himself only being tried and tested" (Kierkegaard 1983, 76–77). Abraham acknowledges his absolute duty to God, which means that, making a sacrifice for God's sake, he makes it for his own sake as well (Ibid., 59). In Kierkegaard's view, here lies the genuine substance of religious experience — faith is a personal relation to God. It is not mediated by relations to any other persons, communities, and even to the humanity as a whole. Religious faith is the paradox that "the single individual as the single individual stands in an absolute relation to the absolute" (Ibid., 56).

Since Abraham's duty is related directly to God and not to any human being, he is no longer within "the ethical," which is Kierkegaard's way to say that Abraham is not within "social morality" (Ibid., 55). In *Fear and Trembling* Abraham is contrasted to Agamemnon, who sacrificed his daughter Iphigenia to Poseidon in order to save his fleet on the way home from Troy. Agamemnon, a tragic hero, relinquishes himself for the sake of the universal, he makes a personal sacrifice for the sake of the common good. Abraham, "a knight of faith," relinquishes the universal in order to become the single individual (Ibid., 75). Abraham is outside the ethical not only because he has violated a certain ethical rule, but first and foremost because in his situation there is no ethical rule to follow. The duty to God is not equal to people's ethical duties, otherwise, there would be no sense in speaking of religion as such (Ibid., 30, 55, 68). The story is, first and foremost, about Abraham and God, not about Abraham and his family or any other people.

Falling outside the ethical, Abraham finds himself outside the universal: he cannot explain himself to any other human being. There is nothing Abraham can say that would not present him as either a sinner, or a madman. That is why, as Kierkegaard puts it, Abraham cannot speak (Ibid., 60, 113–114). In this sense an act of faith is "a confident plunge into the absurd" (Ibid., 34).

Still, Abraham's confidence is not free from fundamental ambiguity. Kierkegaard does not say that Abraham was devoid of resolution, otherwise the patriarch would have been a parody of the knight of faith (Ibid.,119). Nevertheless, it would be wrong to understand this resolution as some kind of self-confidence. When Isaac asked him where the lamb was for the burnt offering, Abraham gave a reply that might sound evasive: "God himself will provide the lamb for the burnt offering, my son" (*Genesis* 22:8). So, Abraham's resolution was due to his confidence in God. As for Abraham himself, it is best to say that he was in fear and trembling.

Surely, Abraham does not fall within what anyone might be willing to call a general norm. This is true in all respects, including the authenticity and strength of his faith. Does not a man of such exceptional faith deserve a religious exemption? In Kierkegaard's words, "if faith cannot make it a holy act to be willing to murder his son, then let the same judgement be passed on Abraham as on everyone else" (1983, 30).

The comparison with Kierkegaard's interpretation of the case shows that the moralistic solution is not obvious. Despite its reference to some ideas and norms that are allegedly self-evident to all, the moralistic solution draws disproportionally on one particular conception of religion. Namely, it is Immanuel Kant's view that "pure moral faith <…> alone constitutes the true religion in each ecclesiastical faith" (1996, 144), which means that morality logically leads to religion (Ibid., 59) and not the other way around. In Kant's view, the concept of Divinity has a purely moral foundation, so religious people ought to understand that "steadfast zeal in the conduct of a morally good life is all that God requires of them to be his well-pleasing subjects in his Kingdom <…> and that it is absolutely impossible to serve him more intimately in some other way" (Ibid., 137). On this account, properly apprehended religious truths tend to underpin and reinforce rather than undermine and subvert "social morality," especially in such a radical way as in Abraham's case. Kierkegaard, on the contrary, rejected the reduction of religion to moral reasoning, because it would make the most unsettling Biblical messages redundant and confusing. Either religion is outside the ethical, or Abraham's story is preposterous.

To agree or disagree that there is a rupture between morality and religion is to make a choice between two metaethical positions. This choice can be justified by the whole battery of sophisticated Kierkegaardian or Kantian arguments, but using them to justify an official decision to allow or deny the exemption to Abraham is incompatible with the commitment to reasonable pluralism. In this perspective, to say that Abraham cannot be

exempted, because true religion never overrides the precepts of "minimal morality" is no better than saying that Abraham's demand is nonsense because God does not exist. The metaphysical controversy between theists and atheists and the metaethical controversy between Kierkegaardians and Kantians are not the kinds of debate that a secular liberal state is allowed to take sides in.

Perhaps, it is not even necessary to undertake a refined Kierkegaardian analysis to show that the moralistic solution is knowingly biased against religion. On the standard theistic view, God's will is the source of moral distinctions for human beings. Accordingly, a religious person may well agree that killing one's own son is morally unacceptable — unless God commands to do so, which makes it not a murder, but a sacrifice. No matter how naïve this conviction may seem to some philosophers, it is a coherent and, from a believer's point of view, intuitively the most "natural" way to conceive of the relation between religion and morality. To require that religious claims in the public square be "minimally moral" is to beg the question against religion in favor of some presupposed standard of "minimal morality," which is designed in advance to keep certain moral commitments at bay. By this standard, to sacrifice one's own son for the greater glory of God is sociopathic, masochistic, and immoral. But for millions of Jews, Muslims, and Christians being ready to do so is a true believer's duty, and I see no reason why it must be totally wrong for them to call it a *moral* duty as well.

Religions are exemplary of comprehensive doctrines, they construct their own basic frameworks of ideas around which individuals' worldviews are built. Religions develop ontologies, epistemologies, and moralities of their own; religious disagreements may run as deep as one can possibly imagine. Therefore, religious pluralism is moral pluralism, and "religious non-establishment" means "moral non-establishment." So, it is unlikely that we could recognize genuine religious pluralism and at the same time justify legal provisions on the grounds of some allegedly universal moral values.

I think, in response liberal proponents of the moralistic solution will agree that their commitment to pluralism has a certain limit. It is always reasonable pluralism, not pluralism as such that they accept. For example, Cécile Laborde uses the concept of reasonableness to draw a principled distinction between claims that are morally abhorrent — such as those of Nazis and fundamentalist terrorists, as well as demands to "perform infant sacrifice, stone 'dishonorable' women, attack physicians performing abortions" — and those claims that are only morally ambivalent, e.g. "demands of exemption from

anti-discriminatory legislation on integrity grounds" (2017, 209, 213–214). She defines morally abhorrent claims as "incompatible with any reasonable conception of morality and justice," while those controversial claims that "can be inserted into one or other conception of liberal justice" are only morally ambivalent (Ibid., 209, 212). Thereby, "morally abhorrent" means "totally unreasonable." Does this have any unambiguously negative implications for Abraham's case?

John Rawls defined reasonableness as willingness to abide by fair terms of cooperation and accept the burdens of judgment (2005, 49, 375). Acceptance of the burdens of judgment has mainly epistemic significance, but there is a moral side to it as well. For instance, when Nazis at the Nuremberg and subsequent trials claimed that they were "forced to serve as mere instruments in the hands of the leaders" (Kershner 2016), they attempted to escape responsibility by shifting the burden of moral judgment entirely onto the shoulders of others, which itself was a morally deplorable step. As for Abraham, presumably he suspended his moral judgment, for he never talked about what he was going to do to his son. Even at the last moment, after having prepared everything for the terrible sacrifice, he still called for God to "provide the lamb for the burnt offering." But Abraham made no attempt to deny the moral significance of such suspension. In this respect, he must not be put in the same category with Nazi criminals. It is precisely Abraham's silence that distinguishes him as a knight of faith from a criminal who is desperately trying to drown out his conscience by the verbiage of totalitarian propaganda. Nazis might be trembling with the gravity of what they were doing, but not with the fear of making an irredeemable moral mistake.

Readiness to abide by fair terms of cooperation has a more direct moral significance, since it is immediately relevant to the question of how people should treat each other. Reasonable claims and doctrines that pass the threshold of moral acceptability are, so to say, "cooperative" as opposed to those that are "mad and aggressive" (Rawls 2005, 144). Obviously, Nazis are outside the boundaries of minimal morality understood in this way, because their doctrine is inherently dependent on the cultivation of hatred towards a dehumanized Other. Meanwhile, to judge upon Abraham's case depending on whether or not his moral attitude is sufficiently "cooperative" would require a great strain of interpretation. Did a father, who obeyed God's order to sacrifice his own son, demonstrate sufficient willingness to abide by fair terms of cooperation? I am not sure how to make sense of this question. It seems to me that under the most sensible interpretation it means:

Would the father wish that God killed him rather than commanded him to kill his son? Suppose, Abraham would rather wish to be killed. Is it enough for his claim of exemption to pass the liberal threshold of moral acceptability? Or should he have made God promise to do the same to His own Son? Should a promise of redemption for all humans have been added to the bargain?

3.2. Against the balancing approach

The conception of minimal morality as readiness to abide by fair terms of cooperation translates itself quite neatly into the legal-political language of citizens' mutually recognized rights and duties. Therefore, the standard liberal egalitarian approach to demands for religious exemptions can avoid making contestable moral judgments about the beliefs by which they are justified. Normally solutions are expected to emerge from the procedure of balancing the claimants' right to free exercise of religion against the rights and liberties of other citizens. The basic principle is that exemption may be denied if a requested measure would "impinge on the rights and freedoms of others" (Maclure and Taylor 2011, 101). The aim of balancing is to optimize rights, to give the greatest protection of religious freedom that is compatible with the same protection of other rights (Pearson 2017, 69).

In Abraham's case the balancing procedure seems to provide a clear solution, given that the patriarch's exercise of religion totally obliterated the right to life and well-being of his son. Abraham even failed to show minimal respect for Isaac as a person. He made no attempt to explain the sublime sacrificial act to the poor innocent boy. How can such exercise of religion merit any protection?

Abraham is not a liberal, but, perhaps, he is not a monster as well. As I have already mentioned, in Kierkegaard's view, Abraham simply could not explain himself to anyone, including Isaac (1983, 60, 113–114). I would go further and argue that probably Abraham was not only unable to give any coherent justification of what he was going to do to his son, but also it was his religious duty not to say anything to Isaac.

It sounds terrible, but keeping Isaac ignorant was the only way to preserve his sacrificial purity. The problem here is not a psychological, but a structural one. It is not that Isaac's soul would have been marred by a myriad of doubts, fears, and false hopes if Abraham had told him everything about the purpose of their trip to the land of Moriah. The real problem is that, if Isaac knew everything, his relation to God would inevitably be medi-

ated by the relation to his father. Having learned about God's order from Abraham and not directly from God himself, Isaac would have no other positive choice but to trust and obey his father, hoping that the latter was not confused in his ways. This would be the only way for Isaac to fulfill his religious duty. But in this case the son's sacrifice would not be purely religious, because the religious service to God would be mediated by the ethical service to the father. Knowing about his father's intentions would make Isaac unable to realize the pure maxim of the knight of faith: "For God's sake and for my own sake as well." It would inevitably be tainted by an ethical supplement: "…and also for the sake of my father."

For Isaac, knowing about his true role would be an insurmountable impediment to performing it. The only way for the son to fully deliver himself to the hands of God was to find himself suddenly seized and thrown on the altar by a man whose face, distorted by awe and horror, he was no longer able to recognize as his father's. In order to be able to address the Heavenly Father the son had to loose sight of the earthly one. Isaac was not meant to see what was going to happen to him precisely not to remain a blind victim — a victim in whose eyes the father figure eclipses the figure of God. He should not have known where God was leading him precisely to follow God's lead freely.

It is not just Abraham's free exercise of religion that came into contradiction with his son's right to life and well-being. Isaac's right to life and well-being clashed with his own religious liberty. On the one hand, there was Isaac's right not to be thrown on the altar with a knife to his throat. On the other hand, there was his religious liberty, the sacred right of every martyr that implies exactly the opposite. And his father was entrusted to protect both of those rights.

As a devout believer, Abraham decided to do everything he could in order to fully realize his own and his son's religious liberty, even at the cost of taking Isaac's life. But criminal laws that prohibit fathers from sacrificing their children to God substantially burden Abraham's and Isaac's exercise of religion. So, why not allow an exemption for such extraordinary faith in order to strike "the right balance"?

Despite this bizarre dialectics, Abraham's case remains quite suggestive about its own solution. Intuitively we are inclined to deny the exemption, but, as I will argue, the balancing procedure struggles to justify it.

One influential account of the balancing procedure was proposed by Robert Alexy (2003). His formula for measuring the weights of conflicting liberties has three independent variables: (1) the "intensity of interference" with a constitutional principle, (2) the "abstract weight" of a principle "relative to other principles independently of the circumstances of any cases," and (3) the "reliability of the empirical assumptions concerning what the measure in question means for the non-realization of [a principle] under the circumstances of the concrete case" (Ibid., 440, 446). The procedure consists in assigning to each of the variables a value on a certain scale and comparing the resulting scores. To avoid unnecessary technicalities we can take a triadic scale (as Alexy himself does when he explains the procedure) and say that each variable can have a low, a medium, or a high value.

In Abraham's case the weight of a unified application of the law that prohibits murder is to be measured against the weight of the decision to carve out an exemption from this law in the name of religious liberty.

If there is no exemption, the intensity of interference with Abraham's religious liberty is *high* — there is a severe punishment for what Abraham attempted to do. This interference must be considered as certain, assuming that Abraham lives in a society that does not normally turn the blind eye to how parents treat their children. Otherwise, if prosecuted, Abraham could simply present the whole story as a family joke, instead of claiming the exemption. So, the probability of Abraham's religious liberty being interfered with is *high.*

If the exemption is given, the intensity of interference with children's right to life is obviously *high,* because devout parents who sincerely believe that God commands them to sacrifice their children will be allowed to do it without the fear of punishment. The probability of children's right to life being jeopardized in this way is harder to assess. Some may say that it is *high,* because there are many abusive parents who will see the exemption as an opportunity to escape punishment for the mistreatment of their own kids. Others may contend that the abuse of the exemption can be avoided by means of sincerity tests and by collecting evidence on how the suspects used to treat their child before. So, opinions on the probability that the exemption will lead to an increase in child murder and abuse may diverge.

If the values of the variables (1) and (3) are *high* both for the unified application of the law and for the exemption, they cancel out one another. It means that Abraham may still get an exemption if the right to free exercise of religion is at least no less important than the right to life. If the probability of an increase in child murders is assessed as *medium* or *low,* Abraham's chances to get the exemption become even greater. Thus, a lot depends on the values of the variable (2) — the "abstract weights" of the right to free exercise of religion, on the one hand, and the right to life, on the other. Which one of the them is more important?

Liberal egalitarians rank liberty of conscience in general and religious liberty in particular among the basic rights derived from the foundational liberal principles of equal respect for persons (Ceva 2011; Nussbaum 2012, Chapter 3), fair opportunity for self-determination (Patten 2017b), individuals' moral autonomy (Maclure and Taylor 2011, 10–11), the necessity to protect individuals' basic interest of self-respect (Shorten 2010; Seglow 2017). Also the received view seems to be that the right to life is far more important than the right to free exercise of religion. At least, when liberals want to make a reservation about the ultimate limits of religious liberty, they routinely refer to something like Abraham's case, although without naming it directly.

For instance, Paul Bou-Habib writes that infant sacrifice may not be accommodated (2006, 123). Emanuela Ceva asserts that no one must have a right to request an exemption from laws prohibiting murder (2011, 22). As an obvious example of a value that can never be outweighed by religious liberty Paul Billingham points at "the law against child sacrifice" (2017, 18). Alan Patten writes categorically: "Nobody thinks that religious liberty requires the state to exempt cults believing in infant sacrifice from its murder laws" (2017b, 129).

Although it is hard to disagree with these statements, we should still think of what justifies them. Liberal egalitarians simply assume at the outset that under any circumstances the right to life is far more important than religious liberty. However, if they are truly committed to "accommodate" religion on the grounds of equal respect for everyone's conscience, this assumption requires justification when it clashes with the conscience of Abraham and his followers.

One argument for the priority of the right to life may be that the idea to rank it below religious liberty is self-defeating. In order to exercise religious liberty one has to be alive

and have no fear of being killed for one's religious views by some militant adherents of another faith. But if religious liberty ranks above the right to life, then people can legitimately kill one another for religious reasons. Consequently, putting religious liberty above the right to life undermines religious liberty itself.

This sounds like a good common sense argument, but its second premise is incorrect. If religious liberty ranks above the right to life, it does not necessarily entail an unrestricted right to kill for religious reasons. Since one has to be alive in order to exercise religious liberty, the prohibition to deprive individuals of religious liberty entails the prohibition to kill them. Also the priority of religious liberty over the right to life does not necessarily entail that individuals can legitimately kill one another in a consensual religious sacrifice. Again, a person who was killed — consensually or not — cannot exercise any liberties, just like a person who voluntarily sold him- or herself into slavery no longer has any personal freedom. So, it may well be established by law that individuals cannot deprive one another of religious liberty in a consensual sacrificial killing, like it is established by law that, despite having all kinds of personal freedom, liberal democratic citizens cannot sell themselves into slavery. The constitutional arrangement that places the right to free exercise of religion above the right to life may be eccentric, but it is not incoherent or particularly inhuman.

Under this arrangement, what is primarily at stake in Abraham's case is not the question of whether parents should be allowed to kill their children for religious reasons. The issue is whether or not parents should be allowed to interfere with their children's religious liberty for religious reasons. Abraham's demand for exemption seems to be in a direct contradiction with Isaac's right to religious liberty. But the dialectical justification of what Abraham did to Isaac that I have discussed above makes things complicated. If one accepts that it may be necessary to remain ignorant of what God holds in store for you in order to follow God freely, then Abraham did not violate, but defended his son's religious liberty and, so to say, actively contributed to its realization. As far as we know, there were no religious differences between Isaac and his father. Therefore, Abraham cannot be suspected of desperately attempting to "convert" his son into the true faith or prevent him from apostasy by sending him straight to God as a martyr.

However, as I have just argued, the hypothetical "liberty first" constitution forbids sacrificial killing even if it is consensual. It seems extremely hard for Abraham to get around this provision, but on closer scrutiny, it turns out that his case is outside of the provi-

sion's scope. Strictly speaking, what happened between Abraham and Isaac had nothing to do with consensual sacrifice — and that is not simply because Abraham did not ask his son for the permission to sacrifice him. "Consensual sacrifice" brings to mind a rather regrettable relation between individuals who mutually reinforce one another's self-aggrandizing religious fervor up to a point when they decide to take "the final step," make "the greatest offering to God a human being can make" etc. Abraham's story cannot be more different. It is a story of a direct, immediate, and overwhelming divine interference with the lives of Abraham and Isaac. No one but God sent Abraham and Isaac on the trip to Moriah. It did not result from their passionate discussions about what they could do together for the greater glory of the Lord. And it was against Abraham's most cherished dreams and expectations about Isaac's future. The fear and trembling of the father, the benign ignorance and the ultimate shock of the son, their miraculous relief and glorious salvation have nothing to do with mutually induced exaltation of religious fanatics. So, it is not a "consensual sacrificial killing" that is at issue in Abraham's case.

Accordingly, the balancing procedure under the hypothetical "liberty first" constitution would weigh the religious liberty of Abraham, Isaac and their possible followers against the religious liberty of those kids whose parents might violate it for some perverse reasons and seek to escape punishment by claiming the "Abrahamic exemption." Here the decisive factor is the number of these potential fake Abraham's followers, who in reality are just awful parents, deranged religious fanatics, and child abusers. If ultimately judges and legislators conclude that the justice system is able to prevent abusive parents from getting away with false claims of religion, then the balancing procedure makes it possible to allow the "Abrahamic exemption."

So, the prioritization of religious liberty over the right to life is neither self-defeating, nor apparently inhuman. Therefore, in order to justify the priority of the right to life over religious liberty and decisively reject the "Abrahamic exemption" one has to pass an unequivocal value judgment about the human mundane existence as compared to individuals' religious pursuits. Since this is precisely the point of an age old and continuing ethical disagreement, I do not see how one can use such judgment to justify the constitutional essentials and at the same time claim the commitment to reasonable pluralism. The whole idea of liberty of conscience implies that the laws of the state must not be aimed at promoting any specific conception of the good. The idea of religious exemption, in its own turn, implies that even when such promotion is an unintended effect of a neutrally justi-

fied generally applicable law this effect should be minimized. Given the commitment to equal respect for everyone's conscience, an attempt to justify a constitutional arrangement by claiming that life is more valuable than religion or vice versa is a non-starter.

Perhaps, liberal advocates of religious exemptions think that they can decisively reject the "Abrahamic exemption" by appealing to some universally recognized value, but I do not see which value it might be.

For example, Bou-Habib denies any accommodation for infant sacrifice, because he thinks that "the sacrificed child would be much worse off than the religious person, to put it mildly" (2006, 123). Even if this is not a straightforward atheistic argument, Abraham would definitely put it another way. Probably, the only thing he did not doubt on the trip to land Moriah, was that the sacrificed child would be no worse off than his father. Even if Abraham himself was deluded by the Devil, at least he could be sure that God will not reject the innocent boy. By the way, the possibility of a grave mistake was another reason for Abraham not to tell anything to Isaac in order not to make him complicit in a terrible sacrilege in case the whole story turned out to be the Devil's plot.

To reject the "Abrahamic exemption" because of the "sanctity of human life" would be ironically self-defeating. If human life is really sacred, then it is the last thing that a human being can refuse to give back to God when God demands it.

An attempt to invoke human dignity in order to somehow resist the "Abrahamic exemption" is not particularly promising as well. The idea of dignity implies that every person is uniquely valuable precisely because a life that is genuinely human is not reducible to biological existence. Thereby, the concept of dignity, which signifies the absolute surplus to a mere "animal life" of a human individual, fits better with the prioritization of religious liberty over the right to life. Perhaps, by a considerable strain of interpretation one could argue that "life" in the "right to life" refers not to mere biological existence, but to human life in a full sense, to something like "life with dignity." "Dignity" here is grounded in the individual freedom of choice that cannot be compromised even in the name of the omnipotent and omniscient God. But on this interpretation, when we talk about the right to life we rather mean something like "liberty of conscience" in general and "religious liberty" as its particular instance. This brings us back to the hypothetical "liberty first" constitution together with its bright legal perspectives for Abraham's case.

It turns out that the balancing procedure obstructs rather than justifies the initial intuitive decision to deny the "Abrahamic exemption." It happens because the procedure involves value judgments about the relative importance of competing rights, liberties, and constitutional principles. Under the conditions of deep moral and ideological disagreement such judgments are bound to be contested. The commitment to reasonable pluralism and equal respect for conscience endorsed by liberal egalitarians does not allow to cut this contestation off once it was welcomed in public justification of legal provisions. (Mind that it *was* welcomed the moment we allowed the unrestricted use of religious arguments in public deliberation.)

Balancing different rights and liberties proves to be a shaky device for liberal egalitarian justice even in the extreme Abraham's case. No wonder then that in far less suggestive real-life cases the balancing approach is even more ambiguous.

3.3. More cases against balancing and common sense

Consider the controversy over religious refusals to provide services related to same-sex marriage. Perhaps, the most famous among such cases is the one of Kim Davis, a county clerk from Kentucky (*Miller v. Davis*). In summer 2015, after the right to same-sex marriage had been officially recognized by the U. S. Supreme Court (*Obergefell v. Hodges*), she refused to issue any marriage licenses in her office at Rowan County in order to avoid signing them for same-sex couples. She sued in federal court to get an excuse from this part of her duties as a public servant on the grounds that same-sex marriage contradicted her Apostolic Christian faith. Being denied the excuse, she persisted in her refusal and stated that in doing so she was acting "under God's authority" (Blinder and Pérez-Peñasept 2015). Having spent five days in jail for contempt of court, Kim Davis returned to her work and delegated the responsibility of issuing marriage certificates to her deputies (Castillo and Conlon 2015). Finally, in April 2016 Kentucky Governor Matt Gevin signed a law that simply removed clerks' names from marriage licenses. Kim Davis's lawyers welcomed the new law, and their client said she was pleased to continue serving her community "without having to sacrifice [her] religious convictions and conscience" (Siemazsko 2016).

The Governor's "technical" solution to Kim Davis's case remains silent on the principled issue: does religious objection against same-sex marriage deserve any special accommodation when it affects citizens' interaction in the public sphere? In similar cases that in-

volve small-business owners who refuse to bake wedding cakes, arrange flowers, or make photos at same-sex weddings neutral "technical" measures have not yet been invented, so the controversy is still open (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, State v. Arlene's Flowers, Elane Photography v. Willock*).

Both parties to such conflicts remain on the defensive while they complain about their liberties being attacked by the opponents. Neither of them actually seeks to impinge on the rights of the other. Kim Davis et al. do not call for a ban on same-sex marriage. They just object to being compelled against their deeply held religious convictions to participate in institutional and cultural practices that celebrate it. Same-sex couples do not seek any personal endorsement of their marriages from any of devout believers. They just require access to the market and public services on the same terms and conditions as everyone else. So, what is more important: devout believers' religious liberty or same-sex couples' right to non-discrimination?

Recently Paul Billingham proposed an elaborate account of how claims for religious exemptions should be weighed (2017). The weight of the claim depends, firstly, on the obligatoriness and centrality of the burdened religious practice to the beliefs of the claimant and, secondly, on the cost the claimant bears if he or she both obeys the law and follows the religious practice. So, firstly, for Kim Davis et al. marriage is not a marginal issue. As Barronelle Stutzman, one of the litigants in *Arlene's Flowers,* has put it: "In my religious tradition, marriage is a sacred religious ceremony between a man, a woman and Christ. It's a covenant with the church. To participate in a wedding that violates those principles violates the core of my faith" (Stutzman 2015). Secondly, in order to follow their faith and at the same time obey the anti-discrimination laws, religious business-owners would have to stop providing services related to weddings, Kim Davis would have to resign from her position as a county clerk. Thereby, religious citizens' claims for exemption from anti-discrimination laws seem to be quite important.

However, the key question is whether they are more or less important than the countervailing claims of same-sex couples. Strictly speaking, we do not need to know anything about how to weigh an isolated claim. What we need to know is how to find out which of the two or more competing claims is "heavier" than the others. Unfortunately, Billingham does not describe any methodology that would allow us to say whether following the precepts of one's religion freely is more or less important than openly expressing one's sexuality without being stigmatized by others. Perhaps, he believes that there is no

weighing device that is precise enough to make reliable relative measurements in such cases. In his own words, the correct solutions for difficult cases "will depend upon a context-sensitive judgment of the balance of interests, and the extent to which the costs to third parties can be minimized" (Billingham 2017, 20).

In making this reservation Billingham joins other advocates of religious exemptions who openly recognize that "legal accommodation of deeply held religious and other convictions is too complex an issue to be settled by algorithms" (Seglow 2017, 189). Therefore, "legal exemptions, both religious and non-religious, are better conceived as exercises in adhockery" (Jones 2017, 173).

These suggestions imply that it might be possible to resolve standoffs between the competing claims of rights by looking closer at the facts and specific circumstances of concrete cases. To this end we can assume at the outset that everyone must have a "fair opportunity for self-determination," which is not limited to religious or cultural preferences, but also includes those of education, employment, family relationships etc. (Patten 2017b, Quong 2006). Supposedly, when the opposite parties are unlikely to agree on which constitutional rights are more important, a pragmatic decision can be reached by balancing their other, more commensurable interests and opportunities. In the case of Kim Davis et al. we should focus on "the importance of economic freedom <…>, the availability of alternative employment for affected employees and alternative business providers for affected consumers, and whether a private business practice contributes to a general pattern of stigmatization and exclusion from which people have a reasonable claim to be free" (Patten 2017b, 153).

Does the avoidance of judgments about the relative value of competing rights and liberties really work? For example, George Letsas (2016) applies this approach to the case of Lillian Ladele, a registrar for marriages, births, and deaths for the London Borough of Islington. She refused to officiate at civil partnership ceremonies for same-sex couples due to her Christian beliefs and finally lost her job (*Eweida and Others v. United Kingdom*). Letsas argues that the decisive question here is whether the employer could have easily accommodated Ms. Ladele, given the nature of her employment (2016, 337). So, in Letsas's view, Lillian Ladele could not be exempt, because it is "not the case that the Borough of Islington could easily reassign her to another job, perhaps less visible" (Ibid., 338).

This solution is an easy target for criticism on the grounds that it ignores rather than solves the problem. Letsas argues that Ms. Ladele's dismissal was justified because she was simply unfit for the job, as if she tried to work as a librarian and could not read or tried to be a taxi-driver and did not know how to drive. But the case is not that straightforward. Lillian Ladele took the job before civil partnerships for same-sex couples were introduced in Britain. So, the fact that she was not offered an alternative employment or excused from the part of her job that contradicted her religion might well be interpreted as a sign that her beliefs were considered not important enough to burden her employer with the costs of accommodation. This interpretation of Ms. Ladele's case becomes all the more relevant in comparison with the case of Kim Davis, whose religious beliefs were considered important enough to pass the law that removed clerk's signatures from marriage licenses. Should we say that in doing so the legislators of Kentucky were overly accommodating towards religion? Or maybe, Ms. Ladele's employer was not accommodating enough?

Letsas would contend that these are precisely the questions that must be avoided. The only issue must be the job-related costs of various accommodating and non-accommodating decisions, not the degree of respect towards religion. But why should religious people accept this way of posing the question? Lillian Ladele filed a religious liberty lawsuit, making it clear that for her it is respect for religion that is at stake, not just her professional career.

Notably, a pragmatic decision in favor of Kim Davis et al. might seem even more convincing, until we turn back to the genuine subject of the dispute. Indeed, those accused of discrimination against same-sex couples have to either compromise their religious convictions or pay large penalties, loose parts of their businesses and quit their jobs. Meanwhile, for same-sex couples the whole problem is apparently about going to another cake shop, contacting another photographer, or maybe, taking a short drive to a neighboring registrars' office. On this analysis, the exemption might well be allowed, especially, as Andrew Koppelman argues, if it is not likely to result in systemic discrimination against marrying same-sex couples (2015, 628).

However, as Justice Goldberg wrote concurring with the majority in *Heart of Atlanta Motel, Inc. v. U.S.*, "discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or

color," or — we can add — because of the person's sexual orientation. Every single case of offence and undeserved humiliation is harmful, therefore the discrimination does not have to be systemic in order for individuals to legitimately seek protection from it. Otherwise, if the issues of "humiliation, frustration, and embarrassment" can be outweighed by easy access to hamburgers and movies, jobs and education, why not allow a small number of segregated restaurants, movie theatres and schools, provided there are enough desegregated ones everywhere?

Yet another pragmatic variation of the balancing approach does not try to avoid mentioning value conflicts related to demands for religious exemptions. On the contrary, it openly acknowledges that such conflicts may be intractable, so individuals have to make tragic choices between their civic duties and religious commitments (Pearson 2013). On this account, the right decisions must be extremely sensitive to specific circumstances of each and every case precisely due to the tragic intractability of deep value conflicts. The decisions cannot be deduced from some particular interpretation of constitutional principles, and they cannot be found just by optimizing the satisfaction of individuals' most ordinary interests. On the middle path between these two extremes the struggle for recognition of people's foundational meaning-giving beliefs is not replaced by the hustle for dollars and cents, but nevertheless, the expected solutions are case-specific, context-dependent, and down to earth, not abstract or "principled."

Consider Megan Pearson's solution to *Elane Photography v. Willock,* the case of photographers Elaine and Jonathan Huguenin who refused to make pictures of a lesbian couple's commitment ceremony. Pearson denies exemption to Huguenins, because "the link between their [religious] views and the disapproved of act is remote. <...> They were only asked to take part in an act which was incidental to the commitment ceremony and had no causal link to it, since the ceremony easily could have gone ahead without a photographer. This is not to deny the conflict that the Huguenins felt, but <…> the interference with their rights was relatively minor" (Pearson 2013, 59–60).

Pearson's argument does not involve any biased value judgments, but her perfectly *ad hoc* decision is vulnerable to objections that are just as perfectly *ad hoc.* Of course, Elaine and Jonathan were not asked to perform a same-sex wedding ceremony. But they were asked to make photos that were supposed to commemorate it. I assume, the couple expected that the ceremony would look beautiful on the pictures — beautiful in a happy, tender, and touching way. Obviously, it made no sense for the Huguenins to even try to

do this job properly. They would hardly succeed in it, since their deeply held convictions made them disapprove of the event they were supposed to represent in the best light possible. That is why in this and similar cases the defendants argue that not only their religious liberty, but also their right to free artistic expression is being infringed on.

Unsurprisingly, "exercises in adhockery" do not result in decisions that are particularly convincing, reasonable, and well-justified. The proponents of balancing expect to arrive at persuasive common sense solutions by mining for more facts and looking closer at specific contexts of the cases. I think, the examples I have discussed here suggest that these expectations are based on a superstition. Furthermore, when it comes to religious exemptions from publicly justified and democratically enacted generally applicable laws, common sense is the least helpful source of persuasive decisions.

I agree that ultimately what makes one reject Abraham's request is common sense. It suggests that the exemption would give murderers and child abusers a chance to ridicule the whole justice system and, perhaps, even escape punishment. Maybe, our rejection is justified by a thought that is even more simple: we just imagine ourselves or the ones we love in Isaac's place. Meanwhile, hardly anyone thinks that solving Abraham's case in this way is a significant accomplishment for a theory of religious exemptions. That is because the whole story deliberately challenges common sense and social morality. Like nothing else, religions are famous for promoting beliefs and customs that defy our ordinary views in countless ways — and it is itself a part of common knowledge about religion. Religion within the boundaries of common sense would be straight nonsense. So, when advocates of religious exemptions draw on common sense to dismiss Abraham's case, they should think if any other demand for religious exemption would pass the same test.

Take the exemption of Sikhs from wearing a protective helmet while riding a motorcycle. It is often cited as one of the least problematic cases for religious exemptions, but does it stand up to the scrutiny of common sense? The helmet exemption is carved out from a law that protects human lives, which is obviously a matter of great importance. Meanwhile, the reason for the exemption is recognition of Sikhs' religious obligation to always wear a turban in public, which is not the kind of obligation that common sense can easily explain and justify.

One may contend that it is not the Sikhs' religious practice that should be tested, but the decision to exempt them. Here is Billingham's justification for such decision: "Even if laws requiring motorcycle helmets are generally justified, there is no great cost to granting an exemption to them. This is particularly the case if the terms of the exemption include Sikhs bearing responsibility for the costs of any injuries sustained that are greater than they would have been were they wearing a helmet" (2017, 19). Is there anything in this reasonable justification that flies in the face of common sense? Some would argue that definitely there is. For instance, in Canada the Premier of Ontario Kathleen Wynne objected against the exemption during the parliamentary debate in 2016 claiming that she "will not be the Premier who stands in front of a mother whose son had been killed because he was not wearing a helmet" (*CityNews* 2016). In Coffs Harbour, Australia a community council member John Arkan, who is himself a baptized Sikh, commented when the issue of the helmet exemption was raised by his constituents: "I would wear a helmet. I've only got this head and I don't particularly want to damage it" (Vukovic 2017).

Since there are strong common sense arguments against the helmet exemption, should we say that Billingham's support for it is based on the commitment to respect religious liberty rather than on common sense? If yes, then what is the rule that specifies when we should hold on to common sense in public justification of legal provisions, and when it should be suspended? I leave it to advocates of religious exemptions to formulate this rule. But if Billingham's argument for the helmet exemption is within common sense, then one has to admit that common sense may as well be inconclusive. In this case, to say that a certain legal provision is required by common sense is just as vague and ultimately absurd as to say that it is required by reason. Reasonable people may disagree with one another, as well as the "common people."

Given that common sense judgments are fact- and context-sensitive, they are also likely to depend on who makes a judgment. That is because different individuals are familiar with different facts and they interpret them within different contexts. So, it always makes sense to ask whom a particular common sense judgment is common to. For example, when Justice Scalia justified the refusal to exempt the members of the Native American Church from the law that prohibited the consumption of peyote (*Employment Division v. Smith*) he cited the U.S. Supreme Court's decision in *Reynolds v. United States:* "To permit this would be to make the professed doctrines of religious belief superior to the

law of the land, and in effect to permit every citizen to become a law unto himself." This justification expresses the common sense of a judge who spends his lifetime arguing with people that try to bend the law in all possible directions. Meanwhile, an "ordinary citizen's" common sense would probably ask, first of all, whether peyote is really dangerous enough to be so strictly prohibited.

As for the case of Kim Davis et al., I daresay that the common sense of an ordinary citizen — who is neither a religious, nor a gay pride enthusiast — is likely to pronounce "a plague o' both your houses!" Some of devout believers' insensitivity towards the long overdue transformations in the public attitudes to gender and sexuality is no better or worse than the insensitivity of some LGBTQ+ people to others' special attachment to tradition. Both attitudes deserve reproach for stirring up intractable conflicts where mutual toleration would not be hard to exercise. Note that, no matter how sensible it is, this moralistic reproach does not suggest any solution after the controversy was rendered in terms of legal and political conflict between religious liberty and gay rights.

To conclude, once we refuse to restrict religious arguments in public justification of legal provisions, it is the common sense — which I am happy to share with liberal egalitarians — that makes us reject Abraham's demand for exemption. But it is very much likely to be the only case that common sense solves unequivocally. And if it is impartiality, persuasiveness, and clarity of justification that one expects from the decisions concerning religious exemptions, then the balancing approach solves even less.

3.4. A solution, political not metaphysical

Suppose, for now we have no better way of addressing the demands for religious exemptions than the ambiguous "exercises in adhockery." Should we look for a more principled and rigorous approach? I think that we should — not just because generally it is better to have a clearer methodology for resolving political conflicts and legal disputes.

Alexy mentions that the balancing procedure requires serious argumentation and reasoning. Otherwise, the weighing of competing claims would be arbitrary or unreflective (Alexy 2003, 439). Ironically, when it comes to reasoning about religious exemptions, the balancing procedure is prescribed under the conditions of a striking disbalance. On the one hand, there is an enormous diversity of general and specific reasons that justify each and every democratically enacted law. These laws have to pass through the crucible of parliamentary debate and many other official and unofficial critical discussions. On

the other hand, there is always one and the same, "fit for all" argument of the form: "I believe that my God commands that I do X, and as the state is committed to free religious exercise, it should allow me to do X" (Laborde 2013, 181). If not for the huge disparity in argumentative effort, the "exercise in adhockery" around religious exemptions might refer to something as good as an open public deliberation, free from dogmatism on all sides. However, given this disparity, the "exercise in adhockery" acquires the opposite meaning of a bad form of political bargaining, in which legislators and judges are publicly blackmailed into making concessions to opinions that their proponents hardly even care to justify.

This observation brings us back to the question of whether or not religious arguments make proper public reasons. But, as I have promised, I will propose a principled solution to the problem of religious exemptions that does not require to take sides in the deeply entrenched disagreement over the permissibility of religious reasoning in public justification. I think the solution of this type might be useful for two reasons. Firstly, as a matter of the "economy of thought," it would be good to spare oneself from having to defend one's epistemic beliefs about the sources of reasonable judgment before proceeding directly to the political issue at stake. Secondly, since this solution does not question the ontological commitments, epistemic presuppositions, and ethical merits of religious discourse, it cannot be accused of violating the norm of equal respect towards all members of the public, both secular and religious.

In fact, there are three strategies that allow to evade the accusations of disrespect towards religion while remaining substantially committed to the value of public deliberation (cf. Gaus and Vallier 2009, 65–70). The first one is the idea that religious arguments can somehow be "translated" into a secular language of moral values in order to make these arguments accessible to all members of the public (Habermas 2008, 130–40; Waldron 2012). The second one is the idea that public reason liberals should not shy away from using religious arguments when they justify their preferred policies to those "unreasonable" citizens who persistently oppose them on religious grounds (Schwartzman 2012a; Clayton and Stevens 2014). Both of these strategies make the burden of justification heavier. This pertains to both religious and secular citizens insofar as the translation of religious reasons is conceived as a "cooperative task in which the nonreligious citizens must likewise participate" (Habermas 2008, 131). Or the additional burden falls upon a particular category of members of the public, namely on those "reasonable reli-

gious citizens" who might be "permitted — perhaps even morally required in certain circumstances — to explain to fellow believers, including non-compliant believers, why religious belief is compatible with or supports liberal norms" (Clayton and Stevens 2014, 81).

The third strategy, which I am going to implement here, makes the burden of justification as light as possible for everyone. It takes religious justifications at face value, sweeping aside whatever ontological, epistemological, and ethical objections might be addressed to them, and focuses narrowly on their political significance for citizens as citizens, not for them as believers or atheists, "fideists" or "evidentialists," traditionalists or progressives etc. This strategy was pursued to some extent by Brian Barry (2002, Chapters 2 and 5), and I think it corresponds — not quite in letter, but in spirit — to Rawls's ideal of public justification on the grounds of conceptions that are "political not metaphysical" (see Rawls 1985).

The content of public reason, as defined by Rawls, includes not only "principles of reasoning and rules of evidence," but also, and actually in the first place, "substantive principles of justice for the basic structure" (Rawls 2005, 224). The latter are the principles for "modern constitutional democracy" (Ibid., 11). It is this substantive dimension of public reason that I would like to focus on. So, the question is: What do religious exemptions from generally applicable laws mean for modern constitutional democracy?

If we fully accept the arguments by which religious citizens justify their demands for exemptions, one important thing immediately comes to the fore: mere reference to God's will is not the final word in religious justification. It is easy to imagine how Abraham's fear and trembling was caused not only by what he was commanded to do, but also by the inevitable conjecture that the terrifying command came not from God, but from his own distorted mind, perhaps captured by the Devil. So, once a reference to God's will is made in the public square, a further important enquiry is due. And it starts with the question: "What makes you think that the commandment you are committed to is given to you by God?" Surprisingly, getting the claimant's answer to this theologo-epistemological question allows to clarify the legal-political significance of the claim and determine what judges and legislators can do about it.

There are two politically significant types of answers to the question about one's sources of confidence that a certain commandment comes from God.

First, a claimant may say "This is how I understand the Scripture…" or "Our priest says so…" or "My whole church says so…" etc. In this case the "commandments" are human opinions about what is the right thing to do expressed on behalf of a religious tradition. As such, these expressions are subject to normal democratic routine. A claim justified by reference to an authoritative opinion, either individual or collective, must be treated on a par with any other individual or collective claim according to standard democratic procedures. Any citizen can criticize any law and even take legal attempts to repeal it, but once the law has been democratically enacted, everyone must abide by it. Merely having a dissenting opinion is not sufficient for being exempt, otherwise there would be no generally applicable laws whatsoever. Even if a dissenting opinion is embraced by a large organized group, it is not a reason for exemption. For instance, if someday a universal single-payer healthcare system is democratically enacted in the United States, dissenting Republicans cannot be exempt from participating in it, even if it goes against their "core meaning-giving beliefs" about what the government and the citizens owe to each other.

Second, a claimant may say that the commandment is given directly in a divine revelation, like "God was talking to me the other day…" or "These are the words of God in the Holy Scripture." In this case, the claim is attributed directly to a divine law. Thereby, it turns into a demand addressed from one sovereign (God) to another (the people). Demands of this kind are no longer within the scope of ordinary judicial and legislative routine. They constitute a challenge posed to society and state by a person or a group of persons who believe themselves to be speaking directly on behalf of a divine authority.

Actually, whether there are exactly *two* sovereigns addressing one another in this situation may need further enquiry.

If the claimant does not recognize the sovereignty of the people in relation to God's authority, then demanding religious exemptions is simply incoherent. If, in the claimant's view, a lower-level state law contradicts an upper-level divine law, then it is coherent to demand that the lower-level law be changed. However, it is incoherent to demand an exemption from the lower-level law, because it would mean that the lower-level state law is still recognized by the claimant, in spite of its contradiction with the upper-level God's law. At least, it might be possible to accept a lower-level law that contradicts the upper-level law as an exception from the upper-level. For instance, religious citizens can interpret laws on marriage equality as exemptions that God somehow allows to certain peoples in the course of their history. But then it is entirely a matter of prayer, meditation,

and religious exegesis to find out whether this is actually the case, say, in today's America and what lessons must be learned from it.

If the claimant, while acting under God's authority, still humbly recognizes the sovereignty of the people, then demanding religious exemptions makes sense, because in this case the laws of the state have the legitimacy of their own — they are not mere lower-level concretizations of the higher-level divine law. If we recognize the sovereignty of both legislatures (of God and people), we may wish that they have mutually agreed laws, like we may wish that two sovereign states draw their borders in a mutually consistent way, coordinate their environmental policies etc. However, mutually consistent laws of two sovereigns cannot be dictated by one of them to another, and ultimately their laws do not have to be consistent with each other. Sovereigns may sign agreements, but there can be no law that obliges them to agree. That is why religious exemptions, which under this interpretation are meant to coordinate the laws of the two sovereigns, cannot be grounded in citizens' constitutional rights. Individuals claim religious exemptions as representatives of a divine authority, not as citizens of their own states. Religious exemptions are not a matter of rights, but of agreements based on benevolence, toleration, trust, reciprocity, and interest.

Is it possible to justify such "benevolent" exemptions from democratically enacted laws without arbitrarily bending popular sovereignty to the authority of religious doctrines? Given the analysis in this section, I do not think so. On the contrary, religious exemptions only compromise popular sovereignty in a pluralistic liberal democracy. However, two eccentric suggestions come to mind.

First, those who seek religious accommodation could be given a status analogous to diplomatic immunity. Some individuals live among us, but they prefer to identify themselves as God's people rather than our compatriots, or they are persons with a kind of double citizenship. These individuals invoke their duties towards a foreign authority in order to be relieved of some of legal duties imposed by the state that they happen to live in. In a similar fashion religious institutionalists sometimes draw an analogy between international relations and relations between church and state (Horwitz 2012, 980; Smith 2009, 1883; for a critique see Schragger and Schwartzman 2013, Cohen 2016). However, they do it more rhetorically than substantially, since the allegiance to a foreign sovereign can justify not only exemptions from certain duties, but also deprivation of certain rights — political rights in the first place. Indeed, those exempt from generally applicable laws

on the grounds of "foreign citizenship" will have to relinquish their rights to vote in elections, as well as the right to run for and hold a legislative or a public executive office. That is because one cannot have a voice in defining the laws of the state or the authority to implement and enforce them and at the same time deny the obligation to abide by these laws due to one's allegiance to another legislative authority.

This first suggestion may be reproached for ignoring that the submission to God's authority is not fully a matter of choice, not even in that very limited sense in which today individuals can choose their citizenship. Strong religious beliefs run too deep into persons' psychology and culture to be easily uprooted or revised in response to external challenges. Their core function is quite the opposite: keeping faith in God is one of the major ways to sustain one's personal and collective identity through time in the face of changes that may come and go all around. In this sense, religion is something unchosen.

Accordingly, the second suggestion is to say that devout believers should be exempt from the laws that contradict their faith because they cannot abide by these laws even if they want to. Religious convictions cause them certain "civic disabilities." Applying this latter notion requires certain reservations, for "disability" is something that is suffered rather than endorsed by those who bear it (I thank the anonymous reviewer for *Res Publica* for emphasizing this point). We may have to say that individuals suffer these disabilities as citizens and celebrate them as devout believers.

Perhaps, as a result, some Christians "will boast all the more gladly about [their] weaknesses, so that Christ's power may rest on [them]" (*2 Corinthians* 12:9). The adherents of other faiths may feel offended by having to label themselves as "civically disabled," but it is not the most dangerous underwater rock for the second suggestion. What can seriously compromise it in the eyes of devout believers is a simple idea that disabilities should be reduced, not propagated. The poorest citizens may be exempt from the income tax, but a good society will try to help these citizens get out of poverty, so that someday they will no longer need the exemption they enjoy now. By analogy, if it is officially recognized that certain religious beliefs and practices cause certain *civic* disabilities, then the government that is committed to protect the citizens *as citizens* has not only a right, but also a duty to reduce these negative effects and make every effort to eliminate the cause itself. It does not mean that individuals with "God-given civic disabilities" should be stigmatized for what differentiates them from the ordinary law-abiding citizens. But it would not be wrong for the government to take precautions against the spread of "disa-

bling" religious doctrines. For the majority the preventive measures against the "disabling religions" may look as legitimate as anti-tobacco campaigns. But for those whose beliefs and practices will be targeted by such measures they will mean persecution of their faith. Consequently, getting a religious exemption will not always be the right way to protect one's religious doctrine in the society.

Conclusion

I have invoked the imaginary Abraham's case to criticize the standard liberal egalitarian approach to religious exemptions from generally applicable laws. This approach can be summarized — a bit ironically — in three major points:

1) religious exemptions are permissible in the name of equal respect for everyone's conscience;

2) religiously motivated murderers, like Abraham, cannot be exempt;

3) all other cases should be decided *ad hoc* by balancing the claims of devout believers against the countervailing claims of other citizens.

I have argued that the third point does not refer to any reliable method of addressing demands for religious exemptions. That is because under the conditions of deep moral and ideological disagreement the balancing procedure proves to be extremely inconclusive. It cannot sufficiently justify even the denial of exemption to Abraham, not to speak of providing unambiguous solutions to real-life cases that are far less suggestive. Accordingly, the second point is nothing more than a common sense reservation made to rule out the inevitable grotesque implications of the first point. Finally, I have argued against the first point that it is possible to consider the demands for religious exemptions respectfully, but still reject them on the grounds that, following Rawls, I called "political not metaphysical." The reason for rejecting these demands is that they cannot be met without bending popular sovereignty to the dictate of religious dogma.

Religious individuals are respected as free and equal citizens insofar as they are not prevented from participating in the process of public deliberation. Especially, if all restrictions on the use of religious reasons are removed — which was the initial presupposition in this article — devout believers cannot complain about being deliberately marginalized in the public square. Meanwhile, carving out religious exemptions from publicly justified and democratically enacted generally applicable laws requires decisions that

are extremely problematic. Firstly, they defy the results of public deliberation reflected in the laws in question, and secondly, they are not unequivocally entailed by the constitutional principles of modern liberal democracies. The only thing that these decisions correlate with perfectly are religious teachings that the claimants adhere to. Thereby, religious exemptions signify not mere respect for the conscience of the claimants, but submission to their favored religious dogma.

Certainly, when brought through a due procedure, the renunciation of popular sovereignty in favor of God can itself be interpreted as a sovereign act, but I doubt that this expression of democratic will can ever be justified by public reason.

CONCLUSION: A TRIPLE WALL OF SEPARATION

The three articles in this thesis addressed three particular questions:

1) Do those arguments by which religious citizens justify their demands for exemptions make proper *reasons*?

I argued that claims of the form "God says so and my conscience requires that I obey" are not reasons. They only signify that certain issues are of great importance to religious citizens, but they do not explicate the rationale behind the practices and rules of conduct that the claimants seek to protect. Religious claims of conscience do not provide adequate answers to the key question in public justification of exemptions: "Why must citizens tolerate the claimants' non-compliance with a generally applicable law?" It means that the claimants give their fellow citizens no reasons to exempt them from laws that are publicly justified and democratically enacted.

I did not deny, however, that there might be religious arguments that provide rich and complex explanations of why believers must or must not do certain things. Christian views on abortion are a good example of such religious arguments in the public square. They fully deserve to be called *reasons.*

So, my answer to the first question was the following: Not all, but only some of the arguments by which religious citizens justify their demands for exemptions — namely, religious claims of conscience — are not reasons. Hence, the second question.

2) Do religious reasons make proper *public* reasons?

I argued that devout believers cannot accept any reasons that go against their faith. Those who ultimately base their arguments on an unconditional fidelity to God in word and deed are not free to loose the debate against those who disagree with their religious doctrine. God's faithful are not free to recognize the wrongness of their own beliefs even in the face of overwhelming counterarguments. In the eyes of the faithful, their opponents must be wrong, even if sometimes only God can sufficiently demonstrate it. It means that for structural reasons those who justify their preferred legal provisions on religious grounds cannot regard their opponents as *equal* partners in democratic deliberation. Religious reason-givers cannot respect those who disagree with them as *equal* co-legislators. In short, reasoning on the grounds of religious faith inevitably involves making non-negotiable claims, and making non-negotiable claims in the process of democratic delib-

eration goes against the duty of civility. That is why I argued that reasons based on religious faith are inappropriate for public justification of legal provisions.

I also discussed the possibility of arguments that invoke God without faith. Such arguments would be negotiable, but at the same time they would be exemplary of what the Judeo-Christian tradition condemns as "tak[ing] the name of the Lord in vain" (Ex. 20:7). Apparently, it is not the sense in which "religion" is invoked by believers when they oppose generally applicable laws, and it is not the way of using God's name that they want to secure for themselves in the public square. Ultimately such invocations of God or gods without faith are either merely rhetorical, which is not sufficient for a substantially religious argument, or they may be part of rather eccentric arguments that refer to pragmatic agreements between individuals and supernatural spiritual powers. Since arguments of this type are negotiable, they might be admitted into the process of democratic deliberation. However, this is not the type of arguments that figure in demands for religious exemptions in contemporary liberal democracies. Moreover, they cannot make the case for religious exemptions until the state officially recognizes and determines the legal status of citizens' agreements with gods and other spirits. When this happens in one or another liberal democratic state, I will be ready to consider the relevant revisions to my line of argument.

What I think those revisions will not affect anyway, is that arguments based on religious *faith* involve non-negotiable claims, and therefore such arguments do not make proper *public* reasons.

Formally speaking, my answer to the second question made the third question redundant. However, for polemical purposes I decided to develop a yet another argument against religious exemptions from the perspective of public reason under the supposition that all constraints on using religious arguments in public justification are removed. Hence, the third question.

3) Are those arguments — whether reasonable or not — by which religious citizens justify their demands for exemptions consistent with the basic principles of modern constitutional democracy?

I argued that, from a "political not metaphysical" point of view, which takes even the most eccentric demands for religious exemptions at face value, the arguments by which

religious citizens support their claims can be divided into two politically significant types.

Firstly, there may be arguments that refer to an individual or a collective opinion on what is the right thing to do expressed on behalf of a religious tradition, e.g. “This is how I understand the Scripture” or “My whole church says so” etc. Such arguments must be treated on a par with any other individual and collective claims according to standard democratic procedures, which imply that having a dissenting opinion about a publicly justified and democratically enacted generally applicable law does not constitute a reason for exemption.

Secondly, there may be arguments that refer directly to the divine authority, e.g. “God was talking to me the other day” or “These are the words of God in the Scripture” etc. Arguments of this type, which all refer to God as a sovereign legislative authority, cannot justify exemptions from generally applicable laws without bending popular sovereignty to the dictate of religious dogma.

As an ironic solution I suggested that exemptions for believers could be justified as a kind of “diplomatic immunity” given to them as “foreign subjects,” or the government could recognize the claimants’ partial “civic disability” caused by religious commitments which make them unable to comply with certain laws. In the first case the exemption would come at the cost of relinquishing one’s political rights. In the second case it would require recognition of the government’s right to protect citizens from the “disabling” influence of certain religious doctrines, so that they would have as little adherents as possible.

These two proposals are hardly feasible, because, obviously, they put the exempted individuals and groups in a precarious and socially disadvantaged position. Perhaps, there might be a religious community unworldly enough to relinquish its political rights, and a community so reliant on divine powers that its members would not be afraid of any government campaigns against them. But at the same time it is too hard to imagine that such sublime communities would bother litigating for official accommodation.

So, my answer to the third question was the following: arguments by which religious citizens justify their demands for exemptions are inconsistent with the democratic idea of popular sovereignty.

Given the answers to the three particular questions, my answer to the general question is negative: religious exemptions from generally applicable laws are not publicly justifiable in a liberal democratic society.

The upshot of my argument in this thesis is *a triple wall of separation* that public reason builds between religion and law in a liberal democracy. Firstly, religious claims of conscience devoid of sound explication of the rationale behind the laws and exemptions that the claimants propose cannot be regarded even as *pro tanto* justificatory reasons for these laws and exemptions. Secondly, no matter how well they are elaborated, reasons based on religious faith cannot be allowed in public justification of legal provisions, because they involve non-negotiable claims that are incompatible with respect for fellow citizens as equal co-legislators. Thirdly, carving out religious exemptions from generally applicable laws is impermissible because it arbitrarily bends the sovereign will of the people to the dictate of religious doctrines. This massive wall has two special passageways through it: one is reserved for "foreign subjects," and another one for "civically disabled." However, entering these exceptional passageways is so eccentric and costly, that suggesting it sounds more like an argument against religious exemptions rather than in favor of them.

In a recent article Miklos Zala (2017) proposed a non-ironic analogy between religious exemptions and the accommodation of disability. In his view, such an analogy can be drawn successfully if disability is understood not as a problem of one's impairment as such, but as a problem of the "*mismatch* between the (atypical) characteristics of people with physical/mental impairments and the social/physical environment" (Ibid., 4). The analogy holds in a sense that certain practices of religious or cultural minorities "are atypical in the given society, and the state does not take them adequately into account in designing social arrangements" (Ibid.). So, according to Zala, the characteristic that requires accommodation must be "(1) *atypical* and (2) *neutral by default,* i.e. the given disadvantage is not inherent in the characteristic; its source is that it is rare in the given society. In addition, society is (3) *not directly discriminatory* against people with such atypical characteristic who (4) want to reach *the same desired end* that people with typical characteristics can already achieve. Finally, (5) the means that members of an atypical group want to use to reach the desired end must be *morally permissible*" (Ibid., 5). On top these five conditions Zala adds another important thing — the accommodation must be reasonable. By this he means that in providing accommodation "institutions have to

balance two moral requirements: inclusion and the costs that accommodation entails for the society" (Ibid., 7).

Given my criticism of the standard approach to religious exemptions in this thesis, it is not hard to tell where I would disagree with Zala's proposal. The first thing I would point out is the assumption that the balancing procedure can unequivocally demonstrate in each case whether or not the accommodation is worthy of its costs. The second thing is the assumption that it is relatively easy to say whether a practice that seeks accommodation is morally permissible or not. As I have argued extensively, under the conditions of deep moral and ideological disagreement both assumptions are unwarranted. In order to assess the cost of exempting religious business owners from anti-discrimination laws that protect LGBTQ+ individuals one has to say whether or not religious freedom of bakers, florists, and photographers is worthy of same-sex couples' "humiliation, frustration, and embarrasment" (*Heart of Atlanta Motel, Inc. v. U.S.*, 292). When religious business owners deny their services to marrying same-sex couples, the moral permissibility of religiously motivated discrimination against this latter category of citizens is precisely the point of contention between the two parties that adhere to different moral standards.

Zala does not discuss such hard cases in the article, so I cannot speculate on what his possible answers to this criticism might be. His major example is a motorbike helmet exemption for turban-wearing Sikhs. As Zala explains, his approach to this case leads to a dilemma between allowing Sikhs to ride motorbikes without protective helmets and providing them with specially constructed helmets of a larger size that could be warn on top of turbans (2017, 7). When Zala spells out his solution he argues that the first best option is to construct special helmets, and then he, in fact, suggests the third option — "to maintain communication in good faith with the Sikh community. This may result in asking them to partly modify their practice, or even forgo motorcycling if they decline the former" (Ibid., 13). Zala does not emphasize an important aspect of this third option, namely that asking Sikhs to "partly modify their practice," — i.e. to replace a turban with a helmet while on a motorbike — is a way to relieve them from the burden of "disability" not by changing the "environment," but by correcting the "impairment" itself. Should not it be the first and the best option to pursue whenever it is available? Perhaps, Zala glosses over this idea because of his decision to treat "impairments" as mere "variations."

I will refrain from discussing whether or not this substitution misses anything substantial in the account of disabilities in general. But I think that disability-as-variation analogy

cannot be applied to religiously motivated non-compliance with publicly justified laws without irony. If the state recognizes that one's "civic disability" — inability to comply with a generally applicable law — at least partly results from one's religious "impairment," then the state is justified in trying to correct the "impairment" of those affected by a religious "desease." Or at least the state is justified in trying to prevent the "contamination" from spreading further throughout the population. This means that the state should carry out a number of policies aimed at suppresion of a particular religion, which is ultimately against the interests of the adherents of that same religion. Otherwise, if the state recognizes that a certain religion causes "civic impairment" and "disability," but forbids itself from doing anything to fight the "disease," then the state's position is absurd.

In conclusion it might be useful to consider whether or not my principled opposition to religious exemptions admits of any exceptions. Cannot we at least exempt Sikhs from wearing motorcycle helmets? The costs of riding without a helmet largely fall on Sikhs themselves, while denying the exemption would make them feel alienated from the general public so insensitive to their important concerns.

In response I would argue that compromising reasonableness never comes at no cost to society. Every loosely justified legal provision broadens the passageway to similar ones. If Sikhs can merely refer to their religious identity to get an exemption, why cannot Christian objectors to same-sex marriage try the same? In the absence of the Sikh precedent judges may refuse to hear this type of cases as not backed by reasons that are appropriate for consideration in court. If the Sikh exemption exists such treatment of claims of religion becomes impossible.

This slippery slope argument may seem disproportionate. One can contend that it is hardly possible to slide unhindered from carving out an exemption in a paternalistic safety regulation to exempting individuals from anti-discrimination laws. This may be correct, but anyway, the Sikh exemption is controversial enough in and of itself, regardless of whether it sets one on a slippery slope towards more problematic concessions. The justification of Sikhs' demand for exemption from wearing motorcycle helmets is flawed in all three aspects that I discussed in this thesis.

Firstly, the initial justification of the demand merely asserts that turban is an important symbol of the Sikh religious identity. But safety helmets figure in traffic regulations as utilitarian items, not as symbols, so the symbolic significance of Sikh turban is not in any

way denied, diminished, or distorted by the requirement to wear a helmet while riding a motorbike. Sikh's religious symbolism is not even considered here. Some may respond that the symbolic aspect cannot be ignored once it has been pointed out by Sikhs. But, as I argued in the first article, the mere claim that wearing a turban is important to Sikhs does not constitute a reason for exemption. The rationale for the requirement to wear a helmet while riding a motorbike is safety. What is the rationale for Sikhs' reluctance to comply with this requirement?

There is an explanation. When in 1675 the 9th Sikh Guru Tegh Bahadur was publicly executed by the Mughal emperor, none of the Sikhs who were present at the scene that day dared to protest and share their leader's fate. In order to prevent such cowardice from repeating in the future Tegh Bahadur's son, the 10th Guru Gobind Singh, commanded all initiated male Sikhs to always wear turbans in public (Cole and Sambhi 1997, 81).

No doubt, this is a tragic story commemorated in a noble tradition. Yet, it turns the demand for helmet exemption all the more incoherent. To my ear, making a public religious liberty case out of having to replace a turban with a helmet while riding a motorbike sounds like profanation of the symbol of resistance to religious persecution of Sikhs in the 17th century India. What was a life and death challenge in the game of thrones in the Mughal empire, now is just a matter of earning extra visibility points in the game of multiculturalism in the contemporary West.

Secondly, I understand that those Sikhs who claim the exemption will not be lectured by outsiders on how to show real respect for their own tradition. The whole point of such claims is to demand respect from others, not to question one's own understanding of what your religion requires from you. The Sikhs' justification for their claim is non-negotiable, just like any similar religious justification.

Thirdly, the whole issue with turbans vs. motorcycle helmets rests on a profoundly ironic disregard of the historical, cultural, and political context. In contemporary liberal democracies Sikhs do not face any form of state persecution of their faith. Even by agreeing to discuss whether or not Sikhs' religious liberty trumps their safety while riding a motorbike state officials get engaged in a pointless symbolic contestation that they had no intention to start. Exempting Sikh turbans is quite similar to banning face-veils and ostentatious religious symbols in public contexts. In both cases the state politicizes traditional religious and cultural symbols for no good reason. The only difference is that with things

like face-veils, hijabs, crucifixes etc. the politicization often comes from the state, while with Sikh turbans the state finds itself under the sway of a religious group that takes an easy chance to top up its political capital. By banning religious symbols from public schools and forbidding government employees from wearing them at work the state arouses the sense of alienation in religious citizens. By exempting religious citizens from neutral generally applicable regulations, such as motorbike safety requirements, the state encourages individuals and groups to alienate themselves from the rest of the public.

I think that the best solution to the Sikh case would be to insist on the obvious: a safety helmet has nothing to do with symbolism. State officials should confine themselves to this simple argument and leave it for the Sikh community to decide whether this has any serious implications for their religion. Sikhs are free to conclude that their religious symbolism is gravely threatened by traffic safety regulations and therefore they must stay away from motorbikes. Or they may conclude that there is nothing particularly blasphemous in riding a motorbike in a safer way, i.e. with a helmet on.

Finally, I would rather leave it open whether or not my opposition to religious exemptions admits of exceptions. According to the view that I defended in this thesis, religious exemptions are not publicly justifiable. I do not think that public reason should go beyond itself and determine when citizens are allowed or even required to compromise it. There is no need for guidance from political theory on this issue. In making concessions to unreasonableness and irrationality political practice does well on its own.

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