Faith in Justice or Legitimacy?

Two Puzzles About Liberalism and Religion

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A thesis presented for the degree of Doctor of Philosophy

UCL, Department of Philosophy

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I, Kim Igorevich Leontiev, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

How are religious and conscientious commitments to be regulated within the liberal state? Can it endorse religious rationales or legitimately enact laws upon purely religious considerations? Are citizens with religious or conscientious commitments entitled to legal accommodations? And when, if ever, should states grant exemptions to a general law to those citing conscience or religious faith against compliance? Since John Locke's classical appeal that the liberal state limit itself to matters of the civil or 'public' good and leave the spiritual or 'private' be, liberals have struggled to find a stable position between, on the one hand, protecting religious freedom with extensive differential rights (accommodations and exemptions) and, on the other, imposing special constraints like disestablishment. These tensions disclose foundational differences on justice and neutrality, including the relevant metrics, baselines of comparison, weighting, ordering, salience and more, culminating in deep, intractable disagreements. This dissertation argues for a radically different approach. It proposes that the above matters might be more promisingly resolved via considerations of legitimacy or the limits of state political power. It first undertakes an interdisciplinary analysis of the current legal and philosophical debates to highlight the tendency of ignoring or otherwise conflating what are actually two discrete, albeit interrelated puzzles. Concerns about whether religion or any other category warrants "special" regulatory treatment are distinguished as the 'Salience-Demarcation Puzzle' about salience from the more fundamental 'Justificatory-Puzzle' regarding the permissibility of differentiation itself. From there, the proposed solution is developed via a more finely-granulated account of liberal legitimacy and identifying a novel, under-theorised, dimension of *modal legitimacy* concerning application and enforcement of otherwise legitimate laws. This cements the liberal basis for disestablishment and offers the possibility of something like exemptions in certain cases of objection. A pragmatic and lateral solution thus emerges, circumventing the prevailing deep disagreements about justice.

Impact Statement

This thesis provides a refinement of the normative-theoretical problems concerning religion and conscience in liberal society and a novel possibility of resolving them via considerations of liberal political legitimacy. More specifically, the first contribution is an interdisciplinary analysis that differentiates between, on the one hand, questions of demarcation or the salience of religion and analogue categories of salience and, on the other, the more fundamental questions of justification of differentiation per se with regard to liberal neutrality. The second contribution recalibrates the issues away from the standard justice-oriented paradigm towards that of political legitimacy or normative limits to the exercise of political power. Here, the dissertation refines the principles of liberal legitimacy with regard to questions of religious (Dis)Establishment and posits a novel, largely under-theorised dimension of legitimacy. This is designated as 'modal legitimacy' and it concerns the application and enforcement of otherwise legitimate laws in contexts of individual objection. This approach circumvents the deep disagreements about justice within the standard paradigm to offer the possibility of a lateral and pragmatic solution to the problems identified.

Within academia, this can inform and potentially redirect two current streams of scholarship: (1) political- and legal-theoretical debates on the differential liberal state practice in constitutional (Dis)Establishment and granting exemptions on religious grounds compared to non-religious analogues; (2) philosophical debates on the requirements of liberal justice in response to cultural pluralism and group-differentiated rights claim and legitimacy in response to grounds pluralism and the jurisdictional boundary problem as to the civil/spiritual or public/private. Since the novel proposal advanced concerns debates within both streams, there is opportunity to link the scholarship more closely whilst also revealing considerations relevant to, but independent of, the current key points of theoretical disagreement.

Outside academia, there are applications for public debates about religion and conscience in politics as well as policies about multiculturalism and diversity. Parts I and II contribute to analytical clarity and refinement of the issues. Part III, meanwhile, bears especial relevance for jurisprudence and judicial considerations on the constitutional limits of legislative and executive power in interference with individual freedoms or even to government more generally in terms of public policy and law reform on cultural and religious freedoms of private persons and voluntary associations. Principally, the thesis advocates shifting away from context-specific categories of exemptions granted in legislation or executive orders, towards less prescriptive and more inclusive laws alongside a paramount role for judicial oversight in enforcement action against principled individual objectors.

Overall, the thesis seeks to reorient deep disagreements on these contentious theoretical and regulatory matters towards their manifestation as a more foundational underlying question of political legitimacy, its coherence and modal limits.

For my grandmother, Lidia,
an incredibly spirited believer.

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Introduction

Just before 5pm on a warm 10th April evening somewhere in Sydney during the autumn of 2019, a restless zeal was deeply stirring. Fresh from a record-breaking match against the Aukland Blues, Australia's highest-scoring rugby full-back, Isileli "Israel" Folau [1] was immersed in an internal struggle, seeking to fulfil something incomparably greater. Soon the message came to him in a 13-worded meme. With a few added lines his quest was over, for now. Set into the irretractable permanence of written form and shared to more than 300,000 followers on Instagram, the message was brief and seemingly urgent: "WARNING Drunks, Homosexuals, Adulterers, Liars, Fornicators, Thieves, Atheists, Idolaters HELL AWAITS YOU REPENT!"[2] Almost instantly, phones were ringing and social media was in a frenzy of reactions: shock, outrage, condemnation, solidarity, pity, ridicule, support, and dismay. Sponsors threatened to withdraw and, hours later, Rugby Australia publicly announced its intention to terminate Folau's multi-million-dollar contract.[3] In the months that followed, Australian rugby turned into the vector of an all-consuming social, legal and political-ideological struggle. Did the Player's Code of Conduct purportedly breached by Folau constitute part of his contract? Were there adequate grounds for lawful dismissal? [4] Had Folau brought Rugby Australia into "disrepute"? Were the posts "homophobic" or "discriminatory" pursuant to the Code, anti-discrimination laws or even more generally? Was it an exercise of the right to free speech or an unprotected instance of vilification or "hate speech"? Varied and difficult as these questions were, ineluctably woven into each of them was a further more fundamental complication that truly encrypted the puzzle. Folau, after all, was a devout Evangelical Christian and his message was fashioned from Corinthians 6: 9-10 and other scriptural verses of the Bible.

The most immediate paradox was reflexive. Even if Folau's post had been discriminatory against persons identifying as LGBTQI+ (amongst others), Federal workplace laws and Rugby Australia's own Code proscribed discrimination on the basis of religion, which is exactly what

[1] RTÉ News, 6 April, 2019, <https://www.rte.ie/sport/rugby/2019/0406/1041066-israel-folau-breaks-super-rugby-try-scoring-record> (retrieved 28 February, 2024).
[2] Rugby World, 11 April, 2019 < https://www.rugbyworld.com/countries/australia-countries/rugby-australia-set-sack-israel-folau-latest-anti-gay-comments-99217> (retrieved 1 March, 2024).
[3] BBC News, 11 April, 2019, < https://www.bbc.co.uk/sport/rugby-union/47893542> (retrieved 1 March, 2024).
[4] Kulikovsky (2019), 163-165.

dismissing Folau for a religious post (on personal channels, in his private time) would arguably be.[5]

Secondly, and irrespective of religious discrimination, was Folau's conduct something to be protected as an instance of religious and/or conscientious freedom? For Folau, like many persons of faith, the Gospel is the Word of God and evangelising or preaching it is a devotional duty to which Christians are scripturally commissioned.[6] Indeed, in this and previous posts, Folau was calling for repentance and appeared to manifest a spiritual, conscientious reaction to contemporaneous events, namely Australia's marriage equality debate and LGBTQI+ campaigns.[7] Just a day earlier, Tasmania had become the first Australian state to legislate rights to retrospectively alter the gender recorded on birth certificates.[8] For someone believing that humans are created in God's image as men or women, gender re-assignment would certainly be a spiritually significant issue. Though some might plausibly question religion's warrant to special protections, whether in problematic cases as this or generally, the post seems to exemplify the relevant hallmarks of an act of conscience or religious practice.

Nor, thirdly, do matters turn any more straightforward by shedding the construal of the post as religious practice and considering it (merely) as speech. This is because the religious content overwhelmingly complicates the assessment about whether this was an instance of protected free expression or unprotected hate speech. The words of the post warn of 'hell' and call for 'repentance' for a wide variety of "sinful" identities, well beyond the categories of anti-discrimination laws. The post carries little sense without its religiously-embedded connotations, no words of hate or abuse. Indeed, from the perspective of the faithful, the inherent truthfulness and love of God's Word is incompatible with vilification and discrimination. Calling out sinfulness does not imply disdain as Folau had previously expounded after fronting the cover of a magazine in support of gay rugby. In his own words: "think of it this way: you see someone

[5] See *Fair Work Act 2009 (Cth)* s. 772; Rugby Australia Code of Conduct, 2019, clause 1.3, available (archived) via < https://web.archive.org/web/20190626051616/https://australia.rugby/-/media/rugbyau/documents/rugbyaucodeofconduct.pdf?la=en&hash=8EE8F8D77E02DE7F1ED033BDC50F2AD8> (retrieved 4 March, 2024).

[6] See for example, Mark 16:15 ("Go into all the world and preach the gospel to every creature") and 1 Tim. 4:12 ("…be an example to the believers in word, in conduct, in love, in spirit, in faith, in purity…"), The Holy Bible, (NKVJ).

[7] For further context and observations see Knox (2020), esp. 32-41.

[8] Provisions can be found in Part 4A, *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas).

who is about to walk into a hole and have the chance to save him <…> if you don't tell him the truth <…> he is going to fall into that hole."[9]

Of course, none of this means the post was not in fact vilifying or discriminatory. At the very least, as Folau himself conceded (Knox, 2020, 39), it was offensive and potentially harmful to many vulnerable members of the LGBTQI+ community already experiencing marginalisation or homophobia. Being condemned to hell for one's sexuality or personal commitments is not just presumptuous (considering it is God who is ultimately supposed to know and decide), but also conceivably demeaning and injurious to personal dignity. Paradoxically though, to establish this is not straightforward for it inevitably requires selective interpretation. That is, one must simultaneously rely on religion for the negative connotation about 'hell' whilst also discarding or neutering the countervailing religious meanings of repentance and love just recounted. Such ambivalence and ambiguity make the translation of religion into a secularised form for public discourse so fascinatingly complex, posing yet a further challenge to those already evinced.

Needless to say, Folau's case is not unique nor are its underlying questions confined to LGBTQI+ rights in Australia of 2019. Rather, it is illustrative of the larger, general problematic between religion (or conscience) and the liberal state with which this dissertation is concerned.

Religion and conscience have posed pervasive and timeless challenges to sovereign governance long before liberalism – and quite apart from whether one adopts these distinctively Western categories or not.[10] In some form or another religious or spiritual freedom and its political relation to the state already appear in texts from civilisation as ancient as Egypt, Sumeria, and China (Hertzke, 2012, 4-5). Contrary, for instance, to China's semblance of state secularism and parochial freedoms for folk religious spiritual practices (e.g. filial piety or ancestor worship), there is a much more complex picture of state-religious dynamics based on a religious-cultural orthodoxy harmonised through a preservationist state and civil society in relation to disruptive (often externally imported) heterodoxies (Yu, 2005, 5-17, *passim*).

Meanwhile, a more prefiguratively modern-liberal case appears within the increasingly inward looking late Roman Empire of the fourth century through a feud over the restoration of a pagan (Greko-Roman) altar to the goddess of victory following the Edict of Milan (Sheridan, 1996,

[9] Folau, Israel, 'I'm a Sinner Too', *Athletes Voice*, 16 April, 2018 < https://www.athletesvoice.com.au/israel-folau-im-a-sinner-too> (retrieved 1 March, 2024).
[10] For a discussion of the evolution of this category in the West, see Smith (1964), 15-50.

186-188). The rival petitions to Emperor Valentinian II, for and against restoration, are littered with a resonant rhetoric about religious pluralism, church-state separation and the demandingness of faith in competition with the civic imperatives of the state.[11]

Many of these themes have become the recurring controversies of religion and conscience within the modern liberal state. From bans on minarets,[12] crucifixes,[13] Christmas nativity and Channukah displays[14], veils and/or headscarves[15] to persistent dilemmas about special tax and zoning rule concessions for religious enterprises,[16] government funding for denominational schools,[17] teaching religious doctrines like Intelligent Design or Creationism[18] and prayer ceremonies (or even oaths or pledges of allegiance and flag salutes) at public institutions and schools.[19] Endless divisions too over legal accommodations and exemptions for faith or conscience-based commitments. Are pacifists to be exempt from military service?[20] Vegans from working with animal products?[21] Faith-based businesses from anti-discrimination laws in employment and health?[22] Native Americans from criminal offenses relating to peyote as an illicit narcotic substance[23] or Khalsa Sikhs from weapon-possession offenses for carrying the *kirpan* in public?[24]

Beneath these public debates are the more fundamental normative-theoretical questions. How ought religious and conscientious commitments be regulated within the liberal state? Is there something distinctive of normative relevance about religion and/or conscience that warrants differential treatment for these commitments over other analogous ones? Might it, for example, warrant legal accommodations or exemptions to general laws for religious or conscientious commitments? Is there another category of normative distinctiveness or 'salience' and to what extent would it permit the state to legitimately endorse, aid or hinder a particular religion or religion in general such as in the form of state-religion disestablishment?[25] Or to act upon

[11] Relevant excerpts from the petitions to Emperor Valentinian II from Symmachus and Ambrose (for and against restoration, respectively) contained in Sheridan (1966).
[12] *Ligue*.
[13] *Lautsi*.
[14] *Allegheny*.
[15] *Dogru*; *S.A.S; Achbita*; *Bougnaoui*.
[16] *Walz*; *Latter-Day-Saints*; *Burlington*.
[17] *Zelman; Carson.*
[18] *Edwards*; *Mansur; Angeleni.*
[19] *Freitag*; *Town-Greece*; *Minersville*; *Barnette*; *Perovy*.
[20] *Seeger*; *Welsh.*
[21] *W.*
[22] *Hosanna-Tabor; Hobby-Lobby*.
[23] *Smith.*
[24] For example, section 139 of the *Criminal Justice Act 1988* c. 32 (UK).
[25] *Everson*; *Lynch; Holy-Synod*.

religious reasons as legislative or public policy rationales, as a kind of constitutional establishment? [26] What, in short, is the proper place and role of religion and conscience in liberal states?

Liberal political philosophy and jurisprudence have repeatedly struggled to produce a unified, stable position here. The core tenets of liberal state neutrality and of protecting religion and conscience (along with other basic freedoms) from direct discrimination and interference have remained certain, but just how they are to be balanced and by what principles are their internal tensions to be mediated is widely contested. It is in part for this reason that the basic tenets have been of little help in resolving the more complex cases regarding indirect or incidental interference. Cases, that is, where the law does not invidiously or latently target or discriminate and is otherwise legitimate, but nonetheless affects some with a peculiar or disproportionate burden relative to others. Thus, to draw on one of the examples above, while a legitimate, uniformly applied, defence law mandating military service might be a considerable burden of time, opportunity, or personal risk for all those conscripted, for those with deep pacifist convictions there will be additional burdens of moral or religious conscience or even civic opportunities if, for example, (free) public education or training were exclusively linked to conscription. Whereas many have been willing, in some of these cases, to extend the protection to some appropriate category of interests including (partly or fully) conscience and/or religion, there has been extensive and deep disagreement on just what kinds of protection, in which cases and in respect of what categories?

Schematically, liberals of the so-called *accommodationist* variety embrace religion and/or conscience as normatively distinctive and therefore warranting differential or "special" treatment in its own right. There is internal divergence, however, as to whether that treatment is only special protections – namely, legal accommodations and exemptions (McConnell, 2000; 2007; 2013), special constraints such as disestablishment (Marshall 1993; Sherry, 1996) or both (Greene, 1992; Audi, 2011; Koppelman 2013)?

Liberal-egalitarians, meanwhile, reject that religion and/or conscience are normatively distinctive per se, but differ on what that entails. For many, religion and/or conscience may in certain cases still warrant special treatment but only if – and to the extent that – it falls within some appropriate category of normative salience. Just what that category is has been contested through multiple proposals – from 'integrity' (Bou-Habib, 2006) to 'questions of ultimate

[26] *Lemon*.

value and concern' (Nussbaum, 2008), 'meaning-giving beliefs and commitments' (Maclure & Taylor, 2011), and 'ethical independence' (Dworkin, 2013), alongside more dynamic propositions like comparative equality of treatment (Eisgruber & Sager, 2007), various balancing approaches (Greenawalt, 2006; Quong, 2006; Billingham, 2017b; Patten 2017a, b) and an influential disaggregation strategy (Laborde, 2017).

For others, however, there is little question of category given that the very logic of special treatment is flawed on various grounds (Barry, 2001; Arneson, 2010; Leiter, 2013; Dworkin, 2013). There is, in other words, no principled case for special treatment of anything besides what is guaranteed by liberalism's basic rights and liberties (which are not taken to extend to indirect or incidental interferences or burdens from otherwise just and legitimate laws).

Differences across these matters inevitably spiral into deep disagreements about the requirements of fairness or justice and even liberalism itself. These disagreements are "deep" because they concern core value judgments and foundational premises such as about the meaning and import of 'neutrality', the relevant metric of equality, how any such constituent measure (e.g. opportunity, resources, welfare etc) might be understood, the baseline for comparison, weighing, ordering and much more. And that is already after setting aside the complex question of what is it that conscience and/or religion actually are and how (if at all) their treatment should differ. Ultimately, these deep disagreements have proved intractably entrenched, leaving the above puzzles about the regulation of religion and conscience mired in vagueness and abstract contestations. In the words of one prominent theorist commenting on accommodations and exemptions, it has become an exercise in "ad-hockery" (Jones, 2017, 174).

This dissertation aims to contribute to a resolution of these matters in two principal ways. First, it seeks to demonstrate that the overlapping normative-theoretical questions about religion and conscience in liberal states in fact comprise two discrete puzzles: the **Salience-Demarcation-Puzzle** and the **Justificatory-Puzzle**. Whilst partly interrelated, these **Puzzles** address conceptually distinct concerns and so conflating them or focusing on one without the other leads to incommensurability and incompleteness amongst various proposed solutions across the legal and philosophical debates. This project of refinement starts with scrutinising the foundational presuppositions about liberalism and religion (**Chapter 1**). Whereas the literature largely proceeds from the received or conventional notions of religion and conscience, taking these to be the primary subject of concern, Chapter 1 will challenge this religion-/conscience-

centric framework by disclosing that it rests on questionable presuppositions or taking liberalism's perceived tensions between the secular and fideistic as a given. Taking this for granted, overlooks the fundamental question about why it is that the debated questions are framed as they are around religion and conscience in the first place? Hence, although provisional, Chapter 1 will offer an immediate critical contribution by providing a more considered and comprehensive account of this framing. From there, a jurisprudential detour is undertaken to highlight the need for an interdisciplinary approach. Specifically, this rectifies the tendencies of philosophical analyses to inaccurately extrapolate from limited legal samples (usually, the paradigmatic U.S cases) and in the legal-jurisprudential literature to overlook abstract uniformities beyond the jurisdiction-specific concerns. With the benefit of this, the refinement of the overarching puzzle is made by individuating it into the above-named Puzzles. (**Chapter 2**). Together, the Puzzles are then justified as necessarily linked despite a leading alternative strategy focused on effective resolution via the Salience-Demarcation-Puzzle, namely the so-called disaggregation approach pioneered by Cécile Laborde (**Chapter 3**). The detailed engagement with Laborde's influential approach in Chapter 3 will corroborate the conclusion of Chapter 2 by highlighting how Laborde's important contributions are limited not simply because they neglect the Justificatory-Puzzle, but because in doing so they are also insufficient for *completely* answering Salience-Demarcation-Puzzle either, despite key improvements relative to alternative liberal-egalitarian approaches.

Thus, before proceeding to the dissertation's second contribution, Part II turns to scrutinise the Justificatory-Puzzle in greater detail alongside the liberal-egalitarian responses to it. That begins with the case for restricting exemptions (and accommodations) to the basic liberal rights and equal opportunities within the liberal-egalitarian framework in what will be called the **narrow-approach** (**Chapter 4**). This will be followed by the **broad-approach** or the case that liberal-egalitarian justice in fact requires more exemptions (and accommodations) than the narrow-approach permits (**Chapter 5**). The discussion will elucidate the aforementioned **deep disagreements**, which will be shown to stagnate into a further formal complication that I will expound as the **Coherence-Problem** (**Chapter 6**). This will motivate the second contribution to be developed in Part III.

The second contribution centres on defending the possibility of recalibrating the distilled puzzles away from their present grounding in concerns about (distributive) justice or fairness towards those about legal-political legitimacy or the proper limits of state power. My thesis posits that reframing the questions in terms of legitimacy promises the possibility of a lateral

and pragmatic solution to the presently deadlocked aforementioned debates. The solution is 'lateral' in the sense that it circumvents the relayed deep disagreements about justice and 'pragmatic' in the sense that it aims to provide practical and regulatory guidance on these matters independently of how the theoretical-normative questions are answered. To be sure, the answers to these questions remain of immeasurable independent value but the possibility nonetheless remains that what justice ultimately requires might not be the same as what can be legitimately pursued through the exercise of state legal-political power.

As shall be seen, however, there is an immediate and critical hurdle to such a proposal stemming from the fact that the deep disagreements about justice only arise once there is agreement (whether actual or presupposed, even if just for argument's sake) about legitimacy. This is most readily evinced in relation to the issue of conscientious/religious accommodations and exemptions. Discussion of these only makes sense if one presumes legitimacy of the law in question. After all, if the law is *illegitimate* then accommodations and exemptions seem rather beside the point – it is a matter about amending or repealing the law.

A central pillar for advocating the proposed solution in spite of these hurdles thus turns on identifying a largely neglected and under-theorised conceptual space between the legitimacy of a law in its aim or rationale and the legitimacy of its application and enforcement in specific, individual contexts of objection. The *possibility* of the lateral solution is therefore intertwined with elucidating the beginnings of a more finely-granulated approach to liberal legitimacy and its extension to novel, largely under-theorised dimensions of application and enforcement - or what I will call '**modal legitimacy**'.

Since every exemption and accommodation is at the same time also a law, questions of legitimacy naturally arise in relation to disestablishment and the permissibility of religious reasons as legislative or public policy rationales. Accordingly, the development of modal legitimacy must start with an overview of the principles of liberal legitimacy in relation to these questions. This turns on the prevalent framework of public reason liberalism and its interpretation. Engaging with these debates, I will argue for why conflicting interpretations of public justification bear decisively on questions of (dis)establishment with determinative implications for the Puzzles (**Chapter 7**). I will then present a novel argument for why exclusivist consensus liberalism is comparatively the most coherent model that cautions against the proposed solutions to the Puzzles advanced by convergence liberals (**Chapter 8**). This will confirm considerations of legitimacy as decisive for the Salience-Demarcation-Puzzle and for

matters of (dis)establishment in relation to both Puzzles. Lastly, I consider the limitations of liberal legitimacy when it comes to coercion and enforcement to motivate the need for the supplementary principles of modal legitimacy, which is then developed and applied to the Justificatory-Puzzle, especially in relation to exemptions, illustrating the *possibility* of the lateral solution proposed (**Chapter 9**). Perhaps most surprisingly and paradoxically, whilst modal legitimacy has all the potential for deep disagreement as noted of justice – and even with higher-raised stakes – it nonetheless, or even precisely for that reason, is capable of avoiding the same fate. The dissertation concludes with a reflection on the Puzzles and where the lateral solution remains partial or incomplete with possibilities for further inquiry (**Conclusion**).

The dissertation, as it turns out then, is as much about legitimacy as it is about the puzzles of liberalism, religion and conscience. And yet this should appear entirely natural, even essential. After all, religion and conscience represent some of the deepest alternative sources of normativity to those of civil society and the state making these commitments fundamentally intertwined with matters of politics and legitimacy. This makes it all the more surprising that legitimacy has been largely neglected or overshadowed by the predominant focus in the literature on the justice of religious or conscientious exemptions and accommodations.[27]

And all the more so given the ample telling empirical indications such as those marking the potence of religion as a political force. It has for, example, been long observed by sociologists and political scientists in terms of religion's institutional and psychological resources for mobilisation and influence in the public sphere (Fox, 2018, 73-77). Recent U.S. electoral data from 2004 to 2016 provides a highly revealing example in various religious-ideological blocs like the consistently 74% upward self-identified white evangelicals voting Republican and the 61% upward "religiously unaffiliated" Democrat voters.[28] The overall phenomenon seems ubiquitous too as suggested by the comparatively less publicised but similarly sharp religious-political impacts across Southeast Asia especially within Muslim-majority societies or Theravada Buddhist ones like Thailand (Larsson & Thananithichot, 2023, 502). And with the rise of populism in the post-truth political era the two-directional religious-political nexus seems evermore mutually operationalizable as examples from Brexit to Trump's MAGA and

[27] Convergence liberals are perhaps the most notable exception to this, as discussed in Chapter 7.
[28] Pew Research Center, 'How the faithful voted: A preliminary 2016 analysis', November 9, 2016 <https://www.pewresearch.org/short-reads/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis/> (retrieved, 14 March, 2024).

Bolsonarismo in Brazil or Imran Khan's Riyasat-e-Madina and the Hindu nationalism of Modi's BJP attest (Yilmaz & Morieson, 2021, 7-15).

The effects of these potencies will, of course, vary but their practical significance remains constant as any survey of recent headlines reveals. From violent religious hostilities like the emblematic Israeli-Palestinian conflict (Issa & Yassin, 2024) or that in South Sudan (Pendle, 2020)[29] to the non-violent but polarising religious and conscientious struggles over vaccine mandates and other public health measures during the COVID-19 pandemic or over abortion rights in the U.S. in the aftermath of *Dobbs*[30] with an interesting shift to religious grounds for both access to and denial of abortions.[31] Or yet more recently still, over IVF following a religiously-motivated judgment on the status of embryos.[32] One need not necessarily characterise these as matters of life and death (at least not in the same manner as the recent reminder from Pakistan's blasphemy laws[33]) to appreciate their determinative personal and collective value impacts. It is the combination of this tremendous potency and depth of complexity that makes the Puzzles about the proper role and place of religion in the public sphere so pressing yet embarrassingly intractable for theorists and politicians alike.

To return once more to our beginnings with Folau, a confidential legal settlement with Rugby Australia drew matters to a formal albeit tragically inconclusive end. Though Folau's dismissal stood, Rugby Australia issued an apology and a speculated 4-million-dollar payout (Knox, 2020, 45). More crucially, none of the critical legal, moral and philosophical questions gained answers to bring closure to the widespread hurt and divisiveness of the social-political saga. Meanwhile, the Federal Government's attempts to address these issues via legislation endured some three years of consultations and parliamentary debates before finally lapsing without accord in July 2022.[34] Shelved indefinitely, the proposed laws like the case they might have settled remain a kind of symbolic testament to the above.

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[29] In 2021, religious social hostilities were reported to decrease following their 2014 unprecedented peak though it remains to be seen whether this trend with continue. See Pew Research Center, ' Globally, Government Restrictions on Religion Reached Peak Levels in 2021, While Social Hostilities Went Down' March 5, 2024 <https://www.pewresearch.org/religion/2024/03/05/globally-government-restrictions-on-religion-reached-peak-levels-in-2021-while-social-hostilities-went-down/> (retrieved March 14, 2024).

[30] *Dobbs*.

[31] The New York Times, 5 July, 2023, < https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom html> (retrieved 12 March, 2024). See also *Pomerantz*; *Satanic-Temple*.

[32] The Washington Post, 28 February, 2024 <https://www.washingtonpost.com/nation/2024/02/28/alabama-ivf-embryos-religion-beliefs/>. (retrieved 12 March, 2024).

[33] BBC News, 8 March, 2024 <https://www.bbc.co.uk/news/world-asia-68511557>. (retrieved 12 March, 2024).

[34] *Religious Discrimination Bill 2022 (Cth)*. <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6821> (retrieved 4 March, 2024).

Against all this background, liberalism's continued confoundment with the puzzles of religion and conscience appears an ever more tragic and dire predicament such that even the mere possibility of a lateral solution seems worthy of a considered examination.

Part I Disaggregating a Paradox

Chapter 1: Religion in theory, religion in law

1.1 A preliminary question

Before embarking to examine the theoretical-normative questions and related controversies about religion and conscience canvassed, a compelling preliminary question demands to be addressed. This is not about the meaning or definition of these concepts and their distinction. These difficulties will be postponed until the following sections to be partly addressed and largely circumvented thereafter. Relying on conventional understandings for now, the concern is that whatever their definition, the very framing of the issues in terms of conscience and religion may in itself seem perplexing. We live in what has been described as a "secular age" – an age in which our social imaginaries are no longer structured by or "embedded" in religious belief (Taylor, 2007, esp. 1-22, 149-159). And though, as the introductory remarks attest, religion has defied secularisation theory's bolder predictions of demise through modernisation (Fox, 2018, 11-17), its resurgence is a far cry from its once inescapable doxastic and social pervasiveness (Taylor, 2007, 1-4). Today, the religious consciousness inevitably operates in a pluralistic world of differentiated value spheres such that any commitment is fundamentally an existential choice amongst final ends or "warring gods", so to speak (Weber, 1919/2004, 27, 22-31). Why then, does modern liberal doctrine and state practice afford religion and, to some degree, conscience their prominence?

This question may sound like that asked about the normative salience or "special" status of religion compared to non-religious analogues like secular moral doctrines or individual conscience. Cécile Laborde, for example, has put it as follows: "how (and why) do we protect freedom of religion in an age where religion is not special?" (2012, 1). While this is another important matter to which we shall come, it must not be conflated with the present preliminary one. The difference, as indicated by the preliminary question's inclusion of 'conscience' alongside 'religion', is that salience in its comparative dimension, such as favoured by accommodationists about religion, or even in its absence, as suggested by Laborde and other liberal-egalitarians, is already a presupposition too far. Inadvertently, or even ironically when it comes to liberal-egalitarians, one has already taken up a religion- and/or conscience-centric frame.

It is this framing that is itself in question. For it seems peculiar unless the protection of religion and conscience actually adds or captures anything not already addressed by other core liberal rights and freedoms? Rights to freedom of association and assembly, for example, can already protect religious congregation and communal practices while those to freedom of speech (and, often, also movement) can cover various forms of religious and conscientious expression from worship to proselytization and dissemination of doctrine or individual faith and conscience. In short, as some have similarly observed, religion and conscience seem to serve – albeit very imperfectly – as a proxy or shorthand for a broad variety of discrete interests not exclusive or even specific to religion and conscience.[35]

Even under no specifically enumerable right, religious and conscientious commitments seem naturally protected via the general "right to liberty". As the scare quotes indicate, there is no such general right per se – at least not in any robust sense as a priority or constraint on political ends (Dworkin, 1978, 268-69; Rawls, 2001, 44). Rather, liberty insofar as it serves as an overarching liberal principle is concerned with non-coercion or non-interference (Gaus, 1996, 162-166) which though vague and highly abstract can nonetheless orient a scheme of rights and protections. Mill's 'Liberty Principle' (1859/2001, 13) or Rawls's notable formulation of a "fully adequate scheme" being "compatible with the same scheme of liberties for all" (2001, 42) capture this nicely. Importantly then, what matters is whether the conduct falls within the relevant sphere of individual liberty or non-interference as approximated by a scheme of protections/constraints and not whether it is of religious, conscientious or any other character. To illustrate, where a right to free movement is limited by, say, the right to property one can equally march for any cause, go on holy pilgrimage or simply to the local pub unless that would involve trespass, in which case all the foregoing are equally precluded. Likewise, a right to free speech would permit expression of conscience, faith or any spontaneous urge provided it does not interfere with, say, another's right to personal integrity whether physical or reputational.

Now it might be thought that examples like these simply overlook the relevance of religion and conscience as part of what weighs one way or another upon how the various bounds of competing liberties are set. Could it not have been just as plausible to posit that it matters when the freedom of speech or movement involves religious or conscientious commitments and may even sometimes outweigh the countervailing liberties described? Is this not precisely how, to take a more acute case, the otherwise inviolable right of the child to personal integrity is

[35] Most notably, Nickel (2005), but also Koppelman (2013); Lund (2017).

outweighed by the religious interests to deny certain medical procedures or inflict permanent bodily alterations like circumcision? These observations are indirectly relevant to the explanation as will shortly be seen, but they do not resolve the question on their own. Merely identifying that the religious or conscientious character of some more general liberties influences the determinations within the competing scheme simply underscores the question: what if anything, explains this isolation of religion and conscience beyond the more general sphere of liberty?

A clue to the answer has already been encountered in the introductory discussion about the complications of religious and conscientious commitments in demarcating free speech from prohibited forms. An instructive further illumination of this is the case of Maryland's Toleration Act of 1649 identified by Michael McConnell as America's "first 'hate speech' regulation" (1992, 17). Two points from McConnell's interesting commentary deserve attention. The first is that the framers of the law seemed to construe the value of free speech as not absolute but instrumental to social cohesion in a religiously pluralistic society. There was no inconsistency found in curbing a fundamental liberal right to preserve a liberal social order (Ibid., 19). Second, and more strikingly, the liberal social order was seen as essentially grounded in or dependent upon the security of religious and conscientious commitments as evident in the schedule of unlawful opprobrious expressions exclusively comprising slurs of religious-denominational identities (Ibid., 18 ff.).

Was it simply that these were the vulnerable identities of the day just as contemporary hate speech regulation today expands to identities of race, ethnicity, gender and sexual orientation? That seems sound, but it misses what is arguably the very crux of the matter. Much like the name of the Act reveals, religion and conscience are not merely the objects of protection as the 'vulnerable identities' analysis would suggest, but also its rationale and target of constraint. 'Toleration', it has become commonplace to note, presupposes objectionability (Forst, 2013, 18; Newey, 2013, 6) which in turn involves normative judgments. Whatever else the sources of normativity here might be, religion and conscience would on almost any definition be consistently amongst these and even most acute or forceful in quality.

Thus, what is most germane about the Act's restrictions on free speech is its basis in the intolerable objectionability of the religious slurs. Here the insights earlier deemed indirectly relevant secure their input. For, as it turns out, religion and conscience do weigh on the determinations or boundary-setting within the scheme of liberties but not in the straightforward

manner earlier advanced. It is not that religion and conscience operate as additional weighty considerations in conflicts of liberties, but rather that, being the frequent ends or causes of the effects of liberty, they operate as inputs and complex aggregate measures of tolerability and thereby the boundaries of competing liberties. As Glen Newey has argued, principled resolutions of conflicts amongst conscientious and religious commitments cannot escape the political concern with order or security as the "*sine qua non* of political life" (Ibid., 119-121). Consequently, the normative principles are never truly pre-political – but reflect the actual conflicts through the particular shape of which the potential resolutions come filtered (Idem.).

It is in part through these background political processes or actual conflicts amongst religious and conscientious commitments that the general scheme of liberties takes its form. Speech, to continue the example, is protected and restricted in the way it is on account of the particular constellation of religious and conscientious conflicts. It is also through these constellations that vulnerable identities arise as vulnerable in the first place (e.g. through the conscience of fanatical racists) and gain protection (e.g. through conscientious objection to racism). This, as we are about to see, extends far more broadly and explains both the classical liberal concern with toleration encountered and the isolation of religion and conscience. The full explanation turns on a deep and extensive subject matter well beyond conventional categories of religion and conscience not to mention the liberal political framework itself. This makes a properly detailed pursuit impossible here. Nonetheless, since completing the answer to the preliminary question requires it, we must venture somewhat beyond our preoccupation with liberalism to glimpse briefly at the more universal dynamic. I turn to introduce this below under the banner of the *theologico-political problem*.

1.2 Theologico-Political Problem

There is no easy way to state the theologico-political problem. Although the term can be traced to Leo Strauss (1979/1997, 453) – probably via Spinoza[36] – neither of them risks venturing a definition. Instead, in a tenuous allusion, Strauss cryptically suggests it to be a problem animated by the co-origins of the political and the divine (1964, 241). Put differently, it seems that questions about the divine, transcendent or sacred arise in connection with those about authority and law, and vice versa (Smith, 2013, 389). At the same time, the nexus forebodes of potential tensions should it be loosened by movements of rationalisation/science/philosophy or

[36] This connection and further context can be found in Smith (2006, 10 ff.).

revelation/theology/prophesy as allegorically encapsulated in Strauss's juxtaposition between Athens and Jerusalem (Idem.). Consequently, because civil-political authority and religious authority are foundationally intertwined, so too are their etiologies: all the most pressing problems of politics and political philosophy, are at an impenetrably deeper level, also those of faith and theology.

For a modern reader, such pronouncements will likely seem highly doubtful if not outright suspect as some sinister programme of revivalist political theology. Those misgivings are, of course, entirely understandable. Has not the so-called modern West forged an alternative path of secularism? Are political questions not consequently settled without theology, through a distinctively civic ethic based on universal citizenship and public values? Whether or not such apprehensions are well-founded, however, depends on how we are to understand this purported Western-secular exceptionalism? Two points can offer cautionary guidance here. The first takes the claimed exceptionalism at face value but reflects upon whether it might not be a case of an exception that proves the rule? The second delves deeper to unravel the exceptionalism itself.

1.2.1 Secularism in perspective

Let us start then with the secularism narrative at face value. Speaking this way is, of course, complicated by the fact that secularism has no one generally settled meaning let alone a singular narrative.[37] Nonetheless, the controversial details need not derail us. The essential aspect is not about exactly how secularism severs the political-theological nexus, only that it claims to succeed. The question is: what does accepting that imply about the theologico-political problem? Does secularism represent (the beginning of) the theologico-political problem's conceptual end or rather an anomaly that merely reinforces it?

A key part of the answer comes from the apparently banal observation that secularism (as distinguished from the epistemic category of 'the secular') is a 'political doctrine' (Asad, 2003, 3). Implicit here is that secularism is not just a *doctrinal* answer to questions about politics but at the same time a *political* medium, deploying constructs like citizenship to mediate the differential processes, competing claims, and identities constitutive of the political (Ibid., 3-7, 13-14). Crucially, these are parallel but distinct projects: doctrinal answers might not altogether

[37] For a sample of influential debate see Taylor (2011); Habermas and Taylor (2011); Bilgrami (2014), 3-57. A detailed narrative of secularism can be found in Taylor (2007). For a critical genealogy of secularism and its narratives see Asad (2003). Some shorter reflections can be found in Stolzenberg (2010); Eberle & Cuneo (2015).

materialise within the political. This is evident in what Jürgen Habermas discusses as the gap between administrative-systematic- and lifeworld- integration, or, roughly speaking, that "[t]he secularization of the state is not the same as the secularization of society" (2011, 15-16, 23).

Habermas goes on to note how rendering 'the political' in the "metasocial character" of popular sovereignty or democratic legitimacy, the secular state must paradoxically both rely on deliberative communicative *freedom* and somehow discriminate and privatise the contaminating (non-rational, non-secular) elements (Ibid., 18-25). For our purposes, the political-social gap reveals something far less complex yet striking – namely how beyond its doctrinal vision, the practical, political impact of secularism appears rather limited to anomalous bands of socially-privileged, educated liberals or similar ideal-types like the Rawlsian 'reasonables' (whether religious or not).

A fuller perspective of the anomalousness can be readily gained on the numbers. According to the most recent survey[38], out of approximately 6.9 billion of the word's people, some 2.2 billion identified as Christian, 1.6 billion as Muslim and another billion as Hindu. Together with Buddhists, Jews, adherents of Aboriginal, folk and "other religions" that is some 5.8 billion religious believers or 84% of the global population.[39]

These are rather tremendous figures and understandably one may question whether such quantitative methods can really convey anything about the authenticity of the believers counted or that their reported faith is more than merely nominal. There is indeed no easy way to know this one way or another but, for what it's worth, one can examine one's intuitions about the actual practices of piety readily found in news and social media spectacles. From the roughly 2-million Haji pilgrims encircling the Kaaba (Qurashi, 2019, 185) to the 8-million single-day procession over the Feast of Black Nazarene in Manilla or, the staggering 40-million gathering for the Kumbh Mela (Gautret, 2014, 107-08), the devotion seems palpable.

Nonetheless, it will be objected that all this is beside the point. Religiosity per se or its composition in civil society is technically immaterial for evaluating the relative scale of secularism's claimed exceptionalism which concerns the severance of 'the political' from

[38] Pew Research Center, 'The Global Religious Landscape', December 18, 2012 <https://www.pewresearch.org/religion/2012/12/18/global-religious-landscape-exec/> (retrieved 10 April, 2024).
[39] The remaining 16.3% were "unaffiliated" though besides atheists and agnostics this category includes those who may be 'religious' or 'spiritual' but not aligned with the any of the surveyed religious categories. Despite being more than a decade old, the results appear to be corroborated by a more recent, 2022 report projecting that the overall numbers will not decline well into 2050 – see Pew Research Center, 'Key Findings From the Global Religious Futures Project', December 21, 2022, < https://www.pewresearch.org/religion/2022/12/21/key-findings-from-the-global-religious-futures-project/> (retrieved April 10, 2024).

theological concerns. I say "technically" because, in line with the Habermasian considerations above, without some secular element in civil society it is not clear how secular political institutions could be set-up and maintained. Beyond that minimal threshold though, the objection is cogent: the comparative scale that matters must indeed be political.

Again, however, the global *political* landscape paints a similarly stark picture. The Pew Research Center Report on Global Religious Restrictions[40] in 2021 measured "high" or "very high" levels of "government restrictions" on religion across nearly a third (28%) of the 198 countries surveyed. A further 36% had moderate to high levels of restriction. Altogether, that is over two-thirds (64%) of the world's existing states. Even discounting for the higher population distributions in more restrictive countries (possibly as high as 75%), it remains safe to conclude that most of the world's people – both in aggregate and as political units - remain under moderate to high restrictions on the practice of religion.

Restrictions, of course, do not indicate a lack of religious freedoms per se but perhaps only unfreedom for some (disfavoured) religions, but not for (favoured) others. Even greater freedoms, might still signify some degree of suppression of incompatible fundamentalist sects or creeds incompatible with religious freedoms for others. Importantly then, whilst incapable of conclusively demonstrating the pursued extent of the secular West's exceptionalism, the data unequivocally indicates the incredible scale of the almost reflexive regulatory impulse towards religious elements not constitutive of the state itself. That impulse betrays the deeper tensions between the civil and religious authority to which the theologico-political problem speaks. It reveals that whatever way we interpret the relative position of the secular West within this context, the theologico-political problem seems to persist as the underlying rule, which secularism's ambitions to transcend have only reinforced.

1.2.2 Secularism reframed

Should all these measures of exceptionalism seem tenuous or hollow, turning to the second point, we can scrutinise the veracity of the claim to exceptionalism itself. At first glance, secularism's success in transcending political theology may seem plausible. That the religious and political are "two separate orders of practice and relations" is from an empirical standpoint "an obvious fact" (Lefort, 1988, 221). Political institutions, values and practices of the secular

[40] Pew Research Center, March 2024, 'Globally, Government Restriction on Religion Reached Peak Levels in 2021, While Social Hostilities Went Down' < https://www.pewresearch.org/religion/2024/03/05/globally-government-restrictions-on-religion-reached-peak-levels-in-2021-while-social-hostilities-went-down/> (retrieved 11 April, 2024).

state are accessible and intelligible on their own terms without dependence on religious meanings. All this and even the very manner of speaking about 'religion' in this reified way seem to attest to the claimed success.

The unravelling of that narrative, however, also begins with this discovery. For, as many have noted, the modern suspicion towards political theology along with the categories of 'conscience' and 'religion' themselves, arises only through the reflexive process of ideological reification and self-understanding of the modern West (Smith, 1964, esp. Ch 2; Fitzgerald, 2000, Ch 1; Bergunder, 2014, 252-59). So ingrained have these notions become that it is hard to imagine that only about two hundred years ago 'religion' was not at all a common reference (Riesebrodt, 2010, 1). In other words, it is symptomatically through secularism itself that the modern consciousness of the theologico-problem arises along with the suspicion of political theology and its very delineation. And so, assessed through its own ideologically constructed conception of religion, secularism guarantees the plausibility of its claims as above.

1.2.2.1 Religion: the particular and the indeterminate

But, conscious of its inherited limitations, this critical standpoint now faces its own hurdle: what could possibly replace the received limiting categories to uncover the obscured dimensions? The hurdle is complex yet, in one way or another, seems inevitably committed to postulating the necessity of an underlying phenomenological reality to religion. No matter its elusiveness to definition and its Eurocentric, Judeo-Christian or other culturally-historically problematic ideological baggage, religion has evolved a ubiquitous conventional utility for referring (however imperfectly) to a seemingly universal dimension of human experience (Smith, 1964, 22; Riesebrodt, 2010, 1-3; Bergunder, 2014, 254). In Émile Durkheim's seminal reflections, the innumerably diverse and protean forms of religious life - intermingled with what we might today call cosmologies, philosophies, even science and more (law too, as we shall see) - still allows for "permanent elements that constitute something eternal and human in religion…the idea that is expressed when we speak of *religion* in general." (1912/2001, 6-7, 10-11). To the extent that all human societies have in some form or another shown concern for demarcating between what is ordinary or "profane" and what is extraordinary or "sacred", religion in this *undetermined*, universalistic, or *general* sense surfaces as phenomenally real (Ibid., 36-37).

The truth or coherence of this sense notwithstanding, it remains instrumental if one is to critically engage with the subject matter beyond the culturally-historically preconditioned form

with which one must begin. Hence, Durkheim's emphasis on historical lineage of religious forms over anything fixed; to understand "recent religions" one must trace "the way they developed historically" (Ibid., 5). Likewise, we can also draw on the first (general) sense, to think about the second, historicised sense (i.e. the ideological byproduct of Western secularism's ambition to found politics within its own self-sufficient autonomous sphere). Through this we can begin to see how rather than breaking with political theology or overcoming the theologico-political problem, Western secularism remains entangled in it.

While pursuing such a venture in its fullness is too unfathomable here, we can nonetheless gain a few key insights by returning to the initial remarks on the theologico-political nexus and considering them again in light of the universalistic, expansive sense of religion to see what, if any, inherent connection to the political can be found. How, that is, is the intertwinement or co-origin of religious and political authority alluded to by Strauss to be understood?

1.2.2.2 Religion, magic and the charismatic origins of the legal-political

Again, there is no definitive account as such, but a core thread of the answer can be found in Max Weber's analysis of magic, prophecy, and charisma. Like Durkheim (1912/2001, 41-44), Weber recognises the extensive interrelations between magic and religion whilst maintaining their conceptual distinctiveness (1922/1965, 28). Yet, in contrast to Durkheim's distinction on the basis of religion's communal dimension (which magic lacks), Weber's account veers towards, the more explicitly political dimension of, power. Weber sees religion as (partly) differentiated from magic's instrumentally rational worldly orientation as a kind of technology ('sorcery') by its (religion's) increased non-instrumental concern with the other-worldly, increasingly symbolic, doctrinal, legal-rational forms (Ibid., 1-3, 26-30). At a deeper level, however, religion and magic are primordially linked along with the primal forms of political authority through what Weber calls *charisma* (Ibid., p. 2).

Along with the 'traditional' and 'legal-rational', charisma is one of the three grounds of domination or authority [*Herrshaft*] – defined in terms of voluntary compliance rather than compulsion over resistance through power or influence [*Macht*] (Weber, 1921/1978, 53, 212, 215). Yet, charismatic authority is unique in going beyond the concern with *ordinary* material or economic needs of everyday life to address the ideal or *extraordinary* needs: the furnishing of meaning, ultimate values or salvation (Klein, 2016, 186). This in turn endows charismatic authority with disruptive potential or "revolutionary power" to precede and supervene over the other types (Weber, 1921/1978, 245, 1117). Transitions, of course, are fluid between these

ideal-types, but traditional- and legal-rational authority are nonetheless both in some sense successive to pure charismatic authority (Ibid., 1121-22).

This is most potently demonstrated by magic as the charismatic primordial form of religious and political authority. Contrary to modern evaluations based on assessments of causality, magic, Weber argues, is primally identified by a spectrum of ordinary and *extra*ordinary occurrence, judged by rules of experience. Hence, although the twirling of sticks to cause fire-sparks and performing a rain-dance to "cause" rain belong to opposite sides of correct/fallacious causal attribution, they can both be magic, in the above sense, if perceived as extraordinary (Weber, 1922/1965, 1-2). The extraordinary power (or 'charismatic' power, as Weber also calls it) in magic does not therefore discriminate between natural and artificially induced forms (Weber, 1922/1965, 2). Consequently, one could attain charismatic authority through natural endowments (e.g. physical might, military prowess, psychological, intellectual or economic talents etc.) or artificially harnessed extraordinary powers more typical of magic (e.g. inducing states of ecstasy, healing, manipulating meteorological events, divination of fortuitous outcomes etc.).

Its form notwithstanding, charismatic authority does not remain pure for long. Eventually, it must stabilise through *routinization* into either the habitual or customary obedience owed *personally* as loyalty ('traditional authority') or *impersonally* within a normative order (legal-rational authority) (Weber, 1921/1978, 246). From this, we can see not only that the civil state and religion (in its modern institutional mould) are both products of legal-rational authority, but also that both originate with charismatic authority, whether magical or otherwise. Reflecting its etymology,[41]charisma partly corresponds to religion in the general, undetermined sense wherein we also find the theologico-political nexus as the basis of religion and politics in their (post-)routinized appearance. As Weber's figure of the 'prophet' exemplifies, religion in this sense bridges both the charismatic authority of magic and the legal-rational authority of (institutionalised) religion *and* the political or civil state. The prophet is neither priest (nor philosopher nor statesman) of legal-rational authority nor magician who operates with primordial instrumental rationality devoid of doctrinal or symbolic orientations (Weber, 1922/1965, 46-47). Exceptionally, the prophet is all of these at once, thus marking the

[41] Latinised from the Greek *kharisma* which draws on Charis, an attendant of the goddess Aphrodite, to convey *divine* gift or favour (Online Etymology Dictionary < https://etymonline.com/word/charisma> (retrieved 17, April, 2024).

theologico-political nexus as simultaneously numinous and normative, both law-giving and divine (Ibid., 49-59; Smith, 2013, 389).

Whatever else we might conclude about Weber's analysis, its reflections on the co-origins of religious and political authority in the charismatic authority of magic and extraordinary *power* provide critical insights into the theologico-political problem. Insofar as 'the political' is the category constituted by relations of power and authority, then it is also a religious – or rather, a theological category - insofar as that is understood in a general sense like that exemplified by charismatic authority in its concern with extraordinary needs of meaning, value and salvation. The point might be framed more ontologically following Claude Lefort who emphasises the impossibility of power operating in a vacuum without the symbolic representation of a social order or institutionalised relations of conflict (1988, 216-221, 225-33). The political then represents a kind of "primal division which is constitutive of the space we call society" (Ibid., 225) and this self-constitution requires some legitimating symbolic representation that is sui generis or outside itself (Ibid., 225-31; Habermas, 2011, 17).

These abstract ideas readily connect with a concrete anthropological reality to which Weber also gestures in stressing the connection between religion and social cohesion. From the ancestral worship of the household unit, family (sib or gens) to that of tribes, "it is a universal phenomenon that the formation of a political association entails subordination to a tribal god" (Weber, 1922/1965, 14, 16-17). It is indeed hard to overlook the ubiquitous centrality of death at the roots of religious life and its manifestations in various funerary cults and other post-mortuary religious-magical practices key amongst which is ancestral piety. In line with Weber's remarks, many like, Francis Fukuyama, have elaborated on how religious belief in dead ancestors proved integral to securing social cohesion beyond band-level organisation by providing a spiritual basis for kinship lineage beyond the more imminently regarded bloodline relations (2011, 63-81). Why else would anyone "want to cooperate with a cousin four-times removed <…> just because you share one sixty-fourth of your genes…"? (Ibid., 63). A scared ancestral bond, on the other hand, might sometimes cover a whole polis - as the founding Hellenic cultural heroes had done – or even a feudalistic state as perhaps the extensive dynastic ancestries in ancient China (Yu, 2005, 26-35).

1.2.2.3 The inverse connection: law, religion and their numinous normativity

More tellingly still, especially from the opposite end of the theologico-political nexus, is that law and religion seem inseparably fluid in their drive for social order. To be sure, the order in question is not civil peace or security. These important prerequisites for stable political community could, in principle, be fulfilled by traditional authority as Weber's care to distinguish *legislator* from *podesta* confirms (1922/1965, 49). Rather, consistent with the meaning-giving role of charisma or religion in its expansive sense, it is a distinctively *normative* ordering. That law and religion are both kinds of normative system is, of course, well-documented (Raz, 1975/2002, 149 ff). Specifically, both are institutionalised (having norms about norms), which distinguishes them from non-institutionalised normative systems like games and rules of etiquette, but not others (i.e. institutionalised ones like professional sport or chartered bodies). Yet, more strikingly, even on Raz's seminal criteria for distinguishing law from other institutional normative systems (comprehensiveness, supremacy, openness) (Ibid., 150-154), some religious institutions could arguably claim to possess these features too, as Raz concedes (Ibid., 151; 1979/2011, 118).

To glean the difficulty of trying to neatly separate the two consider one way of conceiving of "religious" law as law applying to exclusively "religious" subject-matter (e.g. rites and rituals). While there may be some such class of laws, this seems vastly under-inclusive unless one is willing to classify only fragments of, say, *Halakha* or *Shari'ah* as (religious) law. What are we to make of the norms in these codes about subject matter that can also be found in civil law (e.g. inheritance, marriages, taxation)? Nor does it help that the history of civil laws is littered with the sacred. From legal verdicts being rendered by divine signs in trials by combat or ordeal to treaties supervised by deities and more (Waldron, 2022, 7). And even if de-sanctification means that, say, contracts are no longer "holy", the bindingness of the contract as distinct from mere promise resounds of discerning sacred from profane.

Alternatively, conceiving of "religious" law in terms of the institutional source being "religious" or applying exclusively to a religious community turns equally haphazard once it is realised that the designations are derivative of the above or otherwise question-beggingly circular. Were a civil state to legislate against blasphemy, for instance, would the (secular) source really suffice to classify the law as non-religious? Would, say, the traffic regulations legislated by a theocratic state eo ipso be religious? In each case, it seems that the conclusion not based so much on logically defensible distinctions, but already fixed historical-cultural understandings.

It is therefore interesting to find the preserved logic within various etymologies. From the Latin root *religio* signifying the bindingness and regimental pedantry that characterised Roman cultic practices to non-Western equivalents like the Arabic *dīn*, variously used as 'judgment', 'obedience', or 'piety' (Smith, 1964, 23-26, 76, 93-94). Or, more acutely, the Sanskrit *dharma* defying translation as either "law" or "religion" to dynamically encompass both (Ibid., 54; Yelle, 2022, 175). Thus, to quote Robert Yelle, "[s]trictly speaking, the separation of law from religion that is supposedly the hallmark of legal secularism is impossible" (Ibid., 174).

To be sure, nothing here is intended as an indictment of the conventional distinctions between law and religion or other normative systems. The distinctions mark different institutions with specific cultural forms and make sense, serving important pragmatic purposes, relative to their historical-cultural context. All this aligns with the earlier point about differentiation that accompanies development of legal-rational authority from earlier charismatic or traditional forms. This in turn further confirms that, at a more fundamental level, law and religion are not easily delineated, but fluid in their shared distinctively normative character which has nothing to do with institutional form or the aforementioned Razian criteria of legal uniqueness.

Nonetheless, it may now seem like religion and law are simply being dissolved, along with so much else, into a monolithic category of pure 'normativity', becoming some kind of 'sacred' locus, as it were. That would problematically be a step too far. As Tim Crane points out, any over-inflation of religion to encompass all systems of belief whether Marxism, humanism or even atheism would render it redundant whilst missing its relevant phenomena (2017, 28). For Crane, the distinctiveness of religious normativity - or what he calls the "religious impulse" - is 'transcendence': a belief in the reality of a transcendent ideal and a commitment to realising its prescriptions of how things *ought* to be (Ibid., 35-36). Understood within its, culturally dominant, secular sense, transcendence may well fulfil Crane's purpose to ascertain the meaning of religion within that context. Clarifying the distinctiveness of the legal-religious normative confluence pre-institutionally, however, is better achieved by turning once more, to charismatic authority.

Just as the normative aspect surpasses traditional authority and the concern with political order per se, the distinctiveness of legal-religious normativity is best observed in contrast between charismatic and legal-rational authority. Both forms of authority are normative but, recalling that legal-rational authority emerges from routinised charisma, its normativity is derivative rather than (re)generative. Unlike the ordinary priest, statesman, philosopher or other ethical

guru, the true prophet (and lawgiver) does not operate within (or even with moderate alterity towards) existing normative systems of legal-rational authority; they are the revolutionary generators or infusers of normativity itself, bringing norms and meaning into the world (Weber, 1922/1965, 52-59). Thus, in their primal form law and religion are blended in charismatic authority as the untraceably numinous source of normativity itself.

Nor is it strictly necessary to adopt the Weberian framework (apt though it is). The above is equally manifest in general jurisprudence itself. Most explicitly, take the reliance on a higher-order "divine" normative source of law and morality within much of the natural law tradition. Or, less explicitly but thereby all the more tellingly, there is the legal positivist attempts at circumventing this. Besides its tremendous influence, Hans Kelsen's foundational account is particularly symbolic in its attempt to overcome the apparent gap between social facts and (legal) normativity. A fact that someone agrees to or commands X does not eo ipso make X a law unless there is a law which prescribes so. The potential for circularity or infinite regress here leads Kelsen to postulate his famous 'Basic Norm' [*Grundnorm*] as the "ultimate, self-evidently valid norm" (1949/2006, 111). While there is, of course, a great deal more to all this, the undeniably striking feature of the *Grundnorm* is its undeclared but inescapably numinous nature. The transcendental normative ground of all law in any system is effectively whatever it is that mysteriously ignites the spark of normativity itself. From Carl Schmidt's antipathic response (re-)embracing political theology via the extra-legal normative force of the sovereign exception (1922/2005, 18-21, 36-52) to H. L. A. Hart's attempted transposing of Kelsen's problem to the psychological, albeit no less mysterious, "internal point of view" (1961/2012, 102-103), the modern conception of law has not severed the underlying theologico-political nexus.

In sum, though modernity and secularism have instantiated the theologico-political problem with unprecedented self-consciousness and internally differentiated form, this is hardly a transcendence of the problem but rather a continued engagement with it. As the foregoing reflections reveal, whatever its historicised-cultural delineations, religion in its more general, undetermined sense yields a more critically discerning perspective. A universal phenomenological reality of a concern to separate sacred and profane or even construed otherwise, religion is fundamentally intertwined with the very constitution of 'the political' and the distinctively legal-religious (or even moral) normativity with which it is infused. Accordingly, much as Robert Cover had precociously perceived it, law is not a singular, discrete phenomenon but just another normative system or *nomos* within a pluralistic universe

of other *nomoi* (whether legal, religious or otherwise) (1982, 3-11). Not only does this signal an inevitable nomic conflict, but since every nomos is infused with normativity in the charismatic or theological way described – what Cover calls *narrative* (Ibid., 9) – that inevitable conflict will be transcendentally jurisdictional: between irreconcilable claims to the proper ordering of meaning, value and the social world with respect thereto (Ibid., 25-33; Dane, 1991; Smith, 2001; Horwitz, 2008). Indeed, as arguably the deepest alternative sources of normativity, a conflict between religious (or conscientious) authority and the (legal-political) authority of the civil state proves dynamically "existential" (Dane, 2018, 145,150).

Having thus outlined the theologico-political problem and its manifestation within the secular narrative, we can return more specifically to liberalism and its relationship to religion set within this more immersive backdrop. This will in turn also answer the centrality of conscience and religion that was queried in the preliminary question.

1.3 Liberalism, Conscience & Religion

In what way then might liberalism be seen as a distinctive political-theology constructing and responding to the theologico-political problem in line with the preceding discussion? The answer starts from understanding the political theology that liberalism renders self-conscious and proceeds to displace. Indeed, whilst the historical and ideological roots of liberalism in the religious upheavals of early-modern Europe have been routinely speculated upon[42], there has been considerably less meditation on what accounts for the uniqueness of those conditions in contrast to the steady prevalence of traditional political theology elsewhere. As Mark Lilla observes, political theology has been the norm in reflections on political questions because reflection upon our agency and place within the apparent order of the cosmos naturally progresses to that upon the transcendent basis for this and its authoritative prescription for our co-existence with others agents in relations mediated by power (2008, 3-11, 17-19).

It is worth adding to Lilla's assessment that the reflections on the transcendent are, besides natural, also innate. That is, they cannot be entirely displaced even by a conscientious attempt to do so. Thus, even naturalistic modes of explanation like science which methodologically suspend the transcendent do not thereby make or seek to make any claims about it. Science, for example, can comprehensively furnish the physiological causes of organismal decay and

[42] See notably, Rawls (2005, xxi-xxv); also Waldron (2002a); Forst (2013) esp. 170, 214, 218.

death yet, by both its practical limitations and methodological norms, it cannot give any explanation of why it is that we are finite beings who should age and demise or mortally exist at all? Therefore, from within our limits and confrontation with limitless mystery, reflection on the transcendent remains a permanent alternative unless one makes a philosophical commitment otherwise, as, say, in the case of metaphysical naturalism or scientism. Yet, even then one would have turned to the transcendent if only in order to reject it, somewhat paradoxically perhaps.

In light of that, the conditions prompting the uniquely attempted flight from political theology turn all the more intriguing. Naturally, there is no way to furnish a simple or even verifiable explanation given the subject matter and range of variables. At best, a speculative account upon theological observations might offer some of the sought-after insights.

1.3.1 Politico-theological crises and the pluralisation of authority

Drawing on Lilla's retelling, the key theological factor lies in Christianity's Trinitarian innovations to Judaic political theology based on a transcendent God that is neither immanent as a force *in* the world nor the remote *deus absconditus* causally irrelevant to it (Ibid., 26-31). Very synoptically, the story runs as follows. The transcendent God exercises divine sovereignty over the world *normatively* – that is, permitting agential free will but subjecting it to divine commandments and justice. Hence, there is the Covenant Law conveyed initially through the charismatic authority of a chosen patriarch or prophet (paradigmatically, Abraham and Moses). Priestly authority, however, is demarcated for the ritual aspects of Law, but, importantly, always as delegated authority (starting with the appointment of Aaron by Moses on God's instructions (Exodus 28:2)). Nonetheless, it becomes precursor for all subsequent differentiations of civil/military and religious authority starting with the establishment of the monarchy (1 Samuel 8). Under the monarchy civil/miliary authority properly emerges alongside the priestly, but, crucially, both ultimately remain within the singular Covenant-Legalistic framework overseen directly by God via divine and prophetic interventions.

Christianity radically transforms this through the Trinity and replacement of Law with Grace. Christ's divine intervention as messianic intermediary from within the world to God the Father (subsequently through the Holy Spirit), compromises the Judaic transcendent God with immanence. This forms a complex and unstable dynamic (Lilla, 2008, 27-29). Specifically, Grace replaces Covenant Law meaning that, in principle, the theological indispensability of human intermediaries is no more. Nevertheless, priestly authority emerges from its narrowly

ritualistic function to a newfound spiritual authority formerly exclusive to God's charismatic prophets. Priests or "the Church" now gains a preeminent soteriological position as spiritual guide or authority in leading followers towards attaining God's Grace (cf. Mathew 16:18). This authority is not confined to any juridic, territorial realm but is universal like God's sovereignty.

The military/civil authority, meanwhile, loses its theocratic centrality in upholding the Covenant-Legal framework but does not thereby dissolve. Absent Covenant Law is not a moral vacuum but God's universal moral prescription or 'divine justice'. And whilst Grace makes God immanent in personal spiritual salvation (establishing the spiritual authority of the Church), the former transcendence with respect to our external freedom persists as a potential basis for civil or *temporal* authority. This, as Christ himself emphasises, is distinct from both God's sovereignty over divine justice and over salvation through Grace (claimed by the Church): "[m]y Kingdom is not of this world." (John 18:36); "[r]ender therefore to Caesar the things that are Caesar's, and to God the things that are God's" (Mathew 22:21).

Here we can glean the basis for the disintegration of political theology in its traditional mould. This, however, is more than a problem of there now, suddenly, being two streams of authority or even that their directives might incompatibly clash. After all, even if Cesar's laws are wicked, faith can instruct believers on whether to seek Grace in divine forgiveness for civic obedience or in divine alleviation from temporal punishments as martyrs acting in defiance. Yet, there is an ambiguity in how one might construe *temporal* authority as authority over external freedom. It might be that which holds sovereignty over civil (including, military) affairs, corresponding somewhat to Christ's injunction (above) and the distinction between royal/imperial power (*regnum*/*imperium*) and priestly power (*sacerdotium*) (Yelle, 2022, 174). Alternatively, it could be this but in the further elevated sense of being divinely commissioned or supporting the furtherance of God's Kingdom by available temporal means. Thus, with the series of historical accidents through which Christianity grew into its complex institutional form, especially following Constantine's conversion in the fourth century, Cesar's temporal authority was paralleled by that of the Church turning it into something of "an accidental empire" (Lilla, 2008, 32-35). The problem then is that when temporal authority in the second, elevated, sense turns prominent the line between the spiritual and the temporal blurs, failing to identify the relevant Cesar and (the representative of) God. Suddenly, it becomes possible for a subject to be confronted with two or more demands claiming sovereign legitimacy and priority over the other. Indeed, since God is both immanent and transcendent this need not even take institutional

form because, in principle, one may seek Grace directly, making one's own attention to God a demand.

Highly schematic though this may be, it clarifies how the more direct crises to which liberalism is presented as a response are themselves attempted solutions and thereby manifestations of this underlying theological instability. We see, for example, Pope Gelasius' formulation of what would become the prevalent 'Two Swords' doctrine as an attempt to rationalise the proper relationship between temporal (civil or 'State') and spiritual (Ecclesiastical or 'Church') domains in terms of *auctoritas* and *potestas* (authority and power) (Wolterstorff, 2015, 282-83; Yelle, 2022, 178-82). The *auctoritas* of the Church could unify the *potestas* of all states (used here loosely for various political entities like principalities, fiefdoms etc.) in the service of Christendom. Yet, separation of the relevant domains (let alone the identical subjects) was far from neat as tensions like the Crises of Investiture (1075-1077) symbolically attest.

Similarly, we see why it is that the Reformation is so impactful not solely from its fracturing the singularity of *auctoritas* but more so from its de-institutionalising it entirely pursuant to its earlier-mentioned theological immanence (Smith, 2001, 1877). This latter aspect pinpoints how it is that the authoritarian institutional forms and expansionist, totalising, salvationist creeds mentioned in John Rawls's famous speculations in the preface to *Political Liberalism* (2005, xii-xxiv) splinter so long after their initial development within medieval Christianity. If *auctoritas* could like *potestas* be plural then the distinction loses its normativity turning into a practical matter of actual sovereignty (over one's creed) repelling interference by others. Within this metaphysical-theological shift, the Counter-Reformation insistence on the universal *auctoritas* of Christendom starts to look like ideological cover for mustering effective sovereign control.

Consistent with that, the internecine European Wars of Religion represent more than just a pluralistic struggle amongst the expansionist, totalising creeds. They are simultaneously a conflict over the fragmentation/unification of *auctoritas* itself and the underlying political theology that preserved its unity. Their two key resolutions reflect the conflict's duality. The proclamation of *cuius regio, eius religio* at the Settlement of Augsburg (1555) guarantees the temporal sovereign's authority – or, rather, autonomy – in their territorial domain, it does not secure the *exclusivity* or *singularity* of the sovereign in that regard. In principle, authority (and thereby autonomy from the sovereign's asserted authority) remains claimable by others to whatever intra- or extra-territorial, even simply personal, extent as may be. Indeed, even where

the civil sovereign's command (identically) coincides with that of a (recognised) religious authority or even that of a direct revelation from God, such that one obeys the command, the latent question remains: on account of which of the authorities has one actually abided?

A resolution to that is attempted by the Peace of Westphalia (1648) wherein the supremacy of civil authority becomes officiated as guarantee of the integrity of territorial sovereignty from the kind of overlap just highlighted. Though effective in drawing the jurisdictional boundaries of temporal authority in alignment with territorial sovereign states, the answer is incomplete with respect to non-temporal authority. Beyond the temporal political concert, a pluralism of transcendent sovereigns still remains. The jurisdictional boundaries and order of priority have been determined amongst the competing claimants relationally, but not absolutely. Simply put, just because there is no longer a contest between, say, different princes, different bishops or princes and bishops, it does not establish any as the fount of authority per se. They cannot, as it were, self-legitimate the order of authority by their concord alone.

The above, to clarify, is not the classical question of establishing political legitimacy such as would have been addressed by prevalent doctrines of legitimation like the divine right of kings. Even if legitimacy is established or presumed, the issue is the clash with another legitimate authority that is transcendent in the relational sense of being not part of the political concert. Essentially, the problem is one of normative plurality.

It will be wondered then, how any of this is distinctively connected to the crisis of traditional political theology and liberalism? As noted in the earlier discussion of the theologico-political problem, normative conflict is an inveterate occurrence in political life. Interestingly in this regard, Rawls's above-cited remarks on the Reformation and Wars of Religion are made in comparison with Classical Greece which avoided such discord through 'civic religion' wherein all citizens are committed to civic life or the polis as the political, communal highest good (2005, xxi-xxii). Yet, this seems, at best, a difference of degree, not substance since the setting of the highest good cannot be self-fulfilling so as to eradicate alternative evaluations. Normative conflicts will erupt even in Rawls's idealised Classical context as so tragically epitomised by the eponymous heroine of Sophocles' *Antigone*, fatally torn between filial piety or religious and/or deeply conscientious devotion to her ancestral line and her civic obligations to abide by the laws of the polis.

That said, Rawls's example is more misdescribed than wrong. The contextual difference or crisis in traditional political theology does matter a great deal epistemically, and consequently

in weight. In the Classical context a normative conflict like Antigone's is essentially a tragic confrontation between heroic virtue of upholding the public values of civic religion and personal (private) vice as a kind of apostacy. By contrast, the noted theological instability of transcendent-immanence from which the fragmentation of creed and authority ensued also transforms the individual subject into a spiritualised being whose life and its innermost movements belong to the Creator (Forst, 2013, 96-97, 214, 218). Distinctively, each embodies a conscience answerable to God and it is this responsibility of conscience that unfetters reason and consecrates belief as a legitimate source of authority.

1.3.2 Conscience, the individuation of belief and why 'it matters'

Like religion, conscience is a complex, multifaceted notion. While the two are more or less blended in the general, undetermined, sense discussed in relation to the theologico-political problem, conscience proves broader than religion when the two occur in their discrete historically-culturally developed forms. Although equally a product of Western, Eurocentric discourse (Strohm, 2011, 3), conscience is not contained in religion or the Judeo-Christian tradition alone. Apart from its various religious conceptions, conscience has also been conceived in secular terms such as the rationalist conceptions of the Enlightenment, the more intuitionistic models of the sentimentalists (Andrew, 2001, 8, 13, 82-112, 105-130), culturalist and even hybrid, quasi-religious versions (Hill, 1998, 21-3). What matters for understanding the above remarks, however, is the role of conscience in transforming normative conflict, such as in relation to the earlier Classical and/or Medieval contexts, by sanctifying private belief as an autonomous source of legitimate claims.

This, of course, requires immediate qualification. The sanctity of conscience, as Steven D. Smith points out, is already an established Medieval fixture (2001, 1876-77), and nor is conscience itself an early-modern phenomenon, being adopted from its Classical, Roman origins at least 1,500 years earlier (Strohm, 2011, 1). Two key differentials must therefore be stressed.

First, although conscience (across all its conceptions) is fundamentally defined by its subjectivity and interiority (Andrew, 2001, 12; Giubilini, 2021), Classical conscience, *conscientia*, was an inward judgment of oneself from the (social) perspective of others; an internalising of public opinion, as it were (Strohm, 2011, 6-7, 9-10, 38). Hence, if conscience at all features in Antigone's plight, it is the above-mentioned inner chastisement for derogating from the highest good of civic duty. Christian conscience, on the other hand, emerges via the

Pauline appeal to a divinely conferred self-knowledge or *syneidesis* in advancing the displacement of Law for Grace in a direct relationship with God (Ibid., 8; Andrew, 2001, 13-14).[43] Although both terms share the meaning of knowledge or discernment, *syneidesis* lacks the aforementioned connection to the public sphere in *conscientia* (Strohm, 2011, 8). Consequently, despite being rendered as *conscientia* in St. Jerome's Latin translation of the New Testament from Koine Greek, Christian conceptions of conscience retained the Pauline *syneidesis*, diluting concern for public opinion in the Classical conception (Idem.).

Second, despite Christian conscience adopting the more insulated, asocial form, the Medieval emphasis, led by Catholic scholasticism, remained on *syneidesis* (or rather its corruption as *synderesis* (Hogan, 2006, 131)).[44] By this stage, of course, what may have been merely inconsistent translation solidified into a distinction between conscience as *synderesis* and as *conscientia* (Ibid., 128-133). The difference can be summarised in its most influential Thomistic form as follows. Whereas *synderesis* is the divinely instilled, habitual and infallible faculty of *apprehension* between (moral) right and wrong - or good and evil - *conscientia* is that of freely-exercised and therefore potentially erroneous practical judgment or *application* to particular situations (Ibid., 132-33; Ahdar, 2018, 130). The sanctification of conscience of the Middle Ages then, was essentially that of an institutionally bound conception, cultivated by the Church or congregation as the spiritualised public of God (Strohm, 2011, 24-25; Andrew, 2001, 14, 17-18). Conversely, in the early modern period, along with the Protestant emphasis on faith and inner piety (Smith, 1964, 42), conscience gradually turns further inward in favour of *conscientia* wherein each can exercise their judgment on faith, directly subordinate to God. In short, this "Protestant" or "Reformation conscience" completes the individuation and insulation of conscience upholding the sanctity of individual choice: a *conscientia privata* or "private law written in men's hearts" (Strohm, 2011, 20).

The rise of individual conscience then proves both revolutionary and problematic. Indeed, its pioneering proponents like Martin Luther and John Calvin found themselves increasingly on the defensive not just against Catholics, like Erasmus, but "antinomian" advocates of radically subjectivist conscience like Andrew Carlstadt and Thomas Müntzer (Ibid., 24-31; Andrew, 2001, 16). Almost certainly, Luther's pivotal "here I stand [and can do no other]" appeal that it is "neither safe nor right to go against conscience" was not envisioned as a solipsistic blank

[43] See, for example, Galatians 2:16; Romans 2:14-16, 3:21-31, 13:5.
[44] To further complicate matters, syneidesis could also be transliterated as *suneidesis* while s*ynderesis* itself is a subsequent Latin and English transliteration of the earlier *synteresis* (Hogan, 2006, 126-27, 129).

slate for anarchism, only freedom from papacy (Idem., Smith, 2001, 1877-78). That may be so, but the slip is hard to avoid. Even if God's decrees remain the highest good, since these are now proclaimed directly to each reasoner in the mysterious movements of deliberation and conviction, each can only discover the highest good for themselves.[45]

Consequently, like the proliferating divergences on theological doctrine, the religious (denominational) pluralism expands into the more general so-called 'fact of pluralism' (Rawls, 1993/2005, 36, 63-66) about all matters of value, including the conception of the (highest) good. With that, a normative conflict like Antigone's becomes far more profound. For if the highest good is now epistemically suspended then not only would Antigone carry the burden of ascertaining that herself, her compatriots would face the burden of determining whether her resolution is valid over their own. Whatever normative order emerges to settle rival sources of authority, that normative order must itself contend with potential others that are in relation to itself transcendent and cannot be authoritatively addressed from within, on its own terms.

In this way, we can see liberalism not just as a historical development amongst others, but as itself part of the unique crisis of political theology in the West. Liberalism marks an unprecedented elucidation and elevation of the general theologico-political problem to a more critical epistemic and fideistic level. Contrary to the popular view of secularism and liberalism as sprouting from the disenchantment of the world or religious decline, both are thoroughly embedded in religion's internal logical-theological progressions (Stolzenberg, 2010, 1056). Religion appears as a historical precursor or catalyst of the realisation of the independent value of human reason or, more plainly, that "belief matters" (Mendus, 2002b, 12).

But while belief does matter, it does not always matter in the same way. Beliefs about how we *ought* to live and treat others ordinarily seem to matter far more than, say, speculative beliefs about the number of galaxies or the way dogs hear music. Likewise, beliefs that do not conflict with those of others will typically impress us less than those that do. For example, a belief that one ought only to inhume the dead will matter more – not less – when others believe, conversely, that one ought only to cremate them. All this will, of course, also be proportionate to the degree of incompatibility and the subjective importance of the belief, but conflicted incompatible beliefs matter in triggering the traditional political concern of responding to others' perceived moral failures or interference with what is morally required - what Nomi Stolzenberg

[45] As John Wyclif, referencing Galatians 6:5 "each will carry his own burden" anticipates: "*in consciencia mea propria stabilitur*" (as quoted in Strohm, 2011, 16).

designates as the "bad guy problem" (2010, 1059-60). Unless one takes the political quietist route, committing worldly affairs to divine providence or judgment in the hereafter, one must practically resolve when and how moral requirements are to be enforced (Ibid., 1057, 1059).

Yet, with liberalism's above realisation and taking pluralism seriously, the bad guy problem is compounded by the multitude of incompatible beliefs about its proper construction and resolution or what correspondingly evolves into the procedural or "good guy problem" (Ibid., 1059). Unlike the bad guy problem's preoccupation with moral failure, the good guy problem is essentially about how to set the moral boundaries and navigate differences within them amongst cooperating others. Exceptionally, what starts to matter more is belief that coincides or finds common ground with other beliefs about how conflicts of incompatible beliefs *ought* to be addressed. Here, in its outline, is liberalism as a political and ideological response to the fact of pluralism. A political morality that emerges in response to pluralism to safeguard a public realm or institutions of political cooperation excluding private conceptions of the good.

Notwithstanding its contemporary pre-eminence, liberalism is not without its significant challenges. While these will be taken up in more detail in the next chapter and beyond, a general outline of the riddled configuration is worth foreshadowing.

Firstly, by affirming conscience and religion as sanctified or self-authenticating claims of authority, liberalism seems to preclude absolutist or theocratic solutions to the bad guy problem. This immerses liberalism in the good guy problem wherein it looks to a consensus-oriented procedural solution or common ground amongst the various claims. Given the fact of pluralism, however, liberalism will inevitably confront the bad guy problem directly insofar as some claims will be excluded as irreconcilable to the common ground. In that respect, liberalism confronts a tension between its animating political morality above and the seemingly inconsistent or self-effacing exclusionary stance towards certain incompatible claims.

Secondly, conscience and religion in their conventional sense must be seen as effectively interchangeable with any comprehensive belief sets because what ultimately matters about beliefs is their conative dimension as constituents of political consensus. This, however, seems to neglect the pre-institutional importance of beliefs alongside their affective mode of belief-commitment. People hold thousands of beliefs, but not all held beliefs evoke fervour, and even fewer justify immense suffering let alone martyrdom. Various complications of relativity and salience lurk here. After all, the questions of justice and legitimacy that pluralism evokes might in the religious case be raised to a superlative degree. They become questions of *divine* justice

and legitimacy, *ultimate* reality and *eternal* damnation or reward. And whilst it is true that reasonable liberal citizens of the "good guy problem" are expected to be and indeed are committed to the public conception of justice, this does not thereby render the mode of attachment or commitment to one's comprehensive belief irrelevant. It remains a significant burden accompanying political life.

It is in the above oppositions that the canvassed features of religion and conscience bear upon the liberal states in terms of both normative and jurisdictional sovereignty thus completing the answer to the preliminary question with which we began. Both generally and in their specific historical-cultural iterations, religion and conscience are incorporated into the political and the liberal attempt to order it against the fact of pluralism within a broader theologico-political problem. The jurisdictional contours of the civil state or what is public amongst the plurality of religious and conscientious commitments alongside what is normatively salient therein are both determined by the plurality, as illustrated in the earlier example of the Toleration Act.

The above frictions, however, also lead to further and more complex questions. On the one hand, religion and conscience constitute liberalism's archetypal freedom, but, on the other, liberalism's robust commitment to state neutrality amongst different claims and equal respect for persons tempers these freedoms with various concomitant constraints. How are we to make sense of and justify this countervailing dynamic? What is the appropriate level of protection warranted for conscience and religion and what constraints, if any, are justified? Before proceeding to a more detailed engagement with these questions in the next chapter, in concluding this one, it is worth turning briefly to outline the legal regulatory answers to these questions alongside the key terminology to be drawn on in subsequent chapters.

1.4 Conscience, Religion, and Law[46]

The theoretical dynamic described above is conspicuously manifest in liberal jurisprudence and regulatory state practice. To begin with, religion, along with conscience and sometimes also 'thought' often appears as a discrete, fundamental right or freedom in constitutional and human rights instruments.[47] While enshrined as an international human right as well as in regional instruments and national constitutions of many liberal democracies, religion is also

[46] This section draws on material from my earlier work found in Leontiev (2020).
[47] Most notably, UDHR, art. 1, 18; ICCPR, art. 18; but also, for example, U.S. Const., amend I; CCRF, s2(a), *GG* art. 4; *Human Rights Act* (UK), art. 9; ECHR, art. 9, and more.

specifically singled out for constraint, often in the same constitutional provision that protects it.[48] While, of course, there are important differences across jurisdictions, for reasons to be conveyed in the next chapter, there is a sufficient underlying regulatory commonality that allows for a summative statement to be made. For this purpose, the U.S. regulatory context is especially suitable both for its prominence in the philosophical as well as legal scholarship on these topics, but also for its sharply defined form.

Together, the so-called 'Religion Clauses' in the First Amendment of the U.S. Constitution embody the counterpoised exclusive protections and exclusive constraints upon religion, in the following words:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[49]

Before analysing this further, however, it is necessary to unpack the terminological distinctions here.

1.4.1 Taxonomy

The standard way of taxonomizing these mechanisms is by reference to **Establishment** and **Free Exercise** corresponding to the names given respectively to the first and second of the Religion Clauses in the First Amendment of the U.S. Constitution. To be clear, however, when not discussing the U.S. Constitution, my use of these terms will be generic, referring to general practices specified below.

Establishment broadly concerns the proper relationship between civil and religious authority. Commonly recited as the "separation of church and state", Establishment typically *disestablishes* or prohibits the creation of an official state religion (including favouring one religion over others) and otherwise sponsoring a religion through state endorsement or allocation of public resources.

Conversely, Free Exercise protects the freedom to engage in the practice(s) of religion. Free Exercise can be subdivided into *accommodations* and *exemptions*. These will be subject to a more detailed analysis in later discussion, but can be presently adumbrated as follows. Exemptions typically provide a legal excuse to what would otherwise be a contravention of a

[48] For example, U.S. Const., amend I; Fr. Const. art. 1 (prescribing a "secular" Republic); Aust. Const. s. 116; Kenpō, art. 20.
[49] U.S. Const. amend. I.

law. For example, a law requires the wearing of hard-helmets on construction sites but Khalsa Sikhs cannot comply without removing the turban and breaking their religious and/or customary observance of the *Kesh*. An exemption – whether within the same law, a different statute or by judicial grant – would allow them to lawfully enter construction sites without hard-helmets despite the mentioned law.

Accommodations, on the other hand, alleviate risks or burdens which may be suffered through the pursuit of the relevant religious (or other) interest even though no law as such is actually contravened. So, if in the above example there were no law requiring hard-helmets but employers (say, for insurance reasons) mandated the helmets, the Sikh workers might find themselves vulnerable to penalties like dismissal from employment for non-compliance. The disproportionality of this burden relative to other workers might prompt the legislature or executive to enact provisions/orders protecting employees unable to comply for such reasons by limiting the employer's ordinary rights or providing a compensation scheme for those penalised/dismissed.

The distinction may appear formalistic. Accommodations, that is, could be construed as exemptions to laws which would otherwise ordinarily apply whereas exemptions may appear like ex post facto accommodations: had the law been accommodating in the first place there would not be the need for exemption. Generally then, accommodations and exemptions might be interchangeable. Nonetheless, there exists a conceptual distinction and accordingly my references to (religious or conscientious) *exemptions* will vary between the more general and more technical usage according to context.

Relatedly, as a form of state-directed assistance, accommodations and exemptions may sometimes appear to merge into Establishment. This is a critical theoretical problem as will become evident in further discussion. There are legal difficulties too (Sherry, 1996), but to some extent a conceptual difference might be drawn in terms of Establishment being affirmatory – i.e. directing state action in the service of a sponsored religion – whereas accommodations and exemptions are primarily corrective or remedial in nature. As such, there no comparable interchangeable use described above when it comes to the Establishment and the Free Exercise forms.

While all the regulatory forms operate jointly within the legal framework, exemptions, as will emerge, are especially acute in simultaneously triggering concerns about Establishment and

Free Exercise as well as extra-legal matters like liberal state neutrality and equality of persons (or equal respect).

1.4.2 Differential Paradigm

Returning to the aforementioned dynamic of exclusive protections and constraints, 'religion' is noticeably singled out in relation to both the wording of the U.S. Establishment and Free Exercise Clauses. This, of course, is not conclusive given the noted indeterminacy of 'religion' and 'conscience' as categories and their amorphousness even on conventional denotations. Moreover, with the conspicuous absence of 'conscience' from the U.S. Free Exercise clause compared with the international and other domestic jurisdictions, one will either doubt the alleged underlying uniformity across liberal jurisdictions or, accepting it, suspect the legal differentiation expressed to be but superficial appearance. Nor does it help that, perhaps for the above-mentioned reason, there is no definition of either 'religion' or 'conscience' stipulated across virtually any human rights or constitutional instrument, let alone statutes. Since 'conscience', as discussed earlier, may be religious or instead based on non-religious (secular) personal, moral or doxastic, convictions there seems significant elasticity to the legal constraints and protections despite the exclusive wording. Corroborating this, conscience in the secular sense (which I will henceforth adopt as the primary sense unless stated otherwise), has, it will be seen, received legal recognition (Evans, 2001, 53). In short, the phraseology admits of various legal scope.

For these reasons, the actual record of legal or regulatory practice becomes the critical indication. Here, if the U.S. context is taken as at least substantively representative, there is strong confirmation of the earlier given characterisation of the liberal regulatory framework.

With regard to Establishment, religion is constrained in terms of the aid it may receive from the state. There is no like prohibition on state-endorsement of non-religious ethical or moral views. Even if there were ultimately a defensible rationale for this, the contrast is nevertheless extraordinary given that non-religious views can be just as controversial or divisive. And yet, as Micah Schwartzman points out, the Establishment Clause is indifferent to their governmental promotion provided there is no religious element: "if a state government can support gay rights, reproductive choice and gun control, why not also prayer in public school, creationism and displays of religious symbols?" (2012, 1353) The Establishment Clause thus legally constrains, or disadvantages, religion in public life in ways not applicable to secular beliefs and practices.

Like Establishment, the Free Exercise Clause too singles out 'religion'. Hence, only religious beliefs and practices are protected. Thus, in its seminal Free Exercise decision of *Sherbert v. Verner*[50], the U.S. Supreme Court ruled it unconstitutional for the State of South Carolina to deny unemployment benefits to a Sabbatarian on the grounds that she could have accepted employment requiring Saturday shift-work, but refused upon religious grounds. Since there was no law curtailing the claimant's religious practices the issue was one of accommodation, namely whether the mere fact that the benefit denied (and, by implication, a burden suffered) was on account of religious convictions sufficient to invalidate the State's decision (in the absence of an overriding 'compelling state interest', as was indeed found).[51]

It helps to pause and reflect on this point. There are potentially multiple other reasons to refuse Saturday work some of which may even be of comparable importance to the claimant as observed by Potter J. in his telling example of a "mother unavailable for work on Saturdays because she was unable to get a babysitter" [52] As Justice Potter's example reveals, the multiple potential, significant reasons like that of the mother would too have been denied, indicating that the State's decision here is *not* discriminatory in relation to religion, but applies equally to secular concerns of comparable or other importance. And yet, crucially, unlike analogous secular concerns such as of the mother, only the *religious* reason has the benefit of recourse to the constitutional remedy. Religion emerges privileged in legal protection over non-religious reasons of comparable weight. It is worth adding that though Sunday closure laws meant that Christian workers would not encounter this dilemma this discriminatory argument did not form the basis of the decision. Even if successful[53], the proper remedy for that argument would have been the invalidation of Sunday accommodation for Christians rather than the reinstatement of the benefit.

Beyond the constitutional context, the indication becomes even more pronounced – especially with regard to legal exemptions on religious grounds to general laws. These **religious exemptions** are truly abundant in liberal legal systems. According to one estimate, in the United States alone there are over 2,000 statutes containing a religious exemption to a general law (Bou-Habib, 2006, 109). In many liberal jurisdictions, religious exemptions cover a wide

[50]*Sherbert*. Although *Sherbert* has been narrowed by the ruling in *Smith*, this applies only to the 'compelling state interest' test rather than the general principles of accommodation discussed here.
[51] *Sherbert*, 403-404.
[52] *Sherbert*, 416 (per Potter J., concurring).
[53] *Braunfeld* suggests it would fail.

range of subject-matter from ritual slaughter of animals[54], employment[55], taxation[56], housing[57], road safety[58], intellectual property[59], antidiscrimination[60] and criminal laws[61]. It is hard to come up with another such unified category as specifically and diversely protected. Even legal safeguards offered to protected identities such as race, gender, sexual orientation or ethnicity, which primarily deal with antidiscrimination and are not comparable to religious protections in variety and scale. And again, confirming the ambivalence of the special treatment, it has been observed in this regard that religion is often not included as a protected category in general antidiscrimination laws thus leading to the peculiar effect of litigants framing religion as (secular) ethnicity in seeking protection from discrimination while framing ethnicity as religion in invoking exemptions (Barry, 2001, 33-34).

Naturally, there is far more nuance here particularly in relation to jurisprudence on religious exemptions and the comparison in legal treatment across liberal states between religion and conscience or other isomorphic or closely analogous doctrines and interests to which we shall return. The present overview which has introduced the legal terminology and how the riddled theoretical dynamic is reflected in the legal record of liberal state practice – particularly in relation to religious exemptions – may be here concluded.

To summarise then, this chapter contemplated the foundational presuppositions of the theoretical-normative questions and controversies canvassed in the introduction with which this dissertation is concerned. Reflecting on the various meanings and dimensions to religion and conscience and the overarching problematic of the theologico-political problem, the general and historicised senses of these categories were identified. After uncovering the depth and complexity of intertwinement between religious and secular forms of the political in relation to the general sense, the historicised sense was examined. This was contextualised and related to liberalism as a historical-ideological response to political theology in the West. This in turn elucidated the complex internal dynamic between liberalism, conscience and religion which is reflected in the general legal regulatory framework of contemporary liberal states. Thus elaborated, the theoretical-normative questions concerning this dynamic become the

[54] E.g. *Welfare of Animals (Slaughter or Killing) Regulations 1995* Reg 2.
[55] E.g. *Employment Act 1989* c. 38 (UK) s11.
[56] E.g. *Charities Act 2013* (Cth) s 5, s 12.
[57] E.g. *Equality Act 2010* c. 15 (UK) Part 4.
[58] E.g. *Road Traffic Act 1988* c. 52 (UK) s 16.
[59] E.g. *Copyright Act 1976* (US) s 110.
[60] E.g. *Equality Act 2010* c. 15 (UK) Part 2.
[61] E.g. *Criminal Justice Act 1988* c. 32 (UK) s 139(5).

central challenge of rendering coherent and justifying the liberal state's normative and legal relation to conscientious and religious doctrines and practical commitments therein. Although the primary aim of this chapter was to render more explicit the foundational presuppositions that lead to the religion- and conscience- centric characterisation of various normative controversies within contemporary liberal states, two further implications are worth highlighting for the subsequent discussion. First, in relation to what will be specified as the Salience-Demarcation Puzzle, it is precisely the indeterminate sense of religion that elucidates the incompleteness of salience as a category in much the same way as it leaves the conventional sense of religion subject to shifts in response to various historical-theological developments like those discussed of secularism and liberalism in this chapter. Second, and relatedly, the discussed intertwinement between religion in the indeterminate sense and 'the political' foreshadows the aptness of turning to the lateral solution of political legitimacy in resolving the Puzzles. After all, as the next chapter will detail, liberalism's attempts to both protect and constrain religion and conscience eludes any neat principled distinctions, reinforcing once more the underlying politico-theological problem and the complex co-origins of legal-religious normativity discussed.

Chapter 2: Liberalism's Puzzles

The previous chapter concluded by considering how taking pluralism seriously (summed up in the slogan "belief matters") leads liberalism to distinctive problems concerning how to maintain neutrality or equal respect amongst beliefs and persons (as their bearers) whilst reconciling the emanating diverse and incompatible claims. These frictions were encapsulated in the countervailing theoretical dynamic and its legal regulatory counterpart pertaining to Establishment and Free Exercise. This chapter examines liberal attempts to coherently resolve these frictions across theory and law. It will be argued that their success against the various substantive hurdles notwithstanding, the proposed solutions are fatally incomplete from the start. This is because by failing to discern that there are in fact not one but two puzzles, including further levelling and baseline distinctions in each, the proposed solutions conflate incommensurable aspects or leave essential matters unaddressed. Before coming to these complexities, an overview of the classical liberal position will set our bearings.

2.1 Classical Liberalism: the plea for toleration

Having conjecturally traced liberalism as a response to the political-theological crisis culminating in the emergent consciousness of the fact of pluralism and autonomy of subjective reason, we must turn to its particulars. Part of what makes responses to the consciousness of pluralism so fascinating is the element of self-reflexiveness insofar as pluralism encompasses not just (first-order) disagreements but also (second-order) disagreements about how to deal with said (first-order) disagreements. Responses to pluralism therefore must inevitably confront their own participation in the pluralism amidst rival responses. For liberalism too that means not just various incompatible rivals such as, for instance, those of the past in the Counter-Reformation[62], but also an internal plurality of "liberal" accounts.

The 'classical' liberal position amongst these can be gleaned from its canonical presentation in the first of John Locke's *Letters Concerning Toleration*, translated from the Latin as *A Letter Concerning Toleration* (1689) (hereafter, *Letter*).[63] Much as the name conveys, the classical liberal stance is that toleration marks the appropriate response to pluralism. While it has since

[62] This might be roughly characterised as opposition to – or irenic containment of – pluralism within a more fundamental religious-ethical framework beneath the superficial disagreements of *adiaphora* (Forst, 2013, 98-99).
[63] Other notable classical liberal writings that might have instead been considered include: Roger William's *The Bloody Tenent of Persecution* (1643), William Penn's *The Great Case of Liberty of Conscience* (1670), or William Walwyn's *Toleration justified and persecution condemned* (1646).

become a highly analysed concept, toleration in the *Letter* remains undefined and essentially stands for something like restraint from coercion where coercion refers to (external) compulsion by threatened or actual sanctions and/or physical force or violence ("deprivation of any part of his goods" / "with fire and sword" (Locke, 1689/1948; 124, 126-27). Locke's classical liberal position then is essentially that no one has the legitimate right or authorisation to use coercive means to impose upon or counter the belief of others and their *rightful* pursuit of it. Or, in Locke's famous statement (normatively read): "[i]t is only light and evidence that can work a change in men's opinions; which light can in no manner proceed from corporal sufferings, or any other outward penalties" (Ibid., 128).[64]

Locke's central argument for this position rests on three grounds. First, the civil power of the state is limited to that which individuals could have alienated to it, namely: external or "civil interests": "life, liberty, health<…>the possession of outward things, such as money, lands, houses, furniture and the like" (Ibid., 126, 142). This is best understood in conjunction with the *Second Treatise* (1689) where Locke articulates the classical liberal proposition of individuals as sovereign bearers of natural rights that pre-exist the formation of civil or political authority. Individuals, Locke argues, are the subjects of God, their Creator and Proprietor, whose "Laws of Nature" grant them fundamental liberties and rights to "Life, Liberty, Health, Limb" and what "tends to [their] Preservation" (1689/1999 §§4-6/269-271). The theistic premise is not merely period rhetoric as evidenced by its substantive limitations on individual sovereignty with respect to self-destruction and slavery (Idem.). Indeed, the political rights and freedoms quintessentially associated with modern secular liberalism today are in their classical form religiously grounded. As Rainer Forst puts it, "political freedom and obedience to God here go hand-in-hand<…>[t]his is central for early liberalism<…>[individuals] belong completely to themselves because they belong entirely to God." (2013, 171, 218).

It follows then that civil power of the state is limited to that which individuals could themselves legitimately do in its absence, in the 'state of nature'. The state in fact is only necessary because there are disagreements about the relative boundaries of individual (natural) rights and the proportionate measures of retribution and restoration which lead to the greater incommodiousness of conflict or the "State of War" (Locke, 1689/1999, §§16-21, /278-282, §89/325 §§125-131/350-353). Government serves to make laws for the public good or that which equally facilitates each citizen's exercise of their natural rights in pursuit of their above-

[64] The quote relates to the efficacy of coercive means as discussed below, but if "can" is read normatively as, say, "ought" it serves to encapsulate Locke's overall position in the way described.

mentioned civil interests. Any law derogating from these interests to life, body, property etc. is illegitimate or *ultra vires* because natural rights are inalienable in being owed to God: "[f]or no Body can transfer to another more power than he has in himself" (Ibid., §23/284, §135/357)). And so, by the same token, civil power has no remit over inward, spiritual or "religious" concernments because every individual is directly responsible for this to God and cannot forfeit it to others, including the state (Locke, 1689/1948, 126-27, 139).

Second, there is the 'inefficacy of means' ground whereby no externally imposed penalty or force could alter internal convictions (Ibid., 127-28). Being products of belief or understanding, faith and conscience are not volitional. Believing *p* or not-*p* is not a matter of the will and beyond one's conscious or performative control (Waldron, 1988, 67-68). This makes belief impervious to coercion which can only act upon the will. At best, coercion could alter one's outward representations (e.g. recanting or professing, acting in a prescribed manner etc.) but not what one *genuinely* believes which will be both concealed and inviolable. The quoted "light and evidence" passage speaks precisely to this. Apart from persuasion by reason and evidence, beliefs seem responsive only to revelation or "light".

Third, because only authentic belief matters (or guarantees salvation) there is also an 'inefficacy of ends' ground. If religious or soteriological motives drive coercion then they are pointless since coerced belief will not be authentic (Locke, 1689/1948, 128). Moreover, given that there is epistemic uncertainty and disagreement about religious and other spiritual or value concerns, to surrender one's own judgment or entrust these matters to the ostensibly arbitrary determinations or another is imprudent (Idem; Forst, 2013, 221).

The various flaws with Locke's argument have, of course, been widely identified. Empirically, sophisticated psychological methods of interference might challenge Locke's confidence in the immunity of belief to outward pressures (Newey, 2013, 109). Moreover, granting immunity, coercion might still prove effective in forcing subjects towards that which might affect their belief such as looking at the evidence one otherwise wills to ignore etc. (Waldron, 1988, 81). Indeed, there may be a multitude of uses for coercion to shape the external world favourably towards the sought-after beliefs. Plus, since all this presumes Locke's third ground about ends, coercion might again prove efficacious if the third ground is dropped and authenticity is beside the point. For example, if the outward performance is important independently of internal attitude or if the end is not spiritual welfare but something that is fulfilled by merely effecting the outward conformity. Lastly, even if all the above could be defended, Locke's conclusion is

that coercion is *irrational* in regard to spiritual matters – viz. impossible as a means and not fitting as an end.[65] Yet, irrationality is not illegitimacy. It leaves, for instance, the possibility of a sovereign claiming legitimate interference with religion and conscience on the (non-rational) basis that their own faith simply requires said interference, instrumental irrationality notwithstanding.

Locke's argument is especially vulnerable in that regard because, as shown by Thomas Hobbes some four decades earlier, the imperviousness of belief to coercion could equally permit coercion rather than restrict it. After all, if the soteriological or other value of belief does not depend on its external manifestations, then this reason against coercion also dissipates (Newey, 2008, 151; 2013, 109-110). More strikingly still, Hobbes's account does not deny that belief matters but takes this liberal premise as the reason to make belief public and unified instead of individual and private.[66] Belief, Hobbes argues, is a "gift of God" but, without direct revelation or covenant with God, belief is not knowledge or certainty (1651/1994, 63-73, 79-80; 245-46, 338). Accordingly, we must have recourse to God's other provision: our rational faculties. Reason reveals the higher-level contradictions between what one might believe with uncertainty and what one can know with certainty (Idem.). Hence, from the rational point of view, conscience is politically suspect: a pretence to being something more venerable than mere opinion (Ibid., 36).

This is potentially dangerous because where each private judgment is sanctified as conscience, and thereby inviolable, civil society disintegrates into anarchy, each a private law unto themselves (Ibid., 212). Conscience seems to irrationally undermine its own preservation by going against that which natural law, as a rule of reason, commands: cooperation with others to achieve peace (Ibid., 80). For that, conscience must find its rational form as "public conscience" representing the contractual will of all authorised to the sovereign (Ibid., 212). The realisation that belief matters therefore does not automatically lead to classical liberalism. Without contrary argument, it could equally lead to the civil or political effectively consuming the spiritual or moral (Gaus, 2015, 196). Understood as the divinely-ordained rational expression of belief the authorised sovereign serves as "God's Lieutenant" (Forst, 2013, 188-194); the collective or 'public reason' culminating in the "apotheosis of the state" (Ibid., 196).

[65] The latter may support a further argument about irrationality based on the loss of value of religious or conscientious conviction when it arises by compulsion. See Newey (2013, 110 ff.).

[66] As such, classifying Hobbes as a liberal is somewhat contentious. Some scepticism is expressed by Newey, (2008) 150 but others affirm it (e.g. Gray, 2004, 2-3; Gaus, 2015, 114-116). That he differs from classical liberalism, however, seems clear.

Apart from an ethical ground of reciprocity (such as it being hypocritical to rely on convictions to interfere with others where one would object to the inverse), which remains inchoate in Locke's account (Forst, 2013, 222-224, 232), the first ground potentially holds additional independent argumentative resources to those conveyed so far. One might, for instance, suggest that rationality in fact cautions against the Hobbesian proposal because it would be equally irrational to relinquish spiritual concerns to civil power as endangering them to the state of war. That may be so, but since Hobbes denies that one ever relinquishes that which matters, the argument here essentially becomes about demarcation or how narrowly or broadly to construe the spiritual versus the civil domain and thereby the right to freedom of religion and conscience.

Construed strictly as the insulated, interior mode of belief, spiritual concerns can be readily demarcated from the civil for the reasons recognised by both Locke and Hobbes. Each can enjoy freedom of religion and conscience in this sense because it is inviolably internal and opaque to others. This, however, is not the demarcation intended by classical liberalism. Locke's account departs from Hobbes' precisely because it endeavours to include certain outward expressions or manifestations of belief within the realm of the spiritual rather than civil concerns. Yet, once we venture beyond the strict sense, the boundaries prove increasingly difficult to determine. In other words, even if we accept Locke's claim that individuals have inalienable natural rights such as freedom of conscience and religion beyond the (civil) jurisdiction of the state, by whom and according to which normative criteria is this jurisdictional boundary to be set?

Locke is, of course, attuned to this, discussing various examples from the spiritual objections to consumerism despite it being but an exercise of (civil) property rights (1689/1948, 136-37) to the validity of legislating bathing children or culling livestock on public health grounds but not compelling baptism or religious animal sacrifices (Ibid., 143, 146-47). His resolution of these examples via the given distinctions, however, mentions no general rule or principle. Thus, where there is disagreement on the jurisdictional boundaries (as pluralism implies) there seems no stable, *principled* resolution other than what the dominant convictions or the limits of tolerance as proxy for security or measure of fear determines (cf. Newey, 2013, 115-122). Indeed, Locke's own characterisations of the intolerability of atheists and Roman Catholics as

a civil concern due to the threat of security and social cohesion (1689/1948, 155-57) attests to just how controversially partial such determinations might be.[67]

Herein the countervailing dynamic, outlined in Chapter 1, takes shape. The liberal response to pluralism turns to freedom of conscience and religion as the archetypal right, even for Hobbes. Yet, as Hobbes recognised, the pluralism extends to jeopardise this right itself since everyone's conscience will differ on whether some external conduct lies within their inalienable individual spiritual sovereignty or within that of the civil authority. The threat is not simply the dissolution of the state or anarchy, but that of incompatible claims to freedom of conscience and religion. One's conscientious objection to wearing clothes might be incompatible, for instance, with another's conscientious objection to public nudity. If both claims are accepted as properly conscientious on the basis of self-characterisation by their representatives, then it becomes unclear how civil power can intervene to have the conflict resolved.[68] In that regard, Hobbes's solution looks efficacious. Nevertheless, it offers no guidance as to how the sovereign ought to determine the jurisdictional boundary in such conflicts. Are religion and conscience relevant to this determination? If so, why should that be (as opposed to another category) and how are they to be defined or understood particularly concerning what instances of particular conduct fall within or outside these categories.

This becomes especially troubling for classical liberalism which, unlike Hobbes's account, is committed to further ideals beyond an absolute sovereign prerogative. Indeed, if each person's claims are to be treated neutrally, with equal respect or consideration, then apart from finding a principled resolution to the above questions of jurisdictional boundary, it must also be a solution consistent with this ideal. The freedom of conscience and religion then must also be restricted according to various configurations of conflicting incompatible claims, thus completing the dynamic with the counteracting moderation of freedom of conscience and religion to protect and balance the incompatible conflicting individual claims thereto.

In sum, whilst classical liberalism offers an important theoretical framework for addressing pluralism through individual freedom to conscience and religion, its application of these categories beyond the strictly insular leads to the dynamic of complexities which its original

[67] To be sure, the cited pages do not specifically name Catholics (only atheists), but it is implied in the context (e.g. references to foreign (i.e. Papal) jurisdiction) and Locke's statements in other works (cf. Newey, 2013, 115 ff.).

[68] While it may be answered that public nudity of others will not infringe the religious liberty of the pious objector, this already presupposes both a particular (liberal) demarcation as to both the boundary between belief and its manifestation as well as something like the self and other-regarding interests by which the clash of conscientious convictions is to be determined.

theoretical resources prove inadequate to resolve. This will be evinced more concretely in the following sections, particularly section 2.3 where the philosophical tensions are examined. Before coming to that, section 2.2 below takes a jurisprudential detour to consider the regulatory dilemmas arising from the practical application of classical liberalism as it endures in contemporary jurisprudence within Western liberal states.

2.2 A jurisprudential detour[69]

The previous chapter introduced the legal regulatory dynamic within liberal states concerning religion and conscience with the U.S. constitutional context as model. It was noted that religion and conscience (sometimes along with 'thought') are enshrined in international and regional human rights instruments and state constitutions though nowhere explicitly defined. This made the legal record significant for ascertaining how these categories are understood and applied and what kind of regulation results. Briefly looking at Establishment and Free Exercise in the First Amendment, religion seemed textually singled out over conscience (which, as mentioned, I am restricting to the secular sense unless indicated otherwise) and other secular analogues such as various doctrines or commitments of moral or doxastic significance. In relation to Free Exercise, the seminal judgment in *Sherbert* confirmed the textual indication as did the tremendous range and coverage of statutory religious exemptions surveyed at the end.

Reflections in philosophical scholarship on these topics often draw on something like this U.S.-model picture of liberal state practice, which is then critiqued for overlooking the normatively salient analogies between religious and non-religious commitments and doctrines that the account in question proceeds to advance. Fortunately for this tendency, the model picture is, substantively, not inaccurate. Nevertheless, it misses many nuances as to how it is that this picture emerges, especially when many other jurisdictions do not mirror the U.S. clauses and have an Established Church or express provisions inclusive of 'conscience' alongside 'religion'. Within these nuances is not just the jurisprudential basis that unifies the substance of the different jurisdictions but also the deeper uncertainties that in fact considerably overlap with rather than being blind to the philosophical debates. This is sometimes overlooked in the legal scholarship where the narrower jurisdiction-specific issues dominate in focus. The aim of this section then, is to make a very brief, selective survey of cross-jurisdictional trends to extract

[69] This section partly draws on material from my earlier work found in Leontiev (2020).

the various nuanced and internal tensions through which the deeper commonalities emerge but continue to struggle for resolution not unlike the classical liberal paradigm just outlined.

2.2.1 A unity of (Dis)Establishments

As before, we can start with Establishment where the model picture seems undermined by the counter-indicative liberal jurisdictions and the U.S. jurisprudential complications. Notwithstanding the many jurisdictions with disestablishment clauses parallel to the U.S., liberal states are far from homogenous on Establishment. Some liberal states do constitutionally establish a particular religion such as Judaism in Israel, Anglicanism in England, or the Evangelical Lutheran Church in Norway (Cross, 2015, 156). This appears to deviate from Establishment as uniquely *constraining* religion. Meanwhile, in the U.S., the modern interpretation of Establishment set down in *Everson* as the notorious "wall of separation"[70] doctrine has evolved into more complex forms that either moderate separationism like the famous three-pronged *Lemon* test[71] or overturn it entirely as in *Mitchell v. Helms*[72] (allowing *direct* aid to religious schools in conjunction with equal distribution to non-religious schools). These mutations of Establishment from the narrowly religious concern of separation towards the broader one of state neutrality (Greenawalt, 2008, 40-52) deviate from the model picture of Establishment as *uniquely* constraining religion.

Interestingly however, these discrepancies prove complimentary in inversely shifting establishment and disestablishment regimes closer towards a moderated centre. Establishment jurisdictions like England may indeed offer exclusive protections to religion such as the conjoined status of the Head of State with that of Church, the requirement of parliamentary approval for ecclesiastical legislation, and Church involvement in state process: namely, the privileges of coronation rites and reserved membership to the House of Lords (Ahdar & Leigh, 2013, 101-102). Exclusive though they may be, such privileges are also largely symbolic, at least on a comparative scale. For instance, Church of England allocated seats within the House of Lords amounts to roughly 4% (Ibid., n 70) which though not negligible is not substantive either. More importantly, political office and other public positions remain open and unrestricted nor are there coercive or legally entrenched advancements of religious orthodoxy compared to more militant forms of establishment (Hunter-Henin, 2020, 60, 66-69). Substantively, religion remains uniquely constrained. Naturally, symbolic establishment may

[70] *Everson* at 16.
[71] *Lemon*.
[72] 530 U.S. 793 (2000).

still be a source of alienation and/or disparagement (Lægaard, 2017) – but this does not affect the structural features relevant in comparing the discrepancies.[73]

Indeed, returning to the U.S. context, while it may seem that the departure from the *Everson* separationism towards neutrality in cases like *Mitchell v. Helms* challenges the *uniqueness* of religion or the strictness of its disestablishment[74], the neutrality in question only extends to endorsements of identities – essentially replicating the protections of the Fourteenth Amendment as recognised in *Brown v Board of Education*[75] (Feldman, 2002, 702). Such endorsement/exclusions, however, are arguably broader than Establishment per se, being an inevitable feature of democratic politics. Consider war memorials excluding pacifists or a Catholic majority state not practicing capital punishment, for instance (Ibid., 707-710, 723). Not unlike the symbolic Establishment based on historical tradition discussed above, democratic sways where some views prevail over others within a reasonably just framework remains well short of the overt religious endorsements that matter in controversies like, say, school prayer or Creationism.

Establishment in its more substantive sense is unaffected by the above developments and formal differences in constitutional framing whether that involves a symbolically Established Church or not. On the contrary, as has been documented despite the absence of definition and disparate formal expressions, the regulatory outcomes merge closer than the formal letter might suggest (Scharffs, 2018). By way of further illustration, notwithstanding the far narrower judicial reading of Australia's near-identically-worded Establishment clause[76], core constraints on direct state-sponsorship of religious purposes such as chaplaincy programmes have been retained.[77] In Canada, where there is no express Establishment clause, courts have blocked Sunday closing laws[78] and prayer before council meetings[79] relying instead on *CCRF* 2(a), which offers a significant ambit for constraint -earning it the label of Canada's "hidden establishment clause" (Jeremy, 2006, 6). Establishment seems to remain a unique constraint on overtly religious endorsements and sponsorships over non-religious ideology.

[73] For an interesting defence of the permissibility of symbolic establishment against these and like objections see Miller (2021).
[74] *Mitchell-Helms;* See also *Rosenberger*; *Zelman.*
[75] 374 U.S. 483 (1954) (*Brown*).
[76] S.116 Aust. Const.
[77] *Williams-1; Williams-2*.
[78] *Big-M-Drug-Mart*.
[79] *Freitag*.

2.2.2 Free Exercise & The Special Status of Religion

Turning to Free Exercise, the previous chapter's consideration of *Sherbert* suggested much the same on religion's *unique* protections not extended to conscience or other non-religious interests. Again, this might seem restricted to the U.S. context and even then perhaps not entirely representative of it. In relation to the latter concern, the widely-quoted statement from Jackson J. in *West Virginia Board of Education v Barnette* comes to mind:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. [80]

One might also point to the two often-cited Vietnam War draft cases of *Seeger* and *Welsh* wherein exemptions were granted to claimants advancing non-religious conscientious objections.[81] Does this not recognise the constraint and protection of certain other categories? Perhaps some deep, meaning-conferring secular analogues of religion?

The suggestion here quickly runs into legal complications. Its quoted statement notwithstanding, the actual legal basis for striking down the compulsory pledge and flag salute in *Barnette* was not conscience or any other non-religious analogue, but a combination of First Amendment Free Speech, Establishment, and Fourteenth Amendment guarantees.[82] Protection of conscience here is therefore derivative: conscience is crucial for the formation and interpretation of religious beliefs as well as thought more generally, which, in turn, is what is arguably guaranteed by being incidental to the First Amendment's Free Speech clause.[83] Consequently, the passage in *Barnette* seems concerned with conscience in this compound and ancillary sense only.

Likewise, a closer inspection of *Seeger* and *Welsh* yields a more circumspect assessment. In the first instance, the exemptions were not Constitutional, but implied by statutory interpretation of the Universal Military Training Service Act (section 6(j), which permitted exemptions where beliefs related to a "Supreme Being"[84]. Section 6(j) was not a violation of any Constitutional requirement to recognise conscience – Congress could have directly

[80] *Barnette*, 642.
[81] To avoid unnecessary complexity as to designation of the parties across original and appellate processes as well as jurisdiction-specific nomenclature, I use 'claimant' throughout as a generic term to denote the party seeking the relevant right(s).
[82] *Barnette*, 633-34, 641-42.
[83] See for example *Stanley*, *Ashcroft*.
[84] *Seeger*, 165; *Welsh*, 337.

exempted conscience just as much as it could have not provided any statutory exemption at all.[85] In short, the decisions here are limited to one statutory provision with only *indirect* implications on the broader law.

Furthermore, despite the noncommittal nature of the claimants in *Seeger* and, in dazzling contrast, the professed non-religious affiliation in *Welsh* (a self-assessment the Court refused to accept) [86], the problem was considered the same. Essentially, the exclusion of religious beliefs not invoking a "Supreme Being" was held too narrow since the legislation was interpreted as intending to cover religious objectors. Ultimately then, the exemptions were granted not qua conscience but rather as a non-theistic or otherwise more expansively construed notion of religion such that, on some interpretations, conventional religions like Buddhism, Daoism or Confucianism might also qualify.

These cases point to the definitional difficulties in the concept of 'religion' even on conventional understandings. The yet more significant point though is that the above cases did not outright abandon 'religion' in favour of another designation. This reflects the deep entrenchment of religion in the First Amendment. As Michael McConnell points out, the exclusive mention of 'religion' therein is not accidental or contingent; the documentary history reveals that the drafters had at first contemplated adopting the language of "conscience" but in the Senate debates voted it down in favour of "religion", as the text now reads (1990, 1488). McConnell further adds: "The draft cases of the Vietnam War era marked the only instance in the Court's history that it extended religious exemption to persons with essentially secular claims of conscience." (Ibid., 1491, n420).

This is emphatically corroborated by the Supreme Court's other statements reiterating lower court pronouncements on the exclusivity of Free Exercise protections to *religious* beliefs (and practices) (Ibid., 1417). For a potent illustration, take *Wisconsin v. Yoder*[87] wherein the Old Order Amish and Conservative Amish Mennonites were exempted from school attendance for their children beyond the legally-mandated age of sixteen in Wisconsin. The Court made clear its position on the exceptional place of religion under the Constitution:

[85] See *Welsh*, 356 (per Harlan J.).
[86] *Welsh*, 341.
[87] U.S. 205 (1972).

> A way of life, a however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation…if it is based on purely secular considerations; to have protection of the Religion Clauses, the claims must be rooted in religious belief (per Burger CJ at 215).

Religiosity proved paramount as Burger's further material contrast with the philosophical and personal objection from someone like Henry David Thoreau confirmed (Ibid., 216).

A further example is *Hosanna-Tabor* – a Supreme Court confirmation of the so-called 'ecclesiastical' or 'ministerial exception', which essentially bars antidiscrimination laws applying to religious institutions in respect of membership and employment decisions. The ministerial exception alone illustrates the significant privilege afforded to religious practices considering the legitimate, even valuable, objectives of antidiscrimination laws. Since there is no constitutionally recognised exemption for non-religious organisations, such an outcome is simply inconceivable in respect of a secular employer. And yet, submissions that religious groups are not entitled to protections beyond those analogously available under the Free Speech clause to non-religious expressive associations were expressly rejected, the Court noting the "special solicitude" under the First Amendment to the "rights of religious organizations" (Schwartzman, 2012, 1353).

Could all this nevertheless be discounted as U.S. exceptionalism? Might not the European context illustrate a more moderated position inclusive of conscience and other non-religious interests given its express stipulation in ECHR Article 9?[88] Unlike the U.S. First Amendment, Article 9 expressly protects the "right to freedom of thought, conscience and religion" which is said to include the "freedom…to manifest…religion or belief". Importantly, however, 'conscience' (and 'thought') are omitted from the second clause implying a distinction in law between the two sets. This leads to various conceptual difficulties such as the apparent protection of the manifestation of 'belief' (read as covering non-religious matters) but, strangely, not the holding of such belief (Evans, 2001, 53). The probable solution to this might be construing 'belief' as the intended subset of 'conscience' (and 'thought') – an interpretation partly supported by the French version of the Article wherein the slightly broader "*conviction*" is adopted over "*croyance*", which in drafts of the UDHR was used to indicate a closer relationship to religious belief (Idem.).

[88] The comparison here is somewhat asymmetrical, of course, given that the U.S. context is that of a sovereign state national court while Article 9 operates within a treaty jurisdiction requiring deference to state parties.

Even so, it is not clear how 'religion' in the latter clause fits into this schema, and perhaps for that reason has not been expressly discussed in the caselaw. Rather, the European Court of Human Rights (ECtHR), has sought to maintain an open-ended approach (Ibid., 53-59). Specifically, non-religious beliefs such as pacifism[89], veganism[90], atheism[91] and even less doctrinal philosophical convictions of sufficient cogency and seriousness[92] have all been recognised although again the case details leave a more circumspect impression.

In each case, the interest was not granted, albeit being recognised. The then European Commission of Human Rights ('Commission') has, much like the wording of Article 9, excluded 'conscience' from the manifestation of belief. Thus, in *Arrowsmith,* the distribution of pacifist leaflets was held not to manifest (the practice of) pacifism. The Commission's reasoning to find some delimitation between manifestation of belief and its mere motivation of conduct, even if correct, is risky in determining where the belief falls according to the Commission's idiosyncrasies (McCrea, 2010, 126-27) (and without a margin of appreciation to the subjective ground of the believer in each instance). Indeed, it may well be that were the claimant, say, an Evangelical Christian distributing similar leaflets with Biblical verses the Commission may have found manifestation, as, for example, in *Kokkinakis v. Greece*[93] where proselytism was recognised as an integral part of manifestation of religion in Article 9.

Even where manifestation is made out, there are striking disparities between conscientious versus religious concerns. In *W,* a vegan prisoner refused to participate in mandatory work in the prison-run print shop involving animal-tested dyes. The Commission found the right to manifestation outweighed by the justification of the law and its proportionality to the aim of preserving order and fairness in the prison.[94] And yet, a comparable justification was subsequently found insufficient with respect to the manifestation of a *religious* belief in *Korostelev*[95] where a Muslim prisoner's nightly prayers contravened uniform prison sleep schedules and disciplinary actions were taken. That the religious prayer was sufficient to outweigh orderly uniform schedules, while the vegan objections were not, raises questions as to the perception of the comparative seriousness or inviolability of religious and non-religious beliefs.

[89] *Arrowsmith*.
[90] *W*.
[91] *Angeleni.*
[92] *Campbell; Cosans*.
[93] *Kokkinakis*.
[94] *W*, 4.
[95] [2020] ECHR 314 (*Korostelev*).

Alongside the statutory record of religious exemptions considered in Chapter 1, this small but instructive caselaw survey palpably substantiates the manifest entrenchment of differential treatment of religion in terms of both constraint or Establishment and protection or Free Exercise across liberal states. It is important distinguish here between the weaker and stronger senses of the differential treatment in question. Being differential or "special" in the weaker sense entails being different to ordinary (non-salient) categories but not exclusively or *uniquely* so because there are other categories of salience. Alan Patten labels this "*shared significance*" to distinguish it from the stronger sense of *"unique significance*" (2017b, 134) or, rather, being "*uniquely* special" (Patten, 2017a, 212). It is this stronger sense that the legal record reveals and that my references to "differential" or "special" legal-regulatory treatment intend, unless stated otherwise.

2.2.3 Closing Reflections

In ending this detour, we should reflect on the regulatory dynamic in light of the theoretical concerns of classical liberalism and beyond. Although the foregoing discussion has defended the substantive commonality to the regulation of religion and conscience across formally-diverse liberal jurisdictions, it has also revealed the underlying struggles between these interests and neutrality more generally. This is both a more nuanced picture than typically assumed in philosophical debates and more global than jurisdiction-specific legal analyses.

The configurations of Establishment between separation and neutrality, for instance, exposed the impulse to correct disadvantages to religion not inflicted on non-religious doctrines and interests. Meanwhile, the protections of religion via Free Exercise struggle with its extensions to conscience and other non-religious analogues. On the one hand, the concern for equal treatment prompted attempts to expand the protection as seen in *Seeger* and *Welsh* or the Article 9 caselaw discussed. Conversely, the consciousness of undermining civil concerns and the vagueness of what is and is not a manifestation of religion or conscience resulted in a more cautious approach. Hence, *Seeger* and *Welsh* adhered to equalising amongst 'religions' rather than amongst religion and non-religious interests whereas the wording of Article 9 and the caselaw evidence an asymmetry in protection between religion and conscience beyond the strictly insular mode encountered in the previous section. The law's reliance on the conventional category of 'religion' reflects these underlying theoretical difficulties of determining how broad or narrow the Free Exercise should be and its inclusiveness amongst various categories of interest.

This consequently manifests in the special treatment noted and the aforementioned tension between Establishment and Free Exercise whereby privileging 'religion' over other interests arguably breaches Establishment (Greenawalt, 2008, 336-351) whilst only constraining religion leaves it burdened relative to other interests and might paradoxically violate Establishment with a militant form of secularism as civil religion (cf. Hunter-Henin, 2020, 30-37). These internal tensions have even led some to posit that Establishment and Free Exercise as opposed but nonetheless fundamentally co-dependent (Greene, 1992).

These questions about the comparative salience of religion relative to other categories and the normatively appropriate level of state involvement (more robust or less) in either constraining or protecting various categories of interest ultimately attest to the inadequacy of the classical liberal framework in its conceptual resources. This is especially felt in the concrete realities that jurisprudence must settle and reconcile. These reach beyond the strictly insular dimensions of religion and conscience and the formal notions of neutrality as encompassed by guarantees of equal basic rights and liberties.

Beyond the case examples already surveyed, a summative demonstration of these deep uncertainties, that classical liberalism leaves without answer, will be useful to conclude upon. For this purpose, consider the challenges of narcotic regulations in the context of religious practices as most famously highlighted by the controversial U.S Supreme Court judgment in *Employment Division v. Smith*.[96] The question in *Smith* centred on the application of the First Amendment to Native American religious practices involving the consumption of *Lophophora williamsii*, a spineless cactus plant with hallucinogenic properties otherwise known as peyote. Its alkaloids have since ancient times been used for medicinal and spiritual effects as recorded from at least 1560, in colonial sources (Anderson, 1996, 6, 155). It is through these transformative effects that peyote becomes associated with direct access to the transcendent or divine partly embodied by the plant itself, making it an integral and irreplaceable component of Native American Church rituals, collectively referred to as Peyotism. Yet, precisely because it is a potent narcotic, the possession and use of peyote has been criminalised as an illicit substance by various U.S. state legislatures. Inadvertently then, the law proscribes sincerely-held religious commitments and so the First Amendment question arises: does Free Exercise guarantee a religious exemption from criminal persecution in respect of Peyotism?

[96] 494 U.S. 872 (1990) (*Smith*).

After decades of rulings in the affirmative (applying *Sherbert*) by lower courts such as the California 2nd District Court in *People v. Woody*[97], the official Constitutional answer following *Smith* has been 'no'.[98] According to the *Smith* majority, with but a few exceptions,[99] where a general law is relevantly and proportionately referable to a 'compelling state interest' it can apply to religious commitments without exemptions.[100] In Justice Scalia's summation, Free Exercise does not apply to "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[101] The prohibition on substances deemed dangerous to health or community welfare presumably qualify as such law.

2.2.3.1 Diverging Approaches: Narrow & Broad Free Exercise, Exclusivist & Inclusivist Establishment

Whatever the correct interpretation of the First Amendment might be, extrapolating the opposing judicial determinations here beyond the peyote cases and the U.S. context, the crucial indeterminacy left by classical liberalism emerges. The problem originates from the lack of a clear principle for dividing spiritual and civil. As such, even if there exists some consensus on a minimal threshold of what counts as a *direct* intrusion upon the spiritual as discussed in Locke's examples of prohibiting baptism and religious sacrifices, this does little to resolve instances of *indirect* or *incidental* interference burdening religious and/or conscientious commitments as compelling state interest cases imply. To be sure, Locke's account does gesture towards this within the same examples involving public health grounds, but it does not offer a principle upon which to decide between these or what qualifies – or ought to qualify – as a compelling state interest. This in turn leads to divergent liberal approaches which might be broadly split into the following. The '**narrow approach**' upon which religious and/or conscientious commitments are protected only from *direct* forms of interference, not incidental and the '**broad approach**' which extends these protections to *indirect* or *incidental* interference.

[97] 61 Cal. 2d 716 (1964) (*Woody*).
[98] In practice though this answer has been modified by the passage of the *Religious Freedom Restoration Act* 107 Stat. 1488 (1993) (RFRA) and corresponding state-level laws.
[99] Namely, unemployment compensation and "hybrid" cases involving multiple constitutional rights. See *Smith* at 881-84. For further commentary see Greenawalt (2008), 31-32.
[100] *Smith* at 879.
[101] Idem (per Scalia J.).

Obviously, there will be considerable specific variation within each, but at least generally it allows us to characterise decisions like *Woody* as broad approach and *Smith* as narrow approach.

Adding to the complications is Establishment with which these approaches also interact. Parallel to the split between the narrow and broad approaches over Free Exercise, there are divisions between ***exclusivists*** and ***inclusivists*** about religion in political decision-making.[102] As these will be discussed in more detail in Part III, my focus in the remainder of this chapter will remain on Free Exercise. Nonetheless, there are inevitable links between the two that should be highlighted in outline here.

For just as it might be thought that a broad approach risks morphing into a form of Establishment in favour of the protected religion or interest (something briefly contemplated in *Smith*[103]), it must also be borne in mind that general laws might too be so-characterised. Indeed, in contrast to the peyote cases it might be observed that there are no parallel judicial dilemmas with respect to, say, the consumption of alcohol during the Christian Eucharist. It may be responded here that alcohol is not proscribed because of its different (milder or safer) biochemical properties to peyote. Then again, that conjecture is immediately undermined by the fact that throughout the Prohibition Era the Volstead Act specifically exempted alcohol in wine for "sacramental purposes" [104]. More importantly, although the Prohibition may have been an exceptional period of Pietism compared to the permissive liberal norm, it would be too simplistic to characterise the norm as one of secular neutrality. Just as most Western liberal states designate Christian holy days as official public holidays, the prohibition on peyote and permissiveness on alcohol aligns with a moderate Christian stance in contrast to the regulatory approach in, say, a pre-colonial (Peyotist) state or even a modern Islamic state like Saudi Arabia. The point here is not that Western liberal states are covertly moderate Christian theocracies (a clear mischaracterisation) but only that questions about exemptions to general laws cannot be assumed to arise in a political-normative vacuum.

Thus, apart from the difficult contests between the narrow and broad approaches or even ascertaining the relevant baseline for such a distinction, the tense dynamic between neutrality and religious and/or conscientious commitments confronts a host of additional jurisprudential and theoretical challenges. Christopher McCrudden, for instance, has proposed the following

[102] For use schematic presentation on the possible interactions between various approaches to accommodation or non-accommodation of religion and the exclusivism-inclusivism divide see Schwartzman (2012), (2017).
[103] At 918.
[104] Title II, s3.

triad: a *teleological* problem as to what is the point or *telos* of religious and conscientious freedoms in liberal states?, an *epistemological* problem as to how understand the commitments and normative systems from an external point of view (i.e. not that of the claimant)?, and an *ontological* problem about what it is that ultimately justifies our concern with any identifiable *telos* – is there any reason to engage in these matters as human rights or interests at all? (2018, ix-xiii).

Whilst I do not intend to deal with any of these or related questions directly, they remain operative within the tensions of theoretical and jurisprudential dynamics identified. In the following section, I turn to examine the theoretical contest on how to respond to the indeterminate answers of classical liberalism outlined in relation to the liberal jurisprudence on Establishment and Free Exercise above.

2.3 A Puzzled Contest

Given the indeterminacies and tensions within the legal-regulatory practice of contemporary liberal states as evident in the surveyed legal record, there has been significant philosophical and legal-scholarly interest in refining the classical liberal framework to coherently resolve these issues. Whilst this has produced a wealth of important insights, the different disciplinary methods and approaches have also resulted in considerable conceptual confusions and conflations. This not only impedes effective interdisciplinary interaction but obscures the dialectic and issues to be resolved. This section overviews these problems and suggests that they stem from a failure to clearly distinguish between two discrete puzzles either entirely isolated or conflated within the literature. As explained above, the discussion will mostly focus on these issues in relation Free Exercise though much applies and is related to Establishment.

To start with, it helps to mark out the theoretical-normative territory from the jurisprudential. Schwartzman presents the following useful contrast (2012, 1351-53). If one were to ask: "must religion be special?" then, as a matter of law, based on the above record, the answer seems to be "yes". Yet, asking "*is* religion special?" is a wholly different matter, raising normative issues

as to whether the differential treatment of religion is justified as a matter of political morality (Idem.).[105] On this question, a fervent debate ensues.

2.3.1 Liberals: Egalitarian and Accommodationist

One prominent case for **liberal-egalitarianism** or that religion does not warrant special treatment has been advanced by Brian Leiter in his polemically-titled book, *Why Tolerate Religion?* (2013). In line with the above discussion of the legal record's singling out religion over its analogues, Leiter juxtaposes a Khalsa Sikh's religious commitment to carrying the *kirpan* (like in the case of *Multani*[106]) with that of a "rural boy" carrying a similar bladed-object out of secular commitments like a rural life familial tradition marking "maturity" and "identity as a man" (Ibid., 2-3). Unlike the Sikh, the rural boy would probably fail to secure an exemption to legal prohibitions on carrying weapons (Ibid., 3). Against this, Leiter contends that there is no *principled* reason for tolerating or respecting religion *qua* religion – that is, a reason based on some feature(s) that are both distinctive of religion and normatively relevant for toleration and respect, as a matter of ethics or political morality (Ibid., 7, 26-27; 68-91).[107] The legal-regulatory practice of special treatment, in other words, is not justifiable because there is nothing unique about religion that is also normatively salient according to the prominent liberal justifications for toleration.

Leiter's argument consist of both a negative and positive case. The more problematic positive case will be touched upon in the following chapter. Turning, for now, to the negative case, we find it exploits the kind of indeterminacy already encountered in the classical Lockean account regarding what constitutes 'spiritual concernments' and how they are to be demarcated from civil ones. Leiter rightly points out a similar openness in the Rawlsian principle of 'Equal Liberty of Conscience' (**ELC**) and Millian autonomy (Ibid., 15-21). Rawls describes ELC in terms of "moral or religious" interests which hold a general importance to individual rational ends that means they could not be *rationally* compromised except to the extent required to

[105] For an objection to this reasoning see Letsas (2017). While Letsas rightly points out that legal terms like 'religion' are terms of art not intended to necessarily correspond to the concepts those words otherwise designate, the argument that the law and political morality are engaged in the same task relies on a distinctively Dworkinian analysis of law which raises jurisprudential controversies too tangential to the present discussion.
[106] (2006) SCC 6 (*Multani*).
[107] Leiter distinguishes between 'toleration' (or minimal respect) and (affirmative) 'respect' along the lines of Steven Darwall's distinction between "recognition" and "appraisal" respect (see Darwall, 1977, 36-49). Accordingly, apart from toleration Leiter considers whether religion qua religion warrants respect (in the stronger, affirmative, sense). Given that toleration is already the more minimal standard and that the distinction here proves to have little bearing because the conclusions drawn generally apply to both toleration and respect, I will not separately address Leiter's discussion of respect.

secure the same (equal) right of rational and reasonable others (1971, 205-207). Likewise, Mill situates his "liberty of conscience" within a sphere of "a person's life and conduct which affects only himself<…>directly and in the first instance" and others only indirectly and with consent (1859/2001, 15). If so, then the special treatment of religion would appear to require additional justification for exceeding the equal level of protection and constraint on comparable interests.

The problem raised is not necessarily novel but it is trenchant. **Liberal-accommodationists** – those who affirm the special treatment of religion – have long grappled with finding a defensible justification. Douglas Laycock, for example, proposed three bases: religion's historical susceptibility to violent social conflict, its "extraordinary importance to the individual", and its "little importance to civil government" (1996, 317).

Apart from the empirical difficulties establishing the connection between religion and conflict, it is hard to see why religion would be unique in this regard. As Frederick Gedicks observes, not only are there other socially divisive categories, but susceptibility to conflict might equally justify pacification of the agitating groups rather than differential treatment (1998, 553-56). Extraordinary subjective importance and governmental non-importance, meanwhile, are also implausible for their apparent indeterminacy, raising both the 'epistemological problem' alluded to in the preceding section of ascertaining internal attitudes and that of misalignment with the conventional category of religion.

A stronger version of the subjective importance ground might appeal to transcendent consequences like extra-temporal punishments or divine obligations (Ibid., 562-63; Garvey, 1996, 286-87). It is not clear that this helps with the above problems though. Determining the link to and severity of the purported transcendent consequences is objectively impossible especially since a liberal state cannot assess their veracity without losing its neutrality by affirmation or denial (Dworkin, 2013, 113). Subjective psychological detriment, meanwhile, encounters the complication of satisfactorily distinguishing this from psychological pressures of failing to abide by non-religious commitments (Gedicks, 1998, 562; Ellis, 2006, 237-38).

In any case, appeals to subjective evaluations of importance inevitably run into T. M. Scanlon's challenge on the inadequacy of subjective appraisals for objective evaluations of priority or salience (1975, 659-60). One's forgoing of "a decent diet in order to build a monument to his god does not mean his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat" (Idem.). Or, as Rawls separately puts it regarding insistence on the absoluteness of religious duty to divine law: "we cannot expect others to acquiesce to

inferior liberty" and much less "to recognise us as the proper interpreter of their religious duties or moral obligations." (1971, 208).

A more compelling basis might turn to divine obligation. An interesting proposal from McConnell here is that, contrary to the popular conception of Free Exercise as grounded in individual sovereignty or autonomy, the actual ground is that of conflicting obligations whereby believers are "caught between the inconsistent demands of two rightful authorities", civil and divine (1990, 1496). Even taking 'authority' to include religious obligations from non-agential sources, how such sources of alternative normativity are more salient than non-religious analogues remains to be established. It is only from the internal perspective of the believer that the transcendent holds authority whether incomparably, equally, or superiorly. Externally then, there remain the same epistemological and Scanlonian-Rawlsian problems.

Obviously, it is not possible to exhaustively cover all possible liberal-accommodationist bases, but the pattern of complications is similar. In each case, apart from concerns of under/over inclusiveness concerning religion, external justifications prove more justificatory but inadequately distinctive whereas internal justifications inversely more distinctive but inadequately justificatory. More acutely, this presents liberal accommodationists with a dilemma. As Sonu Bedi explains, religious affiliations and practices seem unmistakeably chosen much like any other club or voluntary association (2007, 236). Not only do individuals convert and leave various faiths but their religious practices and commitments are arguably no more compelled than secular choices about, say, being vegan, donning the football club's jersey or a hat with a political slogan (Ibid., 236-239). Consequently, unless religion can be distinguished on some other ground (an unlikely prospect, as so far seen), marking it as special over other associations and practices compels liberal accommodationism to construe religion as somehow primordial and unchosen. Yet, this option is at odds with the above more empirically- and liberally- auspicious voluntary characterisation (Ibid., 240-241, 245). For some, all this simply means biting the bullet and asserting that only illiberal justifications are effective (Garvey, 1996).

None of this is to say that liberal-accommodationism should be altogether dismissed. For as shall be seen, the rival position of liberal-egalitarianism encounters similar hurdles even with the apparently more modest goals about normative salience. What does nevertheless burden liberal-accommodationism is the evasiveness and instability of religion as a category. This is not simply the already mentioned over-/under- exclusive/inclusiveness with regard to the

normative justification and religion, conventionally understood, nor even the necessity of the alignment between the semantic and normative dimensions that might be questioned (Macklem, 2000, 12, 14-16). The complication is rather that the conventional sense of religion itself is normatively unfixed and left to follow the semantic fluidity not unlike that captured by Ludwig Wittgenstein's notion of a "family resemblance" (Ibid., 11-12). [108] Consequently, the conventional meaning of religion becomes doctrinal whereby paradigm cases of religion are relied upon to shape the family of religion and its inclusions which in turn leads to a kind of establishment of state-religious orthodoxy (Ibid., 17-21).

These semantic objections might by countered by moving away from a conventional or foundationalist argument for religious normative salience (qua religion). Timothy Macklem's own suggestion is to focus on the normative value of 'faith' when it is connected to well-being. Faith is essentially a mode of belief or a "commitment to what which cannot be established by reason" or "can be established by reason but is not believed for reason's sake" (Ibid., 32). Macklem's account of faith is, of course, far more detailed in its distinctions between faith and trust (as based on incomplete reasons to believe) and conscience (as based on reason) (Ibid., 34-37), which in turn offers faith a distinct yet non-religious, secular value: enabling non-rational commitments that further well-being (Ibid., 47). Religion can be special as a collective, institutional vehicle of faith insofar as religious faith contributes to personal well-being that depends on commitment to the unknow*able*" and "genuinely mysterious" (Ibid., 47-53, emphasis added). Apart from various specific complications in relation to the distinctions and the ascertainment of well-being, the promise of Macklem's account against the semantic objections is principally undermined by the conceded fact that faith is both broader and narrower than religion (Ibid., 28, 32). That means that faith cannot explain what is normatively relevant about religion without incorporating the (conventionally) non-religious or narrowing religion and thereby returning to semantic complications.

An alternative approach proposed by Christopher Lund is to draw on multiple normative bases in tandem because it is precisely the multi-dimensional and fluid nature of religion that makes it "special enough" (2017, 494 ff.). Religion simply stands in for the various categories to which affording salience seems normatively appropriate.

[108] See Wittgenstein (1959), paras 66-67. Whilst not ecumenical, supplementing the conventional notion of religion with Wittgensteinian semantics has been popular. For a useful discussion see Harrison (2006). Notable examples within legal and philosophical literature include Greenawalt (1984), 763-64); (2006), 139-142; Letsas (2016), 325; Koppelman (2018) 172-73.

Andrew Koppelman has innovatively situated this in the Rawlsian framework of the four-stage sequence[109], arguing that at the second or "constitutional stage" wherein contracting parties gain knowledge of relevant general facts about their society, religion proves itself justifiably special (2017, 31-32, 41-42). Leiter's negative case, we might recall, drew on Rawls's ELC as being indifferent between religious and non-religious salient commitments. That might be so, but ELC is also so broad that, apart from being about more than a general right to liberty (Ibid., 33),[110] ELC remains undefined and quite possibly "limited to freedom from deliberate religious persecution" (Koppelman, 2010, 968, n33). The point is that ELC is exhausted by neither conscience nor religion and is left as an indeterminate arena of salience until the constitutional stage of the four-stage sequence. At that stage, knowledge of economic, historical, cultural and political circumstances of a society allows the parties to identify religion's salience as a matter of contemporary social fact. Thus, even without knowledge of their personal circumstances, parties could identify religion as one of the kinds of salient- or "hyper-" goods with which ELC is concerned (Koppelman, 2017, 35-40).

Plausible as these more sophisticated arguments for liberal-accommodationism might be, their success stems from their generality or multivocal definition of religion. Yet, this endangers the uniqueness of religion in its conventional sense that liberal-accommodationists hope to preserve. Indeed, it is hard to see how non-religious conscience or other candidates for such hyper-good status could not make identical arguments or rely on this multivocality of 'religion' to extend it to expressly secular commitments observed in *Seeger* and *Welsh*. Moreover, even conventionally understood 'religion' proves vulnerable for the above reasons of being arbitrary or doctrinal in its demarcations. This is especially evident in the challenges raised by a proliferation of nascent religions from Druidism to Jediism and Matrixism including those that are ambivalently or even expressly parodic like Pastafarianism (Martin, 2020, 258, 260-61). The more fluid or non-foundationalist liberal-accommodationism will therefore eventually be transposed to a definitional debate about religion or reverted to the original starting point such as the indeterminate ELC.

[109] See Rawls (1971) 195-201.
[110] See Rawls, (2001) 44.

2.3.2 From Demarcation to Justification

At least to that extent, the negative case for liberal-egalitarianism like that made by Leiter has bite. But even granting its probity, and setting liberal-acommodationism aside, it is not immediately clear what the alternative of liberal-egalitarianism entails? Certainly, the definitional concerns about 'religion' are no longer critical and religion loses its salience in the strong sense impugning the legal record of special treatment. To return to Leiter's opening comparison, the differential treatment of the Sikh seems unjustifiable if it is based on the religiosity of the commitment lacking for the rural boy. If both are salient qua moral conscience, then, ceteris paribus, they require the same treatment. In short, what matters for liberal-egalitarianism is that equivalent categories be treated alike whether salient or ordinary. Call this the **egalitarian premise**.

Notice, however, that whilst the egalitarian premise mandates that sufficiently analogous cases are treated alike, it does not prescribe what the normatively salient category from which analogous cases are to be drawn nor the threshold for analogousness or for deciding how a particular case fits within or analogises to the normatively salient category. Perhaps disagreement about thresholds and individual instances are beyond the remit of theory and best left to practical adjudications, but what about the category of normative salience itself? This question proves troublesome because, rejecting that there is anything special about religion per se, liberal-egalitarians are left to explain what is the alternative category (if any) upon which special protections and constraints are to be justified?

Just what that category is and to what extent it encompasses religion (in part or in full) depends upon the particular account of normative salience and how religion is defined in terms of it. For example, if what is normatively salient is moral conscience then instances of religious conscience such as perhaps religious pacifism or vegetarianism would be protected along with non-religious analogues – viz. *moral* pacifism and vegetarianism (as opposed to a mere dislike of violence or *dietary* vegetarianism). Customary practices of a religion like wearing a crucifix or yogic routines would also not be. Nor would secular customs like shaving or jogging. Contrast this with an alternative category such as questions of 'life's ultimate meaning' or ultimate concerns, advanced by Martha Nussbaum (2008, 19, 168-69). Although this replicates moral conscience on denying normative salience to mere preferences, it potentially extends to lifestyle choices like wearing a crucifix or dietary vegetarianism insofar as these are expressive of one's search for meaning and direction of one's life.

Less expansively, normative salience might be restricted to deontic commitments as in Paul Bou-Habib's 'integrity' account (2006, 117, 122-124) where unlike ultimate concerns or moral conscience there would be no reason to accommodate or exempt claims of tradition as raised by Leiter's example of the rural boy. More expansively, Ronald Dworkin's capacious category of 'ethical independence' (2013, 129 ff.) would seemingly cover all individual value commitments potentially dissolving salience altogether.[111]

2.3.2.1 Salience-Demarcation Puzzle

As shall be seen in the next chapter, virtually every account in some way confronts issues of over-/under-inclusivity/exclusivity with regard to 'religion' and in relation to the range of analogous interests. Presently, we need only to notice that the debate over the special status of religion between liberal-accommodationists and liberal-egalitarians extends far further into the puzzle of identifying and justifying the category of normative salience and its constituent elements. This **Salience-Demarcation Puzzle**, as I will elaborate in Chapter 3, has been critical to working out what (if anything) can, as a matter of principle, warrant special protection and/or constraint with regard to general regulation. In essence, the Salience-Demarcation Puzzle is about demarcating and justifying what category of interests or concerns is normatively salient in relation to other (non-salient) categories. As will be seen, it involves both a criteria for how the boundaries of inclusion/exclusion of salience are drawn – such as the principle of limiting salience to X over Y – and a criteria for why X (or Y or both) is salient at all? Different answers to the Salience-Demarcation Puzzle carry distinctive practical implications which become further complicated for liberal-egalitarians with the comparative dimension of formal equality introduced by the egalitarian premise. Thus, in Leiter's Sikh-rural boy comparison, meeting the egalitarian premise requires either:

(a) justifying the differential treatment via

(i) a category that distinguishes the two claimants in salience; or

(ii) a distinction that disqualifies one of the two as an instance of the relevant category of salience;

or

[111] This will be expanded upon in Chapter 3.

(b) levelling the treatment of the two claimants according to whether they are normatively salient or not.

Nothing within the Salience-Demarcation Puzzle's interaction with the egalitarian premise, however, prescribes the scope of the egalitarian treatment. There is no answer as to whether the Sikh and rural boy should be (alike) exempted or (alike) not exempted in respect of their moral conscience were one to pursue (b). This, perhaps, is because these debates have, for the most part, been framed within the legal scholarship which presumes that salience eo ipso entails exemptions/accommodations (or at least a pro tanto indication thereof) and non-salience the contrary. The aim is largely to render state practice with its incline towards religion as special jurisprudentially coherent. At one point, Leiter draws near to this observation, commenting on the difficulty that the law would have evidentially detecting genuine instances of moral conscience (i.e. Leiter's posited normatively salient category) compared with religion and its institutional, collective character generative of textual, doctrinal, testimonial evidence (2013, 95). He hastens to add though that this is not a *principled* reason for differentiating between the two in favour of religion or even amalgamating them into some more expansive category of normative salience (Ibid., 97).

Even overlooking the problematic conception of religion as necessarily institutional that the above comment relies upon, the main argumentative flaw is that none of the evidential attributes favouring religion would help it when it comes to establishing any instance of religious conscience as *genuine*. If that is what matters, then just like with moral conscience there is simply no way to be *certain* that one is actually authentic in citing religious doctrines as their belief.

Nevertheless, all that turns out to be beside the point because the most striking feature of Leiter's account for present purposes is that, in spite of all its elaboration on the Salience-Demarcation Puzzle, it is ultimately not his or any other proposed category of normative salience that leads to the conclusion in question: that neither Sikh nor rural boy ought to be exempted from the prohibition on bladed articles. As Leiter's critics have underscored, his focus on 'toleration' rather than neutrality is a peculiar choice. Not only does it commence from an unjustifiably adverse characterisation of religion as a disapproved category within the liberal state (McConnell, 2013, 777-781), but it presupposes the minimal standard of non-targeted or -discriminatory interference rather than the arguably more robust possibilities of

neutrality such as, for instance, precluding unfavourable differential impacts form otherwise general, uniform laws (Boucher & Laborde, 2016, 505-509).

While that may be true, Leiter's insistence on toleration is defended by his view of neutrality as permitting certain liberal perfectionist judgments that lead to toleration (2013, 13, 115 ff.). Now, since this perfectionist conception of neutrality could in principle equally permit a regime of exemptions, Leiter's more fundamental ground against accommodations and exemptions seems to be based on what might be called the **'anarchy objection**'. Echoing a Hobbesian sentiment, Leiter argues that granting special protections for moral conscience, irrespective of its religious or non-religious grounding, would be tantamount to ""constitutionalising a right to civil disobedience <…> a legalization of anarchy!" (Ibid., 94).

This 'anarchy objection' may appear somewhat hasty considering that, even if broader than religious conscience, moral conscience is not necessarily broader than religion generally or other categories of normative salience upon which accommodations and exemptions might be granted without disintegrating the law as a whole (Schwartzman, 2017, 22-25). Whether moral conscience is too capacious or even vulnerable to abuse by false claims exploiting the epistemological problem is all secondary. This is because the anarchy objection could apply to the Salience-Demarcation Puzzle as a whole whereby it is the possibility of principled demarcation or drawing the line, so to speak, being questioned.

More crucially, what counts is the shift in focus from the concern with the relevant category of normative salience – i.e. the Salience-Demarcation Puzzle – towards the question of the need for differential treatment at all beyond perhaps a narrow scope of normative salience as encountered with the narrow approach in the preceding section. Consistent with that, the normative salience of moral conscience, Leiter contends, does not extend to special treatment in the form of exemptions and accommodation to general laws of uniform application (as per the broad approach). Rather, it extends only to protect from (or constrain) direct discrimination or targeted interference as well as indirect discrimination where the purported rationale or basis for it is but a pretence or cover for direct discrimination (Leiter, 2013, 100-101, 103-107).

2.3.2.2 Justificatory-Puzzle

Thus, irrespective of whether it is moral conscience or something else that is normatively salient, the Salience-Demarcation-Puzzle does not address the separate question about the scope of the salience either in itself of in relation to the interest of others whether direct or as protected by neutral laws of general application. In contrast to the Salience-Demarcation Puzzle,

this related **Justificatory-Puzzle**, as will be elaborated in Part II, essentially turns not on the range or distribution of the differential treatment, but on what kind of differentiation (if any) to general laws can ever warranted by salience or otherwise justified? The Puzzle, in other words, is about the justifiability of differentiation beyond that strictly necessary to the validity or fairness in the baseline or form of the rule itself. The structure of the Puzzle therefore depends on there being a common ground as to the legitimacy of the rule or order that applies uniformly to all and the question of whether there can be forms of salience that warrant differential treatment beyond that uniformity.

The two Puzzles are, of course, to some degree related. After all, if there is some category that is normatively salient then the justification establishing the salience might simultaneously also establish the scope (though not thereby the necessity) of differential treatment. For example, if religion were established as special because of, say, some transcendent consequences these might indicate that exemptions and/or accommodations ought to be granted where these are genuinely at stake. Equally, if normative salience cannot be established for any category or the only possibility is a very loose or expansive category on which all interests are potentially normatively salient this may gravitate towards a narrow-approach answer to the Justificatory-Puzzle. Dworkin's 'ethical independence', mentioned above, might offer such a connection. As Simon Căbulea May argues about exemptions, where there is no principled way of demarcating salience within a particular category, there may be reason to doubt its salience or even the possibility of salience as a ground for exemptions in the broad sense (2017, 191-192, 200-203).

Nonetheless, the Puzzles remain conceptually distinct as illustrated by the divergent positions between them. Leiter and Dworkin, for instance, converge on the narrow approach in answering the Justificatory-Puzzle and yet hold considerably narrower and broader categories of normative salience for the Salience-Demarcation Puzzle, noted above. Meanwhile, despite the above-outlined relatively closer answers to the Salience-Demarcation Puzzle, Leiter and Nussbaum diverge on the Justificatory-Puzzle in respect of which Nussbaum advocates the broad approach.

For Nussbaum, exemptions and accommodations to general laws are necessary as correctives to the unfair inequalities that arise between the societal majority and various minorities disadvantaged by even neutral laws of uniform application (2008, 116-120). Whilst the narrow approach might ensure that general laws are neutral and thereby not targeted at any particular

category or representative group this does not always secure justice. Even accounting for latent discrimination passing off as neutrality, genuinely neutral laws will still have inadvertent incidental effects indirectly affecting various individuals and groups to in disparate ways. These incidental effects can often disproportionately burden some compared to others when the neutral law interacts with forms of religious and cultural plurality (Ibid., 156). Not unlike the earlier-discussed illustration of Peyotism and Prohibition, the non-neutral effects of otherwise neutral general laws uniformly applied, can subvert the egalitarian premise through inadvertently engendered background inequalities (Ibid., 149 ff.). Special constraints and protections for certain normatively salient categories are therefore necessary to curb these inequalities.

In response, Leiter stresses the importance of the unintentional nature of such burdens before highlighting that intentional nature of the burden-shifting that the broad approach commits (2013, 102). This **burden-shifting objection** is essentially that granting special status to some commitments will in many cases mean a comparative detriment to others (Ibid., 99-100). For example, exempting the rural boy or Sikh from the rule against carrying a blade relatively disadvantages the unarmed. The example here is particularly acute since extending the number of exempt categories or groups would aggravate the risk burden upon the unarmed and yet even a single exemption suffices to shift the burden by creating the risk to the unarmed.

Naturally, not all exemptions or accommodations will be burden-shifting, as Leiter concedes (Ibid., 101, 103) and, in any case, there is far more to the Justificatory-Puzzle than this, as will be seen in Part II. Presently, in connection with distinguishing the Puzzles, it is simply worth noting that, aside from a potential attempt to reintroduce the Salience-Demarcation Puzzle as a way of expanding the range of exemptions as alleviation of the burden-shifting, the concerns about fairness permeate both Puzzles in different and sometimes interactive ways.

In the first instance, as already observed, an answer to the Salience-Demarcation Puzzle that is problematically under-/over- inclusive/exclusive will have comparative implications whereby sufficiently analogous categories will engender what Peter Jones characterises as a "distributive" or (interchangeably) "*comparative*" injustice in being treated differentially despite being alike (2020, 176, 180, emphasis added) (I will not, however, follow Jones in treating these terms interchangeably). The rural boy's complaint in relation to the Sikh's exemption is therefore comparative either because (as on Leiter's thesis) the two belong to the same category of normative salience or because there is sufficient analogousness for that to be so. The possible

responses to such purported discriminatory concerns have been outlined above as (a)(i)-(ii) and (b). Option (a) speaks to the comparative concerns, but, as revealed both internally amongst different category proposals and in debate with liberal-accommodationism, non-comparative, *substantiative* concerns also arise in answering the Salience-Demarcation Puzzle.

2.3.2.3 Implications sketched

With the benefit of distinguishing the two Puzzles, option (b) can now likewise be seen in more precise terms. It does not merely level the Sikh and the rural boy according to whether one deems their interests to be both normatively salient or not. It also levels according to the nature of the normative salience (narrow or broad) versus the factual salience (narrow or broad) such as what is the case in law/practice. Here the more patent complaint is *substantive* but in a different sense of substantive to that just mentioned above in relation to Salience-Demarcation. To return to Leiter's case, the substantive complaint may be simply that one should be free to carry the *kirpan* or traditional dagger on whatever relevant category of salience one proposes. If true, this would be an additional ground for complaint to the comparative ground mentioned above. To illustrate, even if everyone entitled is equally, without discrimination, denied, they all would have an individual complaint based on their entitlement. Once some of whom are entitled are differentially treated to others, those adversely discriminated will also have a comparative complaint (Ibid., 180-181).

Yet, as alluded to earlier with reference to the burden-shifting and non-neutral incidental effects, the distinction between comparative and substantive bases for complaint proves far from straightforward. This is because the normative standard against which substantive unfairness might be claimed already implicitly involves the comparative dimension or, more specifically, the *equal* entitlements of others. Freedoms, after all, are inherently competitive within any area of social interaction. If I am free to play loud music at any time another is not free to meditate in silence at those times; if they are entitled to silence after dark then I am no longer free to play loudly then and so forth.

Laws therefore are inherently differential in this manner of altering the totality of interests within any area of social interaction. And so, ascertaining which way to level the difference requires knowing the scope of each entitlement which in turn requires determining the relative entitlement of others. Yet, this can only be known within a more or less complete system of justice specifying the relevant baseline standard of fairness between the various parties. Presumably, as the restrictions on morally odious commitments and those on arbitrary legal

interferences attest, there must be some standard upon which to know which entitlement claims are valid and which are excluded from the outset (cf. Patten, 2017b, 129). But what would be morally odious or arbitrary and how is that to be determined especially under conditions of pluralism and reasonable disagreement that characterise liberal democracies? As already seen, beyond indeterminate formulations like ELC or ethical independence, it is hard to avoid majoritarian cultural forms or value judgments of salience. What, for instance, makes monogamy salient over polygamy? Or legal entitlements to medical leave from employment but not religious? What makes religious or conscientious objection to military service more salient than, say, based on achieving artistic ambitions or a personally central lifelong project? (May, 2017, 197ff.).

This is not to suggest that there cannot be principled answers to these questions. Rather, the problem is that the answers too rely on certain values and their ordering and weighing that may be contested. To continue the running example, ensuring safety might be offered as justification for the prohibition of bladed articles in public. This, it might be advanced, not only equally curtails everyone's freedoms to carry such objects but also equally promotes their interest in avoiding injury. While that may be a rationale that is "public" or in some sense a consideration for all, it does not necessarily hold equal weight or effect for all. Whereas some will be indifferent to losing this freedom or consider it a minor nuisance, for others like the Sikh or, perhaps, the rural boy it might be a great burden. In effect, they would be forced to choose between breaking the law or breaking their commitment and the adverse implications of each. Purportedly, the law restricts both their access to their particular (religious or moral) good *and* potentially also public goods, namely access to certain places and/or the attendant opportunities that depend upon this access.

Accordingly, even if conceptually there "nothing incoherent or nonsensical" for a Sikh majority society to ban bladed articles in public for the above-cited "public" rationale (Jones, 2020, 198), as a matter of practical reason, it seems inconceivable that such a rationale would have greater weight than the religious freedom rationale for *that* majority. Indeed, granting everyone a right to carry such items not only responds to the burden-shifting objection, but also the safety rationale itself – at least in the sense of allowing everyone equal defensive opportunities.

All this reveals the complex interaction or volatility of reasons for the broad approach and reasons for the narrow approach under a different general law. The contest is therefore not necessarily about exemptions or accommodations per se, but about justice or fairness where

even claims framed as a substantive entitlement (rather than comparative complaints about direct or indirect discrimination) must inevitably be situated within the relative claims of others against some fair standard of evaluation and baseline position. And yet, as seen, these prerequisites are themselves deeply integrated within the contest.

Consequently, like the Salience-Demarcation Puzzle with regard to categories and inclusions, the Justificatory-Puzzle must somehow address both the general level challenge regarding standard and baseline, and the specific-level challenge of particular exemptions/accommodations claims situated therein. Problematically, however, these are often entangled or not especially separated within various scholarly accounts. This is readily evident in the already discussed burden-shifting objection and its counterpart response of disproportionate burdens. The two arguments in fact centre on baseline considerations of fairness from different perspectives: the first presuming the fairness of the status quo (which accommodations/exemptions upset by burden-shifting) the second presuming its unfairness (to which the accommodations/exemptions are remedial). The crucial question of how the standard of fairness is to be ascertained under such disagreement is unfortunately overlooked.

For an additional illustration, consider Patten's discussion of *Hobby-Lobby* (2017b, 151-152). Religious exemptions to the requirement of employers to cover contraceptive methods for their employees are, for Patten, involved in a three-way balancing contest with women's reasonable interest for access and the taxpayer's reasonable interest in avoiding additional costs if the religious exemption means government providing the cover. Once again, the balancing logic discloses the baseline presumption by which the exemptions claims are characterised as exemptions. Though in the regulatory context the claim is, of course, an exemptions one, normatively, however, it is also a challenge to the background assumption regarding the fairness of the mandate in question or its characterisation as an essential medical item.

Whilst characterising something as an exemption entails the presumed legitimacy of the law against which the claim is made, this framing is often structurally imposed by the regulatory context or the theoretical construction of the issues. To take that construction at face value risks prejudging the merits of the claim. After all, shifting all the critical considerations about salience and the fairness of the baseline and standard to the characterisation of the background context within which the exemption arises, the Free Exercise claim will indeed appear burden-shifting or stripped of normative force such as in Andrei Bespalov's characterisation of such

claims as *idola fori* - explanatorily empty statements of the form I should be able to X because it is my conscience or some normatively salient category (2020, 226, 229-230).

It is therefore important not to mistake formal presentations for a resolution to the underlying problematic. Resolution here calls for a principled way of separating the considerations about the fairness of the background conditions and legitimacy of the law from those of the merits of the exemptions or accommodations claims in relation thereto. A proposal for this will be outlined in Chapter 6. In the meantime, it suffices merely to point out the necessity of these distinctions as presented. For it is one thing to argue the justifiability of some law like the ban on blades or peyote and quite another to argue the permissibility of differentiating some but not others in application (Justificatory-Puzzle). And still another as to what the relevant criteria amongst many should be for making those differentiations, what it includes/excludes in range (Salience-Demarcation Puzzle).

The rest of Part I concludes by examining the Salience-Demarcation Puzzle from which the reasons for the focus on the Justificatory-Puzzle in Part II will unfold. From there, the fundamental impasse will emerge to pave the way for Part III which completes the picture of the Puzzles in relation to Establishment before turning to examine the interaction with legitimacy from which the possibility of a novel solution will be advanced. Specifically, I will argue that considerations of legitimacy, properly refined, offer a way of resolving the Puzzles in relation to Establishment and, in relation to Free Exercise when extended to the domain of *modal legitimacy*.

Chapter 3: Disaggregation and Beyond

Having outlined how debates over the normative justification of legal-regulatory state practice tend to conflate and vacillate between two distinct albeit interrelated Puzzles: Salience-Demarcation and Justificatory, this chapter turns to the Salience-Demarcation Puzzle in greater detail to demonstrate more fully the incompleteness of its dynamics if left without addressing the more fundamental Justificatory-Puzzle. This will be achieved by examining the Puzzle's central complication of religion to be elaborated below as the Special-Status Problem and what has emerged as the most influential solution: the **disaggregation approach** or **strategy** principally developed by Cécile Laborde (2015, 2017). I will argue that whilst the disaggregation strategy significantly enhances the clarity and defensibility of the liberal-egalitarian framework against the Special-Status Problem, its success there only reveals the deeper challenges of the Salience-Demarcation Puzzle that inevitably lead to the Justificatory-Puzzle.

3.1 The Special-Status Problem

As already foreshadowed, the Salience-Demarcation Puzzle arises within the tense liberal dynamic as to how to reconcile the incompatible pluralism of private judgments within a legitimate, neutral political order. Rejecting the Hobbesian solution of relinquishing all competing private judgments to the absolute determination of the sovereign, classical liberalism confronted the Hobbesian warning of anarchy or every autonomous individual becoming sovereign. Thus, the question of what is to be demarcated as beyond interference by the state and by others (over whom the state can act) becomes central in moderating between the anarchy of limitless autonomy and the absolutism of limitless state sovereignty. In the most pervasive sense of the theologico-political problem explored in Chapter 1, religion and conscience (in the non-conventional, indeterminate, sense) are inextricably operative within any demarcation or (re-)construction of the political. This answered the preliminary question raised there. The Salience-Demarcation Puzzle, however, is concerned with identifying the normatively salient category upon which to coherently ground classical liberalism's moves to differentiate the civil or 'public' from the spiritual or 'private'.

For liberal-accommodationists, the Salience-Demarcation Puzzle is primarily preoccupied with how to establish that religion is distinctively or *uniquely* salient in a normatively relevant way.

To avoid repetition, I will henceforth often simply use **salient**/**salience** as including the qualification "in a normatively relevant way". Establishing religion as salient, it was highlighted, is a formidable task yet by no means confined to liberal-accommodationism. For whatever category replaces religion, its salience must be established compared to alternative possibilities alike. Liberal-egalitarians then also have a similar task. Yet, this task is further complicated by two factors. First, in contrast to liberal-accommodationists, there is the apparent dissonance with the actual legal-regulatory practice of liberal states and its jurisprudential basis. This may seem like a strange complication since the normative position need not necessarily correspond with actual practices. The complication, however, is not the dissonance itself but its indication that freedom of religion remains in some sense necessary as the archetypal liberal right or a desideratum that must be addressed by whatever alternative category of salience is proposed. The second complication, meanwhile, is that unlike comprehensive or perfectionist liberals, for whom state neutrality need not always preclude elevating certain values above others, (political) liberal-egalitarians have a robust commitment to neutrality that does. Hence, as alluded to with Laborde's reference to a paradox in Chapter 1,[112] liberal-egalitarians indeed find themselves confronting what might seem like a paradoxical stance: denying religion to be special and at the same time defending its differential treatment. Religion therefore turns the Salience-Demarcation Puzzle *for liberal-egalitarians* into a more specific problem that I call the **Special-Status Problem**:

> In virtue of what (if anything) is religion normatively salient so as to warrant differential protections and/or constraints in a (neutral) liberal state?

An important immediate clarification must be made here for it may seem that there is nothing problematic about a robust commitment to neutrality whilst privileging religion. Neutrality, after all, is consistent with such foundational rights and freedoms the exercise of which is protected to the greatest extent compatible with the equal right of others. Enshrining religious freedom is precisely what neutrality requires. Anything less risks straying from neutrality and privileging some religion or other good. All this is correct, but orthogonal to the Special-Status Problem. This is because the Special-Status Problem does not deny the foundational rights like freedom of religion and conscience. Instead, its concern is with the *comparative* context of differentiation in tension with the adherence to neutrality when religious commitments serve as the archetypal category of protection-worthy interests, singled out for special treatment

[112] See page 1 for the quoted passage or Laborde (2012, 1).

compared to isomorphic non-religious interests like secular moral precepts or deeply-held beliefs of individual conscience. I have been referring to these as 'closely-analogous interests' or, simply, '**analogues**'. The category of normative salience must therefore be formulated so as to capture all the features of religion and analogues that are differentiation-worthy whilst not extending to anything beyond or losing a coherent connection between the relevant category and its inclusions. In short, what is excluded matters as much as what is included in any proposal.

To gain a clearer sense of the Special-Status Problem, we can return to the discussion of Leiter commenced in the previous chapter. Having covered the negative case challenging liberal-accommodationism to identify what makes religion special, we can turn here to his positive case for why it cannot be done.

After dismissing the possibility that religion might be special because it lacks something that disqualifies other categories from salience, Leiter speculates on what might be distinctive about religion over other categories and whether those features of religion warrant salience (2013, 27ff.). The two core features identified are: (1) "the *categoricity of religious commands*" and (2) "*insulation from evidence*" of religious beliefs (Ibid., 34). There is nothing, Leiter argues, about either of these features (individually or jointly) that holds salience on either the Rawlsian or Millian accounts for liberal toleration (Ibid., 54).

That might be right, but the features identified supporting this conclusion seem problematic in various respects. Most immediate perhaps is the curiously doxastic nature of the features which leave out conventionally recognised and arguably more common aspects of religion like collective and embodied practices. Unsurprisingly, this emphasis renders religion into more of a subset of some broader category like conscience or duty (Koppelman, 2010, 963). Worse, it makes the first feature question-begging and circular insofar as the only thing which makes the categoricity religious as opposed to moral is Leiter's qualification of it as such.

The second feature, meanwhile, proves unstable due to incompatible ambiguities about how it is that religion is insulated from evidence (Boucher & Laborde, 2016, 496-97). Specifically, the insulation might be *subjective* as that of believing some proposition as a matter of faith, or it might be *objective* as where the content of the belief is not falsifiable upon empirical evidence or even aspiring to be (Idem.). Taken subjectively, religion as faith becomes purely a mode of believing as already discussed in connection with Macklem's account in the previous chapter. That means religion could, in principle, extend to any kind of belief, including fanatical

adherence to any facts, moralities or secular doctrines. Taken objectively, meanwhile, it becomes hard to see why religious beliefs are of this nature let alone distinctively so (Idem.). Many religious believers would certainly not see their beliefs as without evidential basis, but rather based on experienced or perceived phenomena, the testimony of others or written testimony of historical events recorded in sacred texts – not to mention natural theology and its philosophical arguments utilising empirical observations (McConnell, 2013, 786-88). In any case, this same kind of perceptual and testimonial sources are the basis of pretty much all our beliefs, not only religious ones (Brownlee, 2017, 317; Eberle, 2002, Ch 8, esp. 245, 278).

Leiter is, of course, wary of this, introducing supplementary features like "metaphysics of ultimate reality" and "existential consolation" to further distinguish religious beliefs from non-religious and borderline cases like Marxism and Buddhism (Leiter, 2013, 37 ff). In that regard, the second-feature might be refined as being about insulation from naturalistic or *scientific* standards of evidence (Ibid. 37-39, 58). Controversial though it may be, such a refinement could distinguish much religious and secular belief, but still not entirely (Brownlee, 2017, 318-319) and not in the most relevant case of beliefs about categoricity of certain commands. Especially problematic for Leiter is that the convictions of non-religious conscience (for example, those stemming from Kant's Categorical Imperative or utilitarian convictions that utility maximisation is the sole good) prove just as insulated from naturalistic standards of evidence as religious beliefs revealing that there is also nothing salient about categoricity or conscience on Leiter's account (Boucher & Laborde, 2016, 499-505).

Since, as noted in the previous chapter, Leiter eventually minimises the salience of moral conscience along with the religious, these criticisms might ultimately have less sting – at least concerning his conclusions. In any case, what is crucial here is not their applicability to Leiter per se, but their general indication about the Special-Status Problem. In that regard, the apparent failure of Leiter's criteria to distinguish religion and conscience points to the difficulty of, on the one hand, constructing categories of normative salience that exclude religion without also excluding that which is deemed warranting inclusion or, on the other hand, including religion but at the same time also including elements of it or its analogues that are deemed not warranting inclusion. Religion, after all, extends to a great diversity of commitments from the categorical claims of conscience to the habitual and embodied practices like dietary or dress customs, communal worship attendance, holidays and ritual observances, as well as conduct marking sacredness and profanity, including hierarchies, environmental requirements, bodily and funerary rites and much more. It is precisely the protean nature of religion and its

analogousness with so many other commitments that prompted the anarchy objection and the Salience-Demarcation Puzzle itself as the search for the relevant category of salience without over/under inclusion/exclusion. Again, as noted in the previous chapter, extending salience to religion even with some exclusions would still leave considerable room for many non-religious claims to salience, as analogues supported by neutrality, whether for traditional rural customs, lifestyle vegetarianism, vehement conservationism or speed racing.

The Special-Status Problem therefore requires liberal-egalitarians to grapple with religion and neutrality in relation to these challenges for any posited category of salience within the broader Salience-Demarcation Puzzle. In concluding this section, and setting up for the prominent disaggregation strategy in the next, it is worth considering some of the ways in which liberal-egalitarians have attempted to respond to this.

One key attempt can be found in Dworkin's posthumously published work, *Religion without God* (2013). Recognising the precariousness of endeavouring to define religion, or characterise it in terms of distinctive features like Leiter's, Dworkin proposes to treat religion functionally for legal and political purposes (2013, 7). In that regard, the legal and political problem of religion is simply that it is a source and expression of value: agnostics and atheists can be "religious" or "faithful" in this sense as much as theists because the metaphysical background or "science part" of religion is ultimately irrelevant, in practical terms, to the "value part" (Ibid., 10-20; 21-29). Since all persons are capable of forming values upon which they act alongside others, the law need not seek to define religion let alone distinguish it from other commitments. Apart from all the conceptual difficulties of such a task already encountered, conferring salience on any resulting category over others would only be discriminatory and in violation of liberal neutrality (Ibid., 132-137). Consequently, all individual value commitments have salience because liberal neutrality recognises a maximally-inclusive category of 'ethical independence' (Ibid., 130). Yet, precisely because of this maximal inclusiveness of ethical independence, salience is effectively dissolved or levelled along with religion: each claim being equal to the maximal extent possible with respect to the same for every other (Ibid., 130-132).

Dworkin's proposal impressively resolves two of the most persistent challenges of the Salience-Demarcation Puzzle: the semantic challenges encountered in defining religion and the inevitably discriminatory effects of salience from under-/over- inclusion/exclusion relative to some other analogue. This allows the liberal state to maintain neutrality without intruding upon religion even by the attempt to restrict it definitionally or through demarcations of salience.

Furthermore, in the same move, questions of Establishment are answered by religion no longer being specially constrained since the only permissible basis for political interference with individual freedoms is the neutral ground of ethical independence of others.

Notwithstanding these advances, ethical independence encounters a critical internal complication. This is because the general right of ethical independence does not itself prescribe how to distinguish between permissible and impermissible restrictions on ethical independence as a result of ostensibly neutral laws. While ethical independence means that accommodating or exempting some would be an unequal burden on the ethical independence of others, the law itself is an indirect source of similar unequal burdens. Dworkin might insist that this is cured by the law's neutrality (Ibid., 133), but this response is inadequate insofar as the neutrality of the law will still express a judgment of salience not just in the various possible forms the law might take but also when it comes to the choice between how the burdens are distributed between having a law and not having it. Thus, Dworkin's suggestion that granting an exemption for Peyotism would also require one for "Huxley followers" and anti-drug control "hippies" (Ibid., 135) already presumes the neutrality of drug regulation and yet asymmetrically denies any like presumptions of salience for all bases of antiregulation. If the state can take the harm of drugs as a neutral consideration why not the harm against weighty interests where these are substantially self-regarding? In short, despite bypassing the definitional and demarcation hurdles concerning religion and salience, Dworkin's proposal finds itself unable to entirely rely on neutrality without re-engaging with salience.

In light of this, one might try to avoid 'religion' and demarcation but retain salience. An innovative attempt of this kind has been devised by Christopher Eisgruber and Lawrence Sager (2007). For Eisgruber and Sager, the key to determining the salience of religion and other salient analogues without the mentioned complications is to abandon the search for categories of salience per se in favour of an "equality-based approach" they call 'Equal Liberty' (2007, 15, 20). On this approach, an interest being 'religious' does not make a difference to whether it warrants special protections or constraints. Nor, for that matter, does any other alternative category of salience such as conscience, ultimate concerns or even ethical independence. Instead, Equal Liberty looks to fairness or the equal distribution of benefits and burdens upon all members of the political community (Ibid., 20).

Specifically, Equal Liberty requires 'antidiscrimination', 'neutrality', and 'general liberty' (Ibid., 52-53). The first explains why religious commitments sometimes appear to be special

when in fact the differential treatment is remedial to correct or prevent discriminatory practices (Ibid., 59). For example, though referable to their religious commitment to maintain a beard the exemption to Muslim police officers in the case of *Newark*[113] does not concern religious freedom per se but rather non-discrimination considering that the police department granted exemptions to the ban on facial hair for medical reasons like folliculitis. Religiosity did not entitle these officers to exemptions against an otherwise uniform (and presumably justified rule), comparative equality or fairness did (Ibid., 90-91). Even if the interest were secular it would have a claim to being exempt if sufficiently analogous to the medical ground (Ibid., 100-102). Nor does this make religious freedom arbitrary or contingent upon chance states of affairs like whether or not a policy already contains a medical exemption. This is because there is sufficient plurality and analogousness across and between religious and non-religious interests that comparative contexts can always be found and argued over as indeed the operation of anti-discrimination suits suggests (Ibid., 107).

The above point is further confirmed by the very nature of constitutional law as an arrangement that balances general liberties on neutral or equal terms. Hence, even absent an existing exemption or accommodation, there may be a concern about neutrality more generally - as already encountered with regard to incidental differential impacts of neutral laws. Where one can argue that the resulting disproportionate burdens would not have been accepted had they affected the majority's interests, Equal Liberty again grounds special protections and/or constraints to rectify the unfairness (Ibid., 92-100). Actual departure from neutrality is not required, hypothetical comparison as to what neutral laws could or would look like can be just as useful. This is especially important for understanding the most difficult type of cases such as the example of *Newark* in reverse (Ibid., 117). Supposing there were only religious exemptions but not medical ones would a secular claim for exemptions succeed in the same way as the religious did? Consistent with their approach, Eisgruber and Sager's answer is to look beyond religiosity or any categories of salience and towards maintaining equal regard. Consequently, what matters is a comparative basis by demonstrating unequal treatment with regard to analogous circumstances (Ibid., 117-119).

Equal Liberty proves remarkably versatile and adaptable in managing neutrality and salience without relying on the salience of any particular category like religion with all its definitional complexity and other problems of demarcation recounted. With all its concern on comparative

[113] 170 F.3d 359 (3rd Cir. 1999) (*Newark*).

justice, however, Equal Liberty offers no indication of the non-comparative baseline for religious and conscientious freedom. Much as the egalitarian premise did not indicate whether to expand or contract the differential treatment to achieve parity amongst claimants, Equal Liberty is likewise silent on this point. Importantly, this stands even accepting Eisgruber and Sager's claims that general liberty will guarantee basic liberal rights and there will always be comparative contexts in a pluralistic political community. In fact, apart from not indicating between expansion and contraction in the scope of some right or freedom, Equal Liberty also leaves the analogising too vastly indeterminate. Without a category of salience, what indicators for analogising are relevant and which are not? Put differently, if everything is potentially salient for analogising then there may be no limit to comparative unfairness and at the same time no way of coherently determining it. Upon what indicators are we to analogise between, say, a strong preference, an economic reason, a medical one and a religious or conscientious one? All might be costly but in different ways in terms of medium, duration, intensity etc. Are psychological costs comparable with physical pain or eternal damnation? Does embarrassment or physical discomfort qualify and at what threshold? These seem like unfortunate comparisons to make and yet reliance on some form of indicia is unavoidable as Eisgruber and Sager's own attempt to compare the "seriousness", "flexibility" and "inflexibility" of various commitments reveals (Ibid., 101, 116-118).

To be sure, the problem here is not simply that interpersonal comparisons are incommensurable, inaccurate, or arbitrary, but rather that much as comparisons without a baseline standard are empty, the use of comparative standards by relying on various indicia eventually replicates the very thing Equal Liberty sought to avoid: categories of salience. Granted, these may be more specifically adaptable than religion, integrity or ethical independence etc., but they are not immune from like controversies of definition and application. The Salience-Demarcation Puzzle persists along with the Special-Status Problem when religion enters the comparisons, however obliquely.

For a final attempt, a strategy endeavouring to establish a defensibly coherent category of salience might be worth considering. We have already encountered several such candidate attempts, including Leiter's moral conscience. Yet, insofar as the Special-Status Problem is concerned we need to understand how such broader categories of salience could justify the partial inclusion and/or exclusion of religion and the demarcation of closely-analogous interests to form a coherent category of salience over non-salient or ordinary categories. A useful illustration here can be drawn from Jocelyn Maclure and Charles Taylor (2011) who advocate

the salience of "core or meaning-giving beliefs and commitments" (2011, 12). Core commitments, they argue, are a necessary and coherent narrowing of the noted comparative unfairness or discrimination complaint that would otherwise be pervasive in a pluralist society where even neutral laws carry differential, non-neutral, effects (Ibid., 73-76). Without such demarcation of salience, the egalitarian premise would either require a proliferation of accommodations and exemptions (as forewarned by the anarchy-objection) or their wholesale elimination which would raise the fairness concerns amongst those disproportionately burdened by the incidentally non-neutral effects of otherwise neutral laws. Most importantly though, irrespective of which of the above it is, *without a category of salience*, neutrality, on the egalitarian premise, entails affording equal weight to all commitments no matter how different they might appear. To take Maclure and Taylor's example, the requests to "leave work at four o'clock<…>to avoid rush hour traffic" and "to get home before sundown to respect the Shabbat" would (counterintuitively) require equivalent weighing (Ibid., 79).

Supposing then that there is some objective distinction between ordinary beliefs or preferences and those that are salient, upon what does such demarcation stand? What, in other words, is it that makes some commitments "core commitments"? Maclure and Taylor here point to the "moral harm" that ensues when individuals are forced to "betray" or violate such commitments (Ibid., 77). As this content-neutral description suggests, the idea is that irrespective of what values or doctrines one holds – religious or otherwise – each of us can subjectively distinguish between those beliefs that are enduring and central to our lives and those which are more ephemeral and peripheral. This in turn enables us to recognise the same fact for others according to their own introspective interpretations, including the likely (moral) harm from such commitment violations.

A notable aspect of Maclure and Taylor's proposal is that the category of salience, though interpersonally vivid, is an ultimately personal or subjective one (Ibid., 81). There is no need therefore to define salience or religion and demarcate which specific elements or tenets of belief are included or excluded. Apart from perhaps their evidential worth in establishing sincerity, these matters are left to each individual themselves (Ibid., 82-84). This also avoids some of the non-neutral limitations of alternative categories like Nussbaum's 'ultimate questions' with its intellectualising slant that excludes the content of many dimensions of "ordinary life as might be subjectively salient albeit not ultimate concerns (e.g. "marriage and family, work, friendship, lifestyle and so on") (Ibid., 96-97). Similarly, as Laborde highlights, the scope need not be "comprehensive" in the Rawlsian sense of applying to most dimensions of life, as (2017, 62-

63). Most importantly, core commitments neither exclude nor privilege religiosity per se. So long as it is sincerely held as a core commitment, its source, and thereby definitions and interpretations of religion and secular doctrines, is irrelevant.

At the same time, however, religious commitments will only be salient when they take on the form of conscience. This, as noted before, excludes a great deal of customary or embodied practices as well as collective and institutional dimensions of religion: congregational gatherings and certain codes of practice, symbolic displays, sacred sites, everyday dress, unmandated charitable works or pilgrimages and more. Many such forms of habitual religious practice that may be interwoven with a believer's identity and laden with meanings would not be protected where they fall short of the threshold of obligation or moral integrity so as to be morally harmful in being dishonoured.

Maclure and Taylor may be happy to bite the bullet here. Since religion is not special then whenever it is not a core commitment it is just like any other ordinary commitment, not salient. Moreover, they could even claim this a merit of their account in being adaptable such that some of the above habitual practices could become salient if an individual sincerely takes them to be so notwithstanding their lesser doctrinal or communal role. Arguably, this is where either subjectivism might altogether eliminate any meaning to core commitments allowing anything to qualify or (through objective considerations of sincerity) become severely limited by doctrinal prejudices towards salience as previously noted (cf. Macklem, 2000, 17-21, 26).

But we can leave these complication aside for, even if solved[114], subjectivism will still be liable to comparative unfairness in two ways. First, it will grant more protections to those choosing or being predisposed to elevate their meaning-giving commitments to the level of conscience even where the practice is identical to those who do not. Even if explainable on principle, it risks incentivising the instrumentalization of conscience and otherwise leads to the yet more serious second unfairness. This concerns the neutrality of Maclure and Taylor's proposal. After all, given the various meaningful commitments it excludes - whether religious or otherwise - one might question the very insistence on conscience or moral integrity. Not only is this liable as an instance of the so-called "Protestant bias" – favouring individualised conscientious or moralising forms (Weinstock, 2006, 241-42; Laborde, 2015, 584-585; Zucca, 2019, 152), but its demarcation seems arbitrary considering the subjective test otherwise adopted for working

[114] For a proposed solution about sincerity see Martin (2020), for one about evading subjectivist grounds see Letsas (2016).

out what is a core commitment. If sincerity is deemed adequate as a check on subjectivism in relation to those commitments why not drop the categoricity limitation and allow sincerity alone to be the check?

3.2 Disaggregation[115]

From the foregoing, we can see how the robust commitment to neutrality and the refusal to elevate religion as (uniquely) special leaves liberal-egalitarians with additional complications within the Salience-Demarcation Puzzle as it relates to religion. Specifically, this Special-Status Problem is that religion per se is not deemed salient yet seems to structure and destabilise alternative broader categories of salience as may be proposed, including with various innovative adjustments canvassed above. All this does not bode well for liberal-egalitarianism given that these complications stem from its internal commitments, which, though by no means universal, are of wide or even mainstream appeal. That they struggle with internal complications is therefore troubling.

Against this backdrop, the disaggregation approach most influentially pioneered by Cécile Laborde in her book *Liberalism's Religion* (2017) offers significant promise.[116] Whilst endorsing the liberal-egalitarian framework, Laborde diagnoses the various complications within the Special-Status Problem discussed as stemming from the same root cause: the inadequacy of religion as politico-legal category and the tendency of liberal-egalitarians to *analogise* it with equally vague liberal categories of capturing 'respect-worthy interests' modelled on something like the Rawlsian 'conceptions of the good' (2017, 3, 14, 27-28).

In particular, this *analogising* strategy is culpable in two respects. First, despite evading the liberal-accommodationist burden of having to define 'religion' and various further attempts to evade other categories too, liberal-egalitarians, as seen, cannot altogether dispense with value judgments about which kinds of beliefs or commitments are salient. Accordingly, liberal-egalitarians must define or demarcate a category of salience which leads to the complications of over-/under- inclusion/exclusion. Laborde refers to this as the "*ethical salience* problem*"* (Ibid., 5-6) where 'ethical salience' roughly corresponds to what I have been calling 'normative salience' or (just) 'salience'. I will use all these interchangeably in discussing Laborde's views.

[115] This section draws on my earlier work contained in Leontiev (2021).
[116] An earlier version of the disaggregation approach can be found in Laborde (2015). For alternative strategies that is also loosely concerned with disaggregation of religion see Nickel (2005); March (2013).

Second, there is what Laborde labels the *"jurisdictional boundary"* problem (Ibid., 5, 7) . This is the challenge of determining what the category of salience comprises with respect to various specific instances. To explain, it is one thing to assign ethical salience to something like 'comprehensive doctrines'[117] (marking what cannot constitute a valid legislative rationale, for instance) or liberty of conscience (marking what pro tanto warrants legal exemption, say) but it is quite another to determinate what is and is not a comprehensive doctrine or an instance of conscience and so forth for other categories like good/right, religious/non-religious, public/private, comprehensive/political etc (Ibid., 8). Liberal-egalitarians, Laborde agues, must be more explicit on this and cannot rely on neutrality, which provides no guidance on how to demarcate these meta-jurisdictional categories (Ibid., 6, 70).

In what follows, I will consider how Laborde's disaggregation strategy offers a corrective to these two challenges for liberal-egalitarianism and its analogising tendency. Like Laborde, my discussion will predominantly focus on the ethical salience challenge for reasons that will emerge when I briefly turn towards the jurisdictional boundary challenge further below.

3.2.1 Disaggregating liberal neutrality

To better understand the contribution of Laborde's disaggregation strategy, it helps to set out the earlier mentioned paradox between the salience of religion and liberal neutrality in Laborde's premise-based form for both Free Exercise and Establishment. For Free Exercise, the ethical salience challenge runs as follows (Ibid., 198):

1. State neutrality prohibits judgments of ethical salience.
2. Religious exemptions [and accommodations] assume the special ethical salience of religion.

Therefore

3. State neutrality prohibits religious exemptions [and accommodations].

And whilst Laborde does not specifically provide it, a parallel for Establishment would run as follows:

1. State neutrality prohibits judgements of ethical salience.

2*. Establishment assumes the special ethical salience of religion.

[117] Doctrines (whether religious, moral, metaphysical or otherwise) articulating what is good of value in human life and practically informing its conduct as a whole (see Rawls, 1993/2005, 13).

Therefore

3*. State neutrality prohibits Establishment.

It is worth noticing that, although facially the prohibition is on religious exemptions/accommodations and Establishment, premise 2/2* contains the operative qualifier "special" which allows for an alternative interpretation that what is impugned is actually exemptions/accommodations or Establishment *which single out religion*. Put differently, premise 2/2* could be read as allowing for exemptions/accommodations and Establishment provided that religion is not singled out – i.e. upon some broader category of salience. The interpretational alternatives are, of course, made irrelevant by premise 1 which prohibits all judgments of ethical salience. Premise 2/2* really serves only to specify whatever category one wishes to stipulate. The upshot of all this is really just to say that it is premise 1 which prohibits ethical salience on the basis of neutrality regardless of whether it is only religion or some broader category that is assumed salient. The truth of premise 1 then is key.

To flesh out the argument, we can consider Establishment and its interaction with neutrality on the analogising approach of liberal-egalitarianism. For liberal-egalitarians, disestablishment is required not because religion is unique nor because the state must be secular. Neutrality prohibits both these claims alike. It precludes all comprehensive conceptions of the good – that is, those based on *comprehensive doctrines*, to again adopt the Rawlsian notion used above. Yet, as Laborde, amongst others – most notably Raz (1986, 117 ff.), points out, there is something incoherent about this kind of strict or complete neutrality (2017, 40). Construing neutrality as "non-interreference with all preferences, conceptions, commitments" – what Laborde terms "broad neutrality" – leads to uncertainties as to how and in respect of what the state may legitimately act (Ibid., 73-74). As already encountered in discussing Dworkin's ethical independence, if the state were to dissolve salience or extend it to all commitments or analogues of religion alike, what commitments would such a move be capturing and replying upon? These concerns are in fact well-known. Rawls, for example, distinguishes between procedural neutrality, neutrality of aim, and neutrality of effect whereby the first is self-defeating because it inevitably presupposes substantive values or fails to quarantine substantively unjust ones while the third is overdetermined in respect of a particular value (even if just) (1993/2005, 190-195). Only neutrality of aim can be properly calibrated to all impartiality amongst comprehensive doctrines yet it too cannot be devoid of substantive value commitments. For it cannot be impartial towards impermissible conceptions of the good,

incompatible with the aims of impartiality like non-interference with – and affording equal respect to – others (Idem.).

If all this is right and a conception of neutrality must be guided by at least a thin conception of the good (in Laborde's parlance, "restricted neutrality" (2017, 71)), then neutrality alone cannot explain what delimits permissible from impermissible or illiberal/unreasonable comprehensive doctrines or conceptions of the good. Imposing special protections and/or constraints like disestablishment upon religion (or any analogue) will, after all, entail that whatever religion (or said analogue) quintessentially is, it is not contained within the relevant conception of restricted neutrality. Yet, why that should be is precisely what the ethical salience challenge presses liberal-egalitarians to be more explicit about. Consider for instance, a conception of restricted neutrality permitting state action only upon publicly justifiable rationales. Such a state would arguably be precluded from taking positions in moral conflicts like the permissibility of abortions though not from promoting goods that are publicly justifiable like, say, environmental protection, cultural heritage or economic and foreign policies, all of which could *indirectly* favour some comprehensive doctrines over others) (Ibid., 76-77). Simply relying on public versus sectarian reasons as the basis for what is permissible or impermissible will lead to serious conundrums with every entanglement. Where would, for example, the endorsement of animal rights, teaching Darwinian evolution, or ecological conservationism fall between public reason justification and furtive imposition of a partial conception of the good?

Returning specifically to religion, these inadequacies of the analogising strategy are just as apparent. If environmental or cultural heritage protection can be construed as a *public* conception of the good not impermissibly encroaching on any private ethics, could the same not be said of a state decriminalising a certain narcotic used in religious ceremonies or protecting a sacred artefact or site, for instance?

One might respond that it certainly could hold but so what? Even if such endorsements of religious commitments are permissible it is not *for* religious reasons but for public reasons. Indeed, both the protection of sacred sites or narcotic rituals could conform to something public like Dworkin's 'ethical independence'. Granted, but even then permissibility of state action does not eliminate the intimation of state endorsement of the underlying religious commitment. To explain, being permitted by restricted neutrality to act does not automatically mean that the state needs or even ought to do so. Remaining altogether indifferent is a genuine alternative. Along with the environmental protection and cultural heritage examples, the case with religion

here is not like that of endorsing vegetarianism over other diets, introducing Catholic hymns or recitations of the *Communist Manifesto* into parliamentary or other public ceremonies. The latter are presumably ruled out by restricted neutrality whereas the former are not, leaving the state able to choose whether to act or remain indifferent. Not being indifferent constitutes a kind of endorsement even if justified on non-comprehensive/non-religious grounds.

This, Laborde argues, reveals that despite their appeals to broad neutrality, liberal-egalitarians ultimately fall back on a more restricted neutrality supported by singling out some salient (even if thin) features of the good – whether ethical (e.g. ethical independence or Equal Liberty) or epistemological (e.g. public reason) which dissect the inclusion and exclusion of state endorsements (Ibid., 115). State endorsement proves entirely permissible where consistent with some conception of restricted neutrality (Idem.). Accordingly, Laborde rejects premise 1 by positing that neutrality does not preclude judgments of ethical salience outright but only within the range of restricted neutrality.

3.2.2 Disaggregating religion

If premise 1 is false, premises 2/2* is enlivened with newfound significance. The key shifts from the permissibility of judgements of ethical salience under neutrality to whether or not religion is uniquely salient. The objection to special protections then is, in Laborde's words, "that religious exemptions single out an *inadequate category* of ethical salience" (Ibid., 201, emphasis added).

The truth of premise 2/2* then turns upon what is meant by 'religion'. Religion in its conventional sense might indeed be too broad or narrow, making premise 2/2* true. Yet, this is where the disaggregation strategy proves decisive. If 'religion' is not treated as an undifferentiated monolithic category or analogised with equally vague liberal categories mentioned, then what is protected/constrained could be the relevant underlying interpretive values/disvalues. This would make premise 2/2* false since "*not all* religion and *not only* religion, meets the relevant interpretive value" (Ibid., 203). An illustrative parallel might be drawn with free 'speech' protection which does not apply to all semantically designated speech but excludes disvalued speech like libel and incitements of violence (Ibid., 2017, 32; Letsas,

2016, 327). The issue therefore is not semantic but teleological and normative, concerning the interpretive value/disvalue of religion for Free Exercise and Establishment.[118]

Thus, with regard to disestablishment, if religion (and for that matter, any category) does not wholesale offend the relevant norms of restricted neutrality it need not be subject to blanket constraints or exclusion. The correction for religion Laborde proposes here is disaggregation into three dimensions roughly aligned with what liberal-egalitarians already implicitly rely upon in discriminating between permissible and impermissible state endorsements. According to Laborde, these dimensions or interpretive disvalues are religion as *inaccessible, vulnerable, comprehensive* (Ibid., 115-117).

Detailing this entire triad is not necessary for our purposes but a few illustrations can convey the general import. Consider something like a religious commitment to almsgiving. State (dis)endorsement does not depend on the religiosity of the commitment per se, but on the reasons for endorsement. Reasons from scriptural prescriptions would be *inaccessible* to non-believers, but for as long as there are some publicly *accessible* reasons such as the benefits of charitable donations the religious origin of this commitment becomes irrelevant to state endorsement (upon the accessible reason) (Ibid., 122-123).

Accessibility, to be sure, is by no means a straightforward dimension nor choice thereof.[119] The alternatives will be elaborated in Part III along with what I introduced as 'inclusivism' and 'exclusivism' about religion (in Chapter 2). For now, it suffices to indicate how disaggregation allows a middle ground between these poles. Contra exclusivists, accessibility does not arbitrarily constrain religious reasons where they are amenable to common evaluative standards and when it does constrain it does so not more unfairly than with secular reasons like private personal testimony that does not meet common evaluative standards (Ibid., 124-129). Contra inclusivists, accessibility stops short of allowing justifications so epistemically obscure to some citizens that they might be disrespected as reasoners and not given a justification they can appraise (Ibid., 129-130).

The epistemic dimension of *accessibility*, however, does not exhaust all the relevant disvalues for disestablishment. Religious displays, for example, are often justified by reference to

[118] The legal parallel here is the use of legal concepts or "fictions" as proxies for regulatory purposes as when a law against the catching of "fish" applies to what is biologically speaking not fish (e.g. whales) or still allows for catching fish which are released back or for research purposes (Letsas, 2017, esp. 46-49).
[119] For some prevalent criticisms see Bardon (2020), Lægaard (2020) Quong (2021). See also Laborde (2020, esp. 121-122) for a revision of 'accessibility' and some responses.

epistemically *accessible* bases of public culture or national tradition, but the permissibility of state-establishment will depend on more than this. There are substantive considerations about justice too like whether the instance of establishment triggers *vulnerability* by carrying adverse valence in respect of minority citizens. Again, the idea here is that religiosity of a symbol is not itself what is determinative. A nativity display in front of a courthouse might carry exclusionary valence whereas a Renaissance artwork littered with Christian motifs might not (Laborde, 2017, 138).

Lastly, even if religion does not trigger vulnerability and is accessible, it might still not be established where this would mean establishing value-commitments which are *comprehensive*. Comprehensiveness may initially sound like a return to liberal-egalitarian analogising between religion and comprehensive doctrines, but the difference is the focus on the limits of state incursion into the private sphere of personal ethics regardless of whether the incursion flows from comprehensive or public reasons. This subtle difference, however, is best understood in connection with the disaggregated category of Free Exercise to which I now turn.

Complimenting the disvalue (category) of comprehensiveness by defining the individual sphere of non-interference is the value (category) of *integrity* – or more specifically, "integrity-protecting commitments (or "IPCs") (Ibid., 203). IPCs are the normatively relevant category for Free Exercise (Idem.). As with Establishment, above, a detailed consideration of IPCs is not our concern. Rather, what matters is the central idea of protecting practices or acts (including voluntary inactions) which enable individuals to lead lives with integrity: "in accordance with how she thinks she ought to live" (Ibid., 204). Since integrity is closely tied to values of "identity, autonomy, moral agency, and self-respect" it is, Laborde explains, "grounded in widely shared values that are not sectarian <…> valued as good by both religious and non-religious citizens" (Idem.).

IPCs then are a category of salience that are precise in capturing the values that underlie Free Exercise justifiable within liberal-egalitarian norms of restricted neutrality. Importantly, IPCs are not coextensive with religion meaning that not all religious commitments will warrant special protection as IPCs just as some non-religious commitments will. IPCs might echo Maclure and Taylor's "core commitments" account, but they are not the same since IPCs extend not just to beliefs but also various mundane but integrity-serving identity-embodied practices. Accordingly, Laborde's IPCs can overcome various disanalogies and "Protestant" biases of privileging orthodoxy over orthopraxy (Ibid., 215).

In sum, disaggregation reveals the multivocality of religion and its lack of co-extensiveness with any one dimension, making analogising a mistake. The interpretive dimensions (values and disvalues) identified also apply to non-religious analogues such as politically vulnerable gendered, sexual or racial identities or comprehensive doctrines. Consequently, to the extent that religion or any other category does not violate the liberal norms expressed in these dimensions it need not be singled out for Establishment nor Free Exercise (Ibid., 144, 203).

3.3 Dissecting Disaggregation

Laborde's disaggregation approach has made an integral contribution to liberal-egalitarianism's struggles with the paradoxical stance on religion described as the Special-Status Problem. As seen, by disaggregating or refining neutrality and religion, liberal-egalitarians are able to afford salience to a range of normatively relevant commitments without having to over/under-include/exclude religion or elevate it as (uniquely) special.

Despite these important successes, disaggregation does not entirely overcome the Special-Status Problem or general dynamic of the Salience-Demarcation Puzzle. To understand why and how, requires dissecting the question of ethical salience more carefully. Although often overlooked, asking what is the normatively salient category is not a single question. Rather, it is two tightly-connected questions: one about what the nominated category of salience encompasses (or what I will call *coverage*) and another about what makes the nominated category salient (or what I will call *basis*). I examine these in turn.

3.3.1 Coverage

The issues of coverage have been implicit throughout this and the previous chapter as we surveyed the various categories of salience and their over/under- exclusiveness/inclusiveness. To illustrate coverage more explicitly, however, we can draw on the perfunctory example of helmet laws and Khalsa Sikhs – a case study which will recur in subsequent chapters as well. In brief, numerous liberal jurisdictions mandate helmet-wearing for motorcycle riders, appealing to neutral public rationales like road safety. Although the laws do not directly or latently target or discriminate Khalsa practices, an indirect disproportionate burden arises. Compared to the average citizen, the observance of the *kesh* prevents Khalsa Sikhs from wearing a helmet and consequently being able to lawfully ride a motorcycle without

contravening their beliefs. Liberal states therefore typically grant exemptions to helmet mandates to remove this burden.

If religion is an inadequate category of ethical salience, then differential treatment such as this appears precluded by liberal neutrality pending normatively relevant justification. Specifically, in terms of *coverage*, the category of religion covers more and/or less than what is normatively salient. To remedy this, an alternative category more aligned with what is salient might be proposed. We have already surveyed many possible contenders: moral conscience, ultimate concerns, integrity, core commitments etc. each of which is subject to the deficiencies discussed about analogising which come to the fore when demarcating coverage.

So, for example, if what matters is the deontic nature of the commitment that may prove under-inclusive if non-deontic commitments which are nonetheless deeply-held seem salient because, for instance, they relate to group membership or identity. This "identity approach" can claim to rectify this under-inclusiveness by attending to the values of collective practices which cement belonging and imbue individual choices with meaning or cultural significance (Eisenberg, 2016, esp. 303-305, 309-311; 2022, esp. 374-376). Nevertheless, the identity approach seems under-inclusive of deep commitments without the collective dimension or group membership such as, say, an individual's personal spiritual practices developed from multiple cultural traditions, or held after abandoning the group (Brownlee, 2017, 311). It also seems arguably over-inclusive insofar as it would potentially cover all group practice claims for an exemption or accommodation. This proves problematic unless one is willing to equate anarchists and bikies with organisational commitments to helmetless riding with the commitments of Sikhs.

Dropping the communal or identity aspect[120], one might rather only expand the deontic proposal towards a wider category of non-deontic but "deep" commitments. Yet, as foreshadowed by the various other candidate categories considered, deep commitments are as unreliable in demarcating coverage. Would an associational charter or the threat of group alienation or retribution make an anarchist or bikie commitment analogously "deep", "deontic" or "onerous" to that of the Sikh? Is there not a sense in which someone might be committed to (a non-moral, non-religious, non-deontic) personal project (such as becoming a chess champion or virtuoso celloist) that is analogously "deep" or demanding to warrant inclusion (May, 2017,

[120] This is not to imply that identity must always or necessarily be communal or social identity. The association simply flows from the 'identity approach' discussed in the preceding paragraph.

198). Further resources for differentiation are necessary if one is to resist these analogies for expanding inclusion. And yet, as May notes, many of the categories advanced can establish dis-analogousness and claims of (comparative) unfairness where like commitments are not afforded like salience to be treated equally (Ibid., 198-199, 201-203).

Lastly, should it be thought that the counter-examples used (anarchists and/or bikies) are too trivial or contrived it is worth noting that such evaluations are insufficient grounds for dismissing the principled challenge that these examples advance. Where a claim is sincere a dismissal by such appraisals would be fundamentally illiberal and discriminatory. Indeed, as Nicholas Martin has shown, many of the stock liberal-egalitarian examples of "trivial" or "frivolous" exemptions claims like those to wear "baseball caps, clown hats, chicken suits and punk fashion" are not disanalogous to actual cases of sincere exemptions or accommodations claims from adherents of various emergent movements or religions (2020, 259-260). Even if originally seen to be parodic like Pastafarianism, the sincerity of many adherents makes these cases challenging for liberal-egalitarians on their subjectivist view of commitments (Ibid., 263-65).[121]

The upshot here in terms of coverage is that each modification triggers its own (dis)analogies. This dynamic is precisely what gives rise to the Special-Status Problem for liberal-egalitarians. As canvassed in the paradox described, what troubles liberal-egalitarians about singling out 'religion' (conventionally understood) over isomorphic secular interests is the violation of the egalitarian premise of neutrality – viz. that like things are not treated alike.

Against this, the contribution of the disaggregation strategy is evident. Reconstructing the ethically salient category upon a precise set of interpretive (dis)values allows for a more coherent articulation of coverage of differential treatment without anomalous under/over-inclusion/exclusion that plagues analogising. Indeed, compared to many of the above categories, Laborde's IPCs can absorb the various proposals to extend coverage to deontic and non-deontic but deep commitments whether based on group-identity, conscience, ultimate concerns or otherwise. Exclusion, on the other hand, still proves more difficult especially where there is no way of disproving sincerity, as Laborde concedes (2017, 207, n. 37). Yet, to the extent that this affects every like subjectivist account this merely indicates the need for further theoretical refinement of what sincerity requires. The considerable merit of Laborde's

[121] Indeed, as Martin points out, Pastafarians – otherwise known as the Church of the Flying Spaghetti Monster (founded in 2005) – have actually been successful in obtaining religious exemptions in various jurisdictions, being permitted to wear a colander as a religious practice (2020, 258).

disaggregation approach then is its effectiveness managing coverage. Nevertheless, there remains the further question of basis or justifying a nominated category as salient. And it is here that the impact of disaggregation starts to dissipate.

3.3.2 Basis

To differentiate basis from coverage, suppose some nominated category of salience were to successfully capture all and only a clear set of closely analogous interests without anomalous exclusions/inclusions. Even then, it remains possible to ask what makes the category salient in the first place? In each case, we can ask why religiosity? Conscience? Identity? Deontic nature? Profoundness? Why *that* category? Why not some other? The answer must be able to justify the basis by appeal to some relevant value without inviting infinite regress or the circularity of appealing to the category's desired coverage. So, for example, appeals to 'conscience' trigger questions as to why conscience matters leading to various justifications such as its moral or categorical character, its connection to ultimate values, integrity or identity etc. which in turn leads to questions about those in infinite regress or eventual reductionism. As Steven D. Smith observes, if conscientious appeals are morally objective then the claimant is faced with the reality that both they and the sovereign are entitled to their conflicting moral interpretations including the denial of exemption or accommodation (2005, 331-332; 334-336). For comparison, consider being sincerely mistaken about having medical grounds for not complying which one in fact lacks (Ibid., 336). Alternatively, without appeal to objectivity, the claim turns into mere subjective disapproval whereby granting such volitional exemptions would effectively render the law non-existent or entirely optional (Ibid., 331-332).

Now, it may be thought that, apart from non-circularity, it is too demanding to expect basis in the form of a foundational value not subject to further challenges of regress. But it is not regress itself that is the problem. Rather, as the reduction into purely volitional objection conveys, the problem is that the foundational value cannot be simply anything. Within the liberal-egalitarian framework, the basis must be consistent with the robust commitment to neutrality. This is no trivial requirement. As noted through the comparison to perfectionist or comprehensive liberalism liberal-egalitarians cannot rely on substantive values, being restricted to the narrower range of public/political values consistent with neutrality on which I shall say more below.

Key to addressing the concern regarding basis upon the disaggregation strategy was the move from the incoherent conception of neutrality as 'broad neutrality' towards that of 'restricted

neutrality', which permits judgements of salience. This is certainly an important corrective demonstrating the flaws of conceiving neutrality as straightforward ban on salience. Yet, what is less clear is that the salience permitted by restricted neutrality is sufficient for addressing these issues of basis.

As the term itself implies, the ethical *salience* of something is determined against foundational background values. For our purposes, these are the norms of liberal-egalitarian political morality, principally the norm of state neutrality. Indeed, it is neutrality that makes ethical salience a "challenge". Beside neutrality are, of course, other foundational liberal norms: for instance, the basic rights and liberties of movement, speech, association, even conscience and religion, as well as respect for persons and the general liberal commitment to the maximal set of liberties consistent with the same right for all others. That which is in conflict with these foundational norms will clearly not have ethical salience for special protections although it may, of course, have it for special constraints.

Naturally, there will be different accounts as to the foundations and specification of the above foundational norms and the exclusion of contradictory ones. Nevertheless, a key commonality is that the foundational norms must be compatible with one another, including (crucially) neutrality. By this, I do not mean to imply that there is no conflict between the foundational norms or that they are somehow complimentary such as, say, on a communitarian paradigm where a traditional division of labour might compliment or be reinforced by gender norms or family structures. Clearly, liberal foundational norms are not like this and do conflict as most vividly illustrated in the introductory discussion of Folau's case and the clash between antidiscrimination and religious liberty (cf. Quong, 2011, 205).

Instead, my claim about the compatibility is more moderate for it refers only to the deeper level of structural compatibility. Liberal foundational norms are not mutually exclusive in a global sense such as say polygamy would be to monogamy or due process to summary executions. In contrast to these kinds of globally mutually exclusive cases, the tensions between foundational liberal norms are localised in discrete spheres. Religious liberty and non-discrimination are in fact generally aligned except for when the discriminatory practice coincides with the religious one. Outside of this localised clash, the underlying structural compatibility persists. Non-discrimination protects religious liberty much like neutrality protects from state interference in individual expression and freedom to form associations and so on. On Jonathan Quong's analysis, the tensions then are localised or 'justificatory' but not global or 'foundational': "a

plausible balance of political values" cross-addressed to each other "as to why one public value ought to be prioritised over the other in cases of this kind" (Ibid., 207-209).

Clarified this way, the asserted compatibility of foundational norms reveals how religious and conscientious freedoms can be enshrined in liberal constitutions consistently with neutrality, as previously remarked. Consistent with the ethical salience challenge, this kind of salience does not concern *differential* treatment, but what, for lack of a better contrast, might be described as ethical salience *in general*. Understanding this distinction between ethical salience for *differential* treatment and ethical salience *in general* requires a brief exposure of the jurisdictional boundary challenge introduced earlier as Laborde's second charge against liberal-egalitarian analogising.

3.3.3 Jurisdictional Boundary

The jurisdictional boundary challenge, it may be recalled, concerns determinations of the boundaries of the various categories about which the state is to be neutral. In this respect, the challenge has already been implicit in the earlier discussion of coverage. Categories of ethical salience are interpretive and capable of departure from conventional semantic designations. Thus, determinations need to be made about what is included or excluded for each category. For example, is a fervent anarchist "religious" in some sense? Is there a sense in which the Sikh's commitment is profound or even deontic in a way that cannot be said of the bikie? And so on.

It has also been encountered with every other determination all the way down to even the core political categories and foundational values. Apart from those just discussed, these might include determinations about what is 'civil' versus 'spiritual', what is or is not a comprehensive doctrine, public/private, religious/non-religious, good/right and so on. Since these occur at a meta-ethical or meta-jurisdictional level, neutrality offers no guidance as to how the demarcations should be made. These meta-jurisdictional judgments, Laborde stresses, are bereft of reliance on neutrality or any other foundational values because they already presuppose them in part. Recall, for instance, the earlier examples about educational or environmental policies the neutrality of which might be challenged as a furtive imposition of conceptions of the good. Or take Laborde's example of abortions. Essentially, by remaining neutral and leaving the matter to individual choice, the state, Laborde argues, already passes non-neutral value judgments such as not ascribing standing/interests to foetuses (2017, 80).

Importantly though, this all-pervasiveness of the jurisdictional boundary challenge is also that which makes it largely inconsequential as Laborde's own conferment of it to mediating conflicts between private associational and public norms attests.[122] Since all normative proposals are caught in it the challenge ends up redundant - much like a metaphysical theory denying physical matter proves in relation to the actual construction of a house.

3.3.4 Salience: General versus Differential

Nevertheless, the jurisdictional boundary challenge is crucial to illuminating the earlier-raised distinction between ethical salience *in general* and ethical salience in regard to categories nominated for *differential* treatment. If, as Laborde maintains, the jurisdictional boundary challenge reaches to the meta-jurisdictional level where neither neutrality nor like foundational liberal norms offer guidance on how judgments of salience should be made then Laborde's own argument about restricted neutrality too becomes effectively an instance of the jurisdictional boundary challenge. To explain, at the point of adopting the liberal-egalitarian value of neutrality, the sovereign state has already necessarily engaged in prior value judgments adopting some over other possible conceptions of neutrality (or even other (non-liberal-egalitarian) conceptions of the good). Indeed, and complimenting Laborde's reason for drawing on restricted neutrality, the jurisdictional boundary challenge incidentally serves as a block to the infinite value-regress problem and thus persists at various stages of interpreting and structuring core norms (as Laborde's aforementioned abortion example sought to illustrate).

The problem, however, is that *not every* judgment of ethical salience is made in the manner of those which set foundational norms such as the content of neutrality or various conceptions of the good. Some of these judgements, namely those concerning categories of differential treatment are made *within an already set normative context* against the background of *antecedent judgments of salience* like those forming the foundational norms. Crucially then, treating every judgment of ethical salience as an entirely *de novo* sovereign act would be to confuse the general possibility – or even necessity – of ethical salience judgments with the specific instances thereof. Put differently, the jurisdictional boundary challenge does not imply that subsequent judgments are entirely independent of or render preceding judgments redundant. Accordingly, when it comes to salience for the purposes of *differential* treatment, it is a salience to be established by reference to the background norms.

[122] See Laborde (2017, Ch 5).

The apparent advance of the disaggregation approach when it comes to basis in fact problematically flows from an equivocation between the general sense of ethical salience disclosed by the jurisdictional boundary problem and used to argue for restricted neutrality and that concerning differential treatment. While it may be true that the liberal state's commitment to neutrality does not end its capacity to make subsequent judgments of ethical salience, it does not mean that those subsequent judgments are entirely unrestricted in possibilities. Background norms such as the content of restricted neutrality will exert influence on subsequent judgments, including potentially prohibiting *certain* kinds such as about differential treatment. In sum, because nothing about restricted neutrality precludes or allows *all* kinds of salience judgments Laborde's disaggregation strategy fails to establish the basis for IPCs and other categories of salience for differential treatment.

It follows that even if something like IPCs are supported by liberal-egalitarian norms of restricted neutrality, as Laborde claims (Ibid., 204), the foregoing distinction demonstrates that this does not automatically mean that these norms also allow the state to endorse the ethical salience of IPCs for differential treatment. Indeed, as the narrow-approach liberal-egalitarians might point out in relation to the Sikh helmet case, being unable to comply with neutral general laws does not threaten the ability to live with integrity for one can do so simply by refraining from (lawfully) riding motorcycles (Barry, 2001, 44-45). Whatever further issues of justice this raises, the present point is simply that salience for differential treatment does not straightforwardly follow from restricted neutrality and might even be precluded by it. To claim otherwise, that integrity grounds differential treatment, is to effectively endorse it as a perfectionist value inconsistent with liberal-egalitarian neutrality even on the 'restricted neutrality' corrective. Integrity, after all, is not unlike religion, a multidimensional and contested concept. Laborde is, of course, aware of this, noting the various values that ground integrity: "identity, autonomy, moral agency, and self-respect" (2017, 204). Yet, as Cheshire Calhoun has detailed, these different values and dimensions lead to quite distinct conceptions of integrity with thinner and thicker forms of value (1995, 235, 2241-252). Indeed, the Bernard Williams-influenced "identity picture" (Ibid., 241) to which Laborde appeals (2017, 204) is precisely distinguished for its evaluative component in emphasising "deep attachment" and "flourishing" as constitutive life goods (Calhoun, 1995, 255). Yet, the idea of a flourishing life is not the same as – and indeed entertains a far more complex array of goods than – what might

be called a "minimally decent life" (Renzo, 2015, 579).[123] This is not to say that every conception of integrity is necessarily perfectionist – like neutrality, much depends on construction – but it is to say that appeal to integrity in the form of salience for *differential* treatment goes beyond any sufficiently thin "public" sense by advancing deeper perfectionist values like flourishing, responsibility, sustained personal commitments and other personal and social virtues (Ibid., 255ff.). These are conceptions of the good which, despite being broadly liberal, are not necessary for political membership and commitment to a liberal-egalitarian regime.[124]

The same goes for disestablishment. The choice of accessibility as opposed to other epistemic standards can only be justified by appeals to what one takes as salient in the relevant conception of restricted neutrality. An especially vivid illustration comes from vulnerability given its pervasiveness in political life. Without interpretative guidance from the background norms against which ethical salience of vulnerability is proposed, the disvalue seems boundless. War memorials carry exclusionary valence with regard to pacifists, sanctioning capital punishment does so for Catholics and so on. Thus, what can and cannot be differentially disestablished does not transcend what is implicit in foundational norms like neutrality and is inevitably caught in jurisdictional boundary problem as part of interpreting them.[125]

To be sure, the problem here is not a familiar administrative or judicial difficulty of interpretation or application to general categories such as whether 'breads' include 'cakes' for the purposes of taxation or whether computer algorithms and phone directories are 'literary works' for the purposes of copyright protection. There is no expectation on Laborde's account to comprehensively set out what IPCs or vulnerability comprise. Rather, the problem is with establishing the *basis* of ethical salience of these categories *for differential treatment*: why does (against the relevant foundational norms) category ABC have salience for differential treatment as opposed to category XYZ, etc.? This is not to say that Laborde's proposed categories could not be derived from liberal-egalitarian restricted neutrality, only that they do not have their basis in it without additional substantiation. It is precisely because restricted neutrality, as a

[123] This is why a minimally decent life offers a naturalistic basis for human rights grounded in needs, as Renzo details (2015, 580 ff.)

[124] Some may well remain unconvinced with the foregoing arguments. My aim, however, is not for a positive case but a negative one. Having cast doubt on appeal to integrity as a public value by showing it open to reasonable disagreement, the burden falls on those advocating otherwise to prove the validity or relying on integrity this way.

[125] Quong comes near to this point in his remark that Laborde's disaggregation is primarily helpful only because it corresponds to her pluralistic view of what makes a legitimate state (2021, 50).

core liberal norm, already secures so many of the fundamental liberal rights and freedoms that the basis for further salience for differential treatment proves challenging.

It is also at this point that the Salience-Demarcation Puzzle runs into the Justificatory-Puzzle. Though coverage and basis are intertwined, the distinction is informative insofar as coverage addresses the comparative concerns about anomalous inclusions/exclusions and the egalitarian treatment of relevant analogues, basis addresses questions of entitlement to salience. That entitlement depends not just the identification and demarcation of a category of interest but also questions about neutrality and the comparative scope of differentiation relative to some baseline. In that regard, the Justificatory-Puzzle goes beyond the ethical salience and jurisdictional boundary challenges as addressed by Laborde's disaggregation strategy. While these are concerned with establishing and demarcating the relevant category of salience particularly with regard to religion as a problematic legal-political category, the Justificatory-Puzzle poses a separate challenge about the permissibility of differential treatment beyond that already structurally embedded in neutrality. This challenge applies regardless of category and is thus left largely unaddressed by the contributions of disaggregation to coverage in the Salience-Demarcation Puzzle. Interestingly, despite partly recognising this, Laborde explicitly sidelines the Justificatory-Puzzle in her argument, emphasising her exclusive concern with "religious exemptions qua religious" (2017, 307).[126]

In conclusion, dissecting the disaggregation strategy and the Salience-Demarcation Puzzle into its interrelated aspects of coverage and basis reveals how disaggregation could aid liberal-egalitarians in avoiding the problems of incoherence and under-/over- inclusive/exclusiveness of analogising between religion and other vaguely-defined categories. This is a considerable contribution to the Special-Status Problem that religion as a protean category engenders. However, in relation to *basis*, disaggregation does not overcome the fundamental problem of establishing salience without going beyond restricted neutrality towards perfectionist values. In effect, the clarifications of the disaggregation strategy shift the paradox to deeper ground where the Salience-Demarcation Puzzle meets the Justificatory-Puzzle with its own discrete concerns. It is to this that we turn in Part II where a parallel impasse will be observed prompting a revaluation of the debates on these matters in Part III.

[126] At n2 Laborde writes: "Conclusion 3 could be reached through a different argument – for example an argument that purports to show that exemptions *per se* are incompatible with equality or the rule of law. Although I do not think those arguments generally succeed, I do not discuss them in detail here, as I focus on the specifically liberal egalitarian concern with religious exemptions *qua* religious."

Part II Exemptions and Justificatory Priority

Chapter 4: Difference and Justice

Disaggregating religion as a strategy to resolve the Special-Status Problem confirmed that liberal-egalitarians can reject religion as salient without thereby failing to afford it salience when warranted by various discrete (dis)values. This also allows greater internal coherence of *coverage* in limiting anomalous under/over- inclusivity/exclusivity compared to analogising through vague and inadequately defined categories like 'religion' or 'conceptions of the good'. Nevertheless, the *basis* of any proposed (dis)values as a category of salience remained unanswered by restricted neutrality. Whilst restricted neutrality could establish a general salience of various foundational liberal (dis)values, salience for *differential* treatment remained problematic in going beyond what liberal-egalitarian neutrality, as a thin conception of the good, might entail. Disaggregation therefore did not entirely resolve the Salience-Demarcation Puzzle in relation to the basis of salience beyond that already within liberal-egalitarian restricted neutrality. Instead, it shifted the Puzzle to deeper ground where the negative problem of basis meets the Justificatory-Puzzle that challenges the very possibility of differentiation whatever its category – i.e. differentiation as form – in relation to liberal-egalitarian neutrality. In this Part, I turn to the Justificatory-Puzzle directly to demonstrate its precedence over the Salience-Demarcation Puzzle and the prominence of Free Exercise in relation thereto. In this chapter, I overview the distinctiveness of the Justificatory-Puzzle and how and why it complicates differential treatment within the framework of liberal-egalitarian state neutrality.

4.1 Neutrality and Difference

To elucidate the distinctiveness of the Justificatory-Puzzle and the prominence of accommodations and exemptions in relation thereto, we can adjust any of the previously discussed examples to bracket the issues of the Salience-Demarcation Puzzle therein. For a start, consider the Peyotism case. As seen, the claim is as much about the relevant entitlement as it is an indictment of the apparent Establishment of proscribing peyote but not other drugs like alcohol which the cultural or religious majority consumes. Notice that whilst this involves a discriminatory element or comparative unfairness, it is *indirect* and distinct from the more direct – or, rather, pronounced – form that might arise were alcohol along with peyote

prohibited but an exemption granted to Christians for sacramental wine without an exemption for Peyotists for their ceremonial uses. To be sure, the indirect discrimination here need not be invidious or based on discriminatory motives whether conscious or unconscious towards any identity or group characteristic. Now, let it be granted that coverage and basis concerns could be resolved with something like Laborde's disaggregation approach. That is, everyone, Peyotists included, accepts the basis of inaccessibility, vulnerability, comprehensiveness and integrity or IPCs for salience warranting special constraints and/or protections. Accordingly, the law is accepted as not raising Establishment matters because it is seen as proceeding from public safety concerns and the bio-chemical differences between alcohol and peyote and thus lacking the disvalue dimensions. Let it also be that IPCs are respected and so exemptions to the law are granted for anyone whose IPCs require access to proscribed substances whether peyote or otherwise. To be sure, we might even stipulate that citizens do not seek to abuse IPCs and the legal system can, to everyone's satisfaction, manage the characterisation of IPCs and discern sufficient and authentic from insufficient and inauthentic claims. It results in a coherent and robust regime of narcotic regulation with IPCs exemptions for, say, Peyotists, Hoasca ceremonies[127], Rastafarians[128] and sundry others. And, to reiterate, we are taking it that there are no doubts about the basis of IPCs, including interpretation and application with the resulting coverage.

Now, suppose some have developed a safe formula of the prohibited narcotics taking which delivers them indescribable pleasure or some other valuable experience. Would these individuals have any complaint against the law once the above points are conceded as to Establishment, and the coverage and basis of the IPCs for Free Exercise? It seems that they would. Although they may accept that there is no Establishment problem and they lack an IPC entitlement to exemptions, they may nonetheless consider it unfair that they cannot lawfully do that which some of their fellow citizens can. For them, the unfairness might be characterised as stemming from the fact of differential rights itself.

But given that differential rights are an inherent part of the law, as previously noted, that would prove too overreaching an objection. Unless one would also impugn policies like disabled parking spots, concessional ticket prices or age qualifications for voting, the mere fact of

[127] E.g. *Gonzales*.
[128] E.g. *Prince*.

differential rights per se cannot be the objection here. What then, in light of the above concessions might be left?

Looking closer, we can identify the following three potential issues. The first is the rule of law or that aspect pertaining to the sameness or "generality" of the law, as Lon Fuller described it (1964/1969, 46-49). The law must be formulated in impartial and general terms such that it does not analytically predetermine its application with regard to any individual or group of individuals. A law cannot, for example, narrowly tailor itself to apply only to some individual or group such as specifically naming someone as impugned or exempted like within the infamous Bills of Attainder. Thus, exemptions must, as a minimum, be general and uniform such that if all born on New Year's Day get a prize there cannot be the exclusion of those named John, Mary, and Zhirou without some other generally-stated exemption that would apply to them in relation to the prize rule. Though this is a purely formal requirement it does at least guard against blatant arbitrariness and partiality. If there is no general category by which to only exclude those named John, Mary, and Zhirou, then it makes excluding them – and only them – harder. In more realpolitik terms, "a ban on foreign travel when there is no exemption for legislators or party members" or "abortion" where the "wives and daughters of male legislators" are included are all "less likely" (Waldron, 2002b, 3). Nevertheless, this is rarely the issue since most exemptions, particularly in liberal states, do not violate this formal requirement compliance with which, in any case, will not guarantee justice or non-discrimination.[129]

A law satisfying the above formal generality might nonetheless lead to the second issue of violating it in spirit. Differential rights are inherently sources of inequality with some able to do what other cannot and vice versa. This is prima facie unfair. Consider the following simple comparison.[130] Company ABC has a rule of 10 paid annual leave days for all employees (**10-days-rule**), but with an exemption for IT staff who are subject to the 10-days-rule plus an additional two days per quarter (**10-days-rule-plus**). Formally, the rule is expressed with sufficient generality not to offend the above requirement but there is apparent inequality between different staff which seems unfair. One way in which the unfairness might be resolved is if it turned out that the inequality was indeed just apparent. For instance, the 10-days-rule was based on a formula proportioning leave to the total cumulative hours of a full-time

[129] So long as the norm is stated generally (e.g. all of race X or deemed by agency Z to be an immigrant cannot ride public transport).
[130] The following adopts from my prior example used in Leontiev (2020).

employees. Since the IT staff consistently exceeded this by an amount that would proportionately yield an additional two days, then, properly construed, there is no differentiation with just one rule for all adjusted according to unequal variables.

This resolution is of little interest for looking at differentiation though and so we might consider an alternative form of the example where the rule is substantively different. In that regard, it is worth noting that it is not simply extra hours worked that is relevant here. Were it merely about the hours, the rule would raise the entitlement for all kinds of reasons that staff might work more than full time hours whether due to disability, work addiction, preference to avoid domestic duties, slowness, inefficiency etc. The rule then is presumably interested in IT staff extra hours because they are based on something objectively relevant such as being contracted for, or otherwise deemed necessary and/or valuable by ABC. The prima facie unfair differentiation *might* therefore be rendered fair by appeal to the objective value or salience. I stress "might" because another possibility is that the unfairness could remain but be justified by some other overriding considerations like exigency or practical necessity.

But even if the salience of IT staff and non-salience of some of the other reasons for additional hours worked is accepted, the differentiation in entitlement corresponds to differential opportunities and effects. The IT staff can do what others cannot: they can use their additional labour hours to earn additional benefits. One could, in principle, accept the salience or differentiation in entitlement but object to the differentiation in objective practical outcomes that results. This is not a kind of discrimination noted above where out of all IPC- or otherwise entitled-groups only some are granted the entitlement and others not. In the example under consideration, the non-IPC claimant accepts the entitlement of the IPCs and their own lack of entitlement, but objects to the differential practical outcome. Stripped of the various assigned meanings, the conduct of possessing or ingesting the narcotic substance is in objective terms identical: "the religious use *is* narcotic use" (Ibid., 8) whether IPC protected or not. Exemptions and accommodations whether for IPCs – or some other accepted category of salience – therefore translate into (objectively) identical conduct being treated differently. We can imagine someone thinking: "I can understand that for those with IPCs being legally allowed to use these substances might matter a great deal compared to me. Yes, I lack an IPC and I do not require peyote to fulfil any religious obligation or live with integrity, but it is nonetheless important to me in enhancing my daily experience and artistic work. It is frustrating to be restricted from it and I do not see why the law can accommodate the identical conduct there but not in my case?"

Unlike the above 10-days-rule and 10-days-rule-plus case, the differentiation here does not equalise effects and opportunities but rather introduces inequalities. And whilst some basis of salience like IPCs may offer a corrective to the unfairness of inequalities it need not take the form of creating further inequalities. Just as prohibiting baptism where there is no prohibition on bathing could be impugned on the basis of an IPC, allowing only baptism would not make the prohibition on all other substantively alike conduct, such as bathing, fair.

Drawing again on Waldron's analysis, the upshot here about differentiation can be roughly matched with his two questions about exemptions and the rule of law: "(A) Is there room for exemption given the generality of the law's aim? (B) <…> is it fair to give the benefit of that room to members of this cultural or religious group as opposed to other people in society?" (Ibid., 19). The Justificatory-Puzzle suggests that salience alone does not mean that the answer to (A) should translate into the differential rights based on fairness in (B).

Salience alone does not render all forms of differential rights fair or justified. There are other considerations as the distinction drawn in chapter two between the narrow and broad approach makes clear. Thus, perhaps what (A) really reveals is that there is room to loosen the regulation to allow more safe narcotic use in general or the hiring of additional IT staff or whatever may be the case rather than instituting differential rights regimes. Salience might render some differentiation fair, but it does not suffice to justify all forms of differentiation where the differentiation leads to objective differences in effect or opportunity with respect to identical conduct. There will, of course, be complex questions as to the specifics (to be addressed later) but the upshot here is that, apart from form, the rule of law in substance (or "spirit") aims towards non-differential treatment (Ibid., 9) except as necessary to achieve fair equality.

Lastly, the third potential issue in the complaint about differentiation centres on the burden-shifting objection. As may be recalled from Chapter 2, exemptions and accommodations inherently redistribute the benefits and burdens of the uniform application of the general law. Again, even supposing that the IPCs justify exemptions and accommodations there are inherent costs to (in this case) non-IPC groups. Some of this burden-shifting is "horizontal" from one individual or group to another and some "upward" or vertical "to society at large" (Jones, 2016, 516-517). For an illustration of horizontally shifted burdens consider an employer or co-worker that must alter the roster to accommodate the IPCs of employees that cannot work during certain regular periods. For that of a vertical burden-shifting, consider the motorcycle helmets exemption which may translate into increased public health and welfare costs from aggravated

head injuries. Seen in terms of these two planes, there are arguably few instances of exemptions and/or accommodations that are in no way or degree burden-shifting (Ibid., 535). Perhaps the most ubiquitous exemptions/accommodations burden-shifting is the vertical sense of disrupting or otherwise diluting the rationale or aim for which the law was enacted. This will be expanded on later because it forms its own important complication to the Justificatory-Puzzle, but it serves here to illuminate the potential universality of burden-shifting.

The burdens shifted will not always be significant, of course, especially when considered relative to the burden of not accommodating or exempting. Nonetheless, these balancing considerations are distinct from the prior question of whether the shifting is itself justifiable when it comes to who is to bear the impacts of a neutral general law. Again, though all laws impose differential burdens in the incidental impacts on various individuals the issue of burden-shifting does not contradict the principle that where such burdens are unfair they ought to be rectified. The issue is rather that insofar as this rectification proceeds by way of differential rights, the question of who ought to bear the burdens of that differentiation becomes live.

The burden-shifting objection to differential rights then relates to the above rule of law complaints in an indirect manner. Ending the differential rights regime would simultaneously address the burden-shifting objection, but the burden-shifting objection remains distinct since it might also be addressed by retaining the differential rights but compensating those burdened, for example. Also, there are differences between cases. Sometimes the burden shifted corresponds to the differential rights directly such as in the *kirpan* case whereby the burden is the relative risk of being unarmed when some in the population carry a blade which is also the inequality. Other times, it does not as in the case of motorcycle helmets whereby the burden is on the public health system but the inequality between the exempted and unexempted is a separate matter. In this way, burden-shifting forms a further issue or complaint about differential rights beyond the formal and substantive rule of law complaints surveyed.

From the foregoing, we can observe the distinctiveness of the Justificatory-Puzzle and the prominence of accommodations and exemptions thereto. Specifically, even bracketing the matters of coverage and basis examined with regard to the Salience-Demarcation Puzzle, there remain deeper concerns about differentiation itself. As clarified, these are not concerns about all forms of differentiation or differentiation *simpliciter* but nor are they about salience either. Whilst the arguments from Chapter 3 about the basis of some category of salience for the purposes of differential treatment under restricted neutrality are pertinent here as intersecting

concerns, one could accept the basis and the entitlement of some under the relevant category of salience, but still object to certain differential treatment for the reasons discussed above.

Thus, as noted, salience might be relevant to some forms of differentiation such as securing fundamental rights or unfair burdens as a result of Establishment, for example, but it does not thereby justify all forms of differentiation. In particular, it does not necessarily justify the unequal distributions of opportunities or rights in relation to (objectively) identical conduct nor the various forms of horizontal and vertical burden-shifting that follows. In short, though salience entails the kind of differentiation I have in Chapter 2 introduced as the "narrow approach", it does not entail that just outlined, introduced as the "broad approach".

In this regard, though Establishment remains an inseparable element, as will become evident in Part III, Free Exercise acquires a particular acuteness compared to Establishment with respect to the Justificatory-Puzzle. This is because in considering whether the salience justifies the narrow or broad approach the question of Establishment is only indirectly relevant. Yet, being relevant in determining whether the general law is indirectly discriminatory in relation to some salient category, Establishment does not determine the correct remedy between the narrow and broad approaches. The unfairness in some form of Establishment may be addressed other than by broad approach exemptions and/or accommodations. And, as seen, even accepting whatever form of Establishment there might be, the complaints about the broad approach would remain on the above-discussed grounds. Indeed, even if the prohibition on motorcycle helmets is a form of paternalistic Establishment or the prohibition on peyote but not alcohol is a latent Christian Establishment the same conduct (helmetless riding, peyote use) is prohibited for all. To the extent that there are burdens on certain groups these are embedded in the general rule rather than shifted, as it were, by differential rights. Conversely, exemptions and accommodations will, on the broad approach, introduce a level of problematic differentiation beyond Establishment.

Not only does this result in a comparative prominence or some having a right to do that which others cannot, but also it burden-shifts and results in a non-comparative prominence by disrupting or diluting the very rationale or aim for which the law was enacted. This combination of a comparative and non-comparative prominence is evident across the cases considered. An accommodation allowing alternative working schedules or dress codes (comparatively) allows some to work and dress in ways not available to others *and* at the same time (non-comparatively) undermines the purpose that uniform schedules and dress serve. Exemptions allowing some to

ride helmetless or consume a prohibited substance again yield inequality *and* at the same time undermine the aim or rationale for the legal requirement.

To foreshadow, the non-comparative prominence is especially troubling because it adds a further justificatory requirement for basis. For even if some basis of salience (accommodations/exemptions) can be established, it does not automatically establish that this basis outweighs the rationale or basis for the law as a competing concern. Yet, this along with the comparative inequality is precisely what the broad approach entails. The point of emphasising all this, however, is not to impugn the broad approach or condone the narrow. That debate is to come. It is only to underscore the distinctive concerns of the Justificatory-Puzzle with regard to differentiation wherein the prominence of Free Exercise and the choice between the narrow and broach approach become discernible. With that, we can turn to examine the case against the broad approach followed by its defence.

4.2 The Narrow Approach

Although not necessarily confined to liberal-egalitarianism, I will restrict the debate this way given that many of the interlocutors to be discussed are liberal-egalitarian proponents of either the narrow or broad approach. The starting point then, for both, is to say something about liberal-egalitarianism. The divergence about exemptions and accommodations already signals the diversity within this label. Beyond a very general characterisation therefore I will primarily draw on the Rawlsian account as the representative foundational view from which the divergent positions can be subsequently traced. Generally stated, liberal-egalitarianism, as the name implies, stands for a combined commitment to liberty and equality (Glaser, 2014, 26). Echoing the 'classical liberal' and 'libertarian' tradition[131] is an impulse towards maximising individual liberty, but departing from it, is a concern with substantive equality which addresses socio-economic disparities arising through liberty itself, not just politically imposed forms like serfdom, estates, or castes, (Nagel, 2003, 64). Since these liberty and equality impulses are in tension, liberal-egalitarianism is, in part, a project of reconciling or balancing them (Glaser, 2014, 28).

[131] Unless stated otherwise, I treat these interchangeably as variants of the same "liberty tradition" – see Mack and Gaus (2004, 115).

Rawls's theory of Justice as Fairness (JAF) neatly exemplifies this in its two constitutive principles. The first, '**Equal Liberties**', aims to guarantee equal civil and political rights to all, stipulating that:

> each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties of all (Rawls, 2001, 42).

The second, '**Socio-Economic Principle'** then imposes two conditions on socio-economic inequalities resulting from the exercise of the above freedoms.

> first, they are to be attached to offices and positions open to all under conditions of **fair equality of opportunity**; and second they are to be to the greatest benefit of the least advantaged members of society (the **difference principle**) (Ibid., 42-43, bolding added).

Crucially, for our purposes, is that Equal Liberties formally curtails the political restrictions on individual liberties according to a kind of formal neutrality requirement. That is, a restriction upon any individuals must be such that it does not upset the adequacy and equality of liberty in the scheme with respect to others. It cannot be that some groups have a greater freedom of assembly than others or can restrict the movement or expression of others without being subject to the same restrictions (under same applicable circumstances). Representing this most pertinently, for us, is Rawlsian Equal Liberty of Conscience (**ELC**) already encountered in Chapter 2. As noted there, the formal equality embedded in ELC (and, as just seen, in Equal Liberties itself) ensures that all individuals have the same equal share of religious and conscientious liberties as others. None can impose their 'conception of the good' or idea of what is valuable as an end (Rawls, 1993/2005, 19) upon others to a greater degree than have it imposed upon them. Religion and conscience along with all comprehensive doctrines will therefore be limited by ELC as vehicles of these conceptions of the good. Accordingly ELC and the rest of Equal Liberty, Rawls argues, is reasonably acceptable because it allows each the pursuit of their values to the maximal extent possible in compatibility with the equal right of others (1971, 205-210).

This is all in turn supported by the Socio-Economic Principle which ensures that all have substantively fair equality of opportunity to secure the means necessary to realise the fair value of their liberties like ELC and individual conceptions of the good. Rawls's notion of "primary goods" or "things that every rational man is presumed to want" (Ibid., 62) is relevant here. Whilst Rawls mentions "natural" primary goods ("health and vigour, intelligence and imagination" (Idem.), it is the *social* primary goods ("rights and liberties, powers and

opportunities, income and wealth") alongside "self-respect" (Idem.) that are properly amenable to distributive justice. The Socio-Economic Principle provides the structurally equal opportunity to exploit and access primary goods in preserving the bases of self-respect which in turn is necessary for self-determination or pursuing individual conceptions of the good (Ibid., 440).

Perhaps with the exception of the more idiosyncratic difference principle, the Rawlsian account provides a model of the liberal-egalitarian project of marrying individual liberty with substantive, socio-economic, equality. At its core, it is that the realisation of individual liberty to the maximal extent compatible with the same rights of others requires equal regard for all or a unitary conception of membership in the political community. All members - or "citizens" as I will loosely refer to them – stand as equals to one another in right along with distributive entitlement to primary goods. On this conception of **liberal-egalitarian citizenship** (as I will call it) citizens are equal "self-authenticating sources of valid claims" (Rawls, 1993/2005, 32).

Rawls famously appeals to the hypothetical contractualist device of the 'original position' to argue for his liberal-egalitarian principles. Very crudely summarised, the original position represents what rational parties would choose when negotiating fair terms of social cooperation from behind the 'veil of ignorance' – an epistemic filter removing knowledge of particulars from the hypothetical parties to eliminate partiality and model fair and reasonable contractual conditions (Rawls, 1971, .118 ff.; 2001, 14-18). The fairness and reasonably acceptable nature of the procedure of choice modelled thus represents to us why Justice as Fairness is the most reasonably acceptable choice. Without delving any further into the complex constructivist argument here[132], the key element worth underscoring is that liberal-egalitarian citizenship can be construed as representing what is at the outer bounds of reasonable acceptability or capable of being mutually acceptable to all rational and reasonable persons as an agreement for social cooperation on fair terms. This, to be sure, is envisioned with a certain gravity as highlighted by Rawls's notion of the **"strains of commitment"** or that the contracting parties in the original position are to see their choice of principles as binding and be, in good faith, willing to accept and comply with them unconditionally for their entire lifetime once the veil of ignorance is removed and they assume their self-actual position in society (Rawls, 1971, 145, 176; 2001, 103).

[132] For an extended overview, see Freeman (2007), Ch 4. On constructivist methodology, see O'Neill (2003), 347-367.

Whilst Rawls himself does not occupy a clearly definable position between the narrow and broad approach, there are considerable resources within his liberal-egalitarianism to support the narrow approach. Specifically, the issues of the Justificatory-Puzzle introduced above concerning objectionable inequalities in differential rights over same conduct and burden-shifting can all be supplemented and expanded through a broadly Rawlsian liberal-egalitarianism in favour of the narrow approach.

Probably the most influential contribution in that regard is found in the work of Brian Barry. Starting from what I have above labelled 'liberal-egalitarian citizenship', Barry postulates that such a unitary conception of political membership excludes "special rights (or disabilities) accorded to some and not others on the basis of group membership" (2001, 7). Entertaining such rights-differentiation not only conflicts with liberal state neutrality between different conceptions of the good, but also the equal regard amongst citizens in the distribution of primary goods as the all-purpose means afforded to individuals on the basis of political membership alone. Whilst all that permits a pluralism of identity-formations and voluntary associations, it does not involve recognition of those private interests beyond ensuring their equality of fundamental rights and protections. This preserves fairness in socio-economic aspects centred on a "very strong conception of equality of opportunity" (Idem). In Barry's own summary,

> [f]rom a liberal-egalitarian standpoint, what matters are equal opportunities. If uniform rules create identical choice sets, then opportunities are equal. We may expect that people will make different choices <…> [b]ut this has no significance: either way, it is irrelevant to any claims based on justice, since justice is guaranteed by equal opportunities.

Just what constitutes 'equality' and 'opportunity', it will emerge, is highly complex. Indeed, there is a vast literature on these matters, but my engagement here will only focus on select aspects relevant to the topic of accommodations and exemptions. Accordingly, to appreciate Barry's point about liberal-egalitarianism and the narrow approach, it suffices to note that liberal-egalitarians must, at the minimum, support a substantive conception of equal opportunity (or "fair" as opposed to "formal" equality of opportunity, in Rawlsian parlance[133]). Substantive equality of opportunity (**SEO**) goes beyond the mere legal equality of the formal sense where all have the same rights and none are directly discriminated against by identity-based legal exclusion from opportunity. On its own, that would still allow material

[133] See Rawls (1971), 72-73.

disadvantages to undermine equality between persons with otherwise matched levels of ability and determination. For example, absence of legal restrictions for attending university or running for public office based upon having a certain amount of property or belonging to a particular ethnic group will do little for those who are born into families that cannot afford to pay university tuition or match the costs of electoral opponents from wealthier families. SEO therefore aims to remedy these and like disadvantages to ensure all can compete fairly on the basis of ability and determination.

Naturally, there are complications here about what degree and measure of equality is required. For even if the government were to subsidise or abolish university fees and grant public funds to electoral candidates, many other inequalities would remain. Some might be able to attain and intergenerationally entrench advantages like hiring private tutors or securing better places through economic or social influence etc. What then is the level of equality required by SEO?

As foreshadowed, it suffices, at least for now, to say that it requires more than formal equality of opportunity and anything less than what might be called **perfect equality of opportunity** whereupon all have "the same likelihood of achieving any social position from birth" (Freeman, 2007, 97). Such a conception would require extreme measures such as entirely randomising the allocation of social positions or abolishing the family and other interventions with private concerns and individual liberties (Ibid., 97-98; Rawls, 1971, 74). Moreover, it would also likely lead to an overall diminished value of opportunity. After all, to re-adapt an example concerning equality of welfare (Dworkin, 2002, 60-61), even if there were some means of curing severe handicaps to allow those persons equal opportunities for employment options normally unavailable to them, where the expense of attaining such perfect equality is extreme it would effectively make the equality an end in itself without meaningful value even for its intended beneficiaries.

In the same vein, SEO cannot extend to unequal regard amongst opportunities and individual values thereof. Consistent with Equal Liberty and Rawls's lexical priority between the two principles of JAF (1971, 244), opportunities cannot trespass upon one another nor be guaranteed where they are foreclosed by personal voluntary choices or those of others (Miller, 2002, 46-47). My opportunity to drive without checking for cyclists cannot override your opportunity to cycle nor can I complain that I have no opportunity to play team sports if no one else wishes to play. And if I freely, albeit unwisely, invested in sports equipment I cannot complain that I now have no opportunity to spend on alternative entertainment for some time.

Within these general qualifications, SEO (as distinguished from formal and perfect) can be seen to favour the narrow approach. So, as just observed, though SEO applies to accommodations and exemptions necessary to remedy inequality of opportunity based on direct discrimination and socio-economic inequalities this does not extend beyond ensuring the opportunity is available and reasonably competitive. For example, free public education along with fair value means of pursuing it like a level of housing, sustenance, and access to requisite learning materials seems plausibly required. As do accommodations and exemptions for disabilities where feasible: signs in braille or wheelchair access ramps to classrooms and exempting guide dogs from prohibitions on animals in public buildings, for instance. Conversely, accommodations like private tuition subsidies for all willing but means-limited, personal sight readers or walkers are arguably not. It is not that they are impermissible, but only that they are not required as a matter of justice. Critically, this is not because of their differential nature. It is not that some who can afford it or are not handicapped would nonetheless like the same public assistance. Rather, they are not required because they go beyond what is strictly necessary to allow the means-limited or handicapped the same set of basic opportunities as the means-endowed or unhandicapped enjoy.

In contrast, where differentiation goes beyond what is necessary to equalise citizens with respect to opportunities the inequalities introduced in differential rights to objectively like conduct or choice sets becomes problematic as a matter of justice. As noted, if most citizens cannot access some narcotic substance or ride helmetless but some can, then SEO and liberal-egalitarian citizenship is undermined. Of course, the costs experienced in relation to the uniform rule may vary considerably: whereas for some caffeine is the only drug necessary and wearing a helmet is hardly any inconvenience, for others there are serious commitments involved and might even render the opportunity like riding a motorcycle altogether too costly to pursue. Barry acknowledges all this, but deems it irrelevant when it comes to SEO because opportunities are inevitably of disparate costs for different citizens: "[p]acifists will presumably regard a career in the military as closed to them; [c]omitted vegetarians are likely to feel the same way about jobs in slaughterhouses" (2001, 35).

That does not mean, however, that pacifists and vegetarians do not, objectively speaking, have the opportunities in question – at least not in the same way as a blind person cannot sight read regular text. We could at least imagine a vegetarian working in a slaughterhouse if necessary to, say, make a point or an experimental documentary but not a blind person (sight) reading.

Therefore, the differentiations of exemptions and accommodations that go beyond SEO, Barry argues, are as irrelevant to liberal-egalitarian justice as what is commonly referred to as 'expensive tastes' (Ibid., 34-35). The problem of expensive tastes (including, preferences or interests) is typically associated with debates about whether liberal-egalitarian justice ought to be concerned with equality of welfare.[134] In essence, expensive tastes require comparatively more resources to be satisfied than an average (as in mainstream) or "ordinary taste" and this leads to the apparent problem that to compensate for this and achieve equality of welfare those in question would need to be allocated considerably more resources than others.

The above examples, however, disclose a similar issue for equality of opportunity. If SEO is to be sensitive to the costs of pursuing opportunity stemming from subjective preferences and beliefs, it would require accommodations and exemptions to remove these costs. Yet, that problematically goes beyond making opportunities available and intrudes on liberal-egalitarian citizenship by de-equalising opportunities. That is, allowing some to do what others cannot rather than enabling some to do what others can.

An important objection is that this construes expensive tastes in narrowly subjective terms. Whilst some "tastes" such as the Islamic *salah* - requiring prayer five times daily - might be expensive simply in terms of the adherence time or opportunity costs, other tastes such as the *halal* (and *kosher*) dietary requirements might only become expensive in combination with external circumstances such as the 'humane slaughter regulations' prohibiting the kind of animal slaughter required to produce *halal* and *kosher* meat (cf. Barry, 2001, 35-36). We can capture this distinction in terms of **intrinsic** versus **extrinsic costs (or burdens)** (cf. Jones, 2020, 121). One might therefore contend that, at least when it comes to extrinsic expensive tastes, accommodations and exemptions are merely remedying the inequality of opportunity created by the general law, not the belief or preference.

Whilst the intrinsic/extrinsic distinction rightly alerts us to a possible injustice within the general law this would be a separate issue to that of whether the accommodation or exemption is required by justice. Indeed, claims for accommodation and exemptions, by their very form, do not seek the repeal of the law as unjust or even illegitimate. Unlike with civil disobedience (at least as Rawls conceives of it (see 1971, §55)), exemptions and accommodations claims accept the law in general but seek to limit its application (Jones, 2016, 527). As such, it need not be denied that many costs are extrinsic or jointly produced by subject and circumstances.

[134] See, notably, Cohen (1989), 912-913; Dworkin (2002), 48-59. For a related discussion, Rawls (1971) 30-31).

For this only indicates that the cost might be transferred from the subject to others. It does not indicate whether it ought to be transferred or how to answer the question of who should bear the costs?

If the law is just and not directly or latently discriminatory, then to the extent that there is SEO in the objective sense traced in Barry's Rawlsian account, the extrinsic nature of the expensive tastes does not make exemptions and accommodations any more required as a matter of justice. The idea here, in essence, is encapsulated in the general operation of antidiscrimination regimes concerning indirect discrimination such when a rule or practice puts some identity or class of persons at a relative disadvantage to others (Ibid., 517). Whilst the disadvantage might make indirect discrimination *pro tanto* wrongful, wrongfulness all things considered depends on whether the rule or practice from which the disadvantage stems is "a proportionate means to achieving a legitimate aim" (Idem.). Since most aims that do not offend direct discrimination or basic rights of others will be legitimate, proportionality of means become key. If the aim could be effectively achieved with means that do not carry the said disadvantages then the proportionality comes into question. Thus, whilst a business might legitimately require employees to work Saturdays, if it also requires this of Sabbatarians despite having other employees that could cover these shifts that looks arguably disproportionate. The opposite, of course, follows if there is a staff shortage or considerable costs to the business or other staff in doing so. Even in the case of equalising opportunities for the disabled there may be limits to what can be accommodated or exempted. For example, even if accessibility can be improved there may nevertheless be inherent requirements of a role that foreclose it to some: hearing requirements for sound engineering or fitness requirements for policing would not fall foul of the above test as indirect discrimination (of the deaf or the unfit). Nor, of course, does the balance of significance here matter. Relative to the claimant's disadvantaged interests, the rule or practice may be relatively less significant but this does not bear on proportionality which measures only the adopted means in relation to legitimate ends (Ibid., 525).

Thus, when it comes to exemptions and accommodations the extrinsic nature and magnitude of the burden or cost for the claimant is not what makes their "taste" expensive. Rather, it is the threat of differentiation to the law's legitimate aims and SEO or liberal-egalitarian citizenship. Sometimes, this is especially acute in the directness of the clash between liberal-egalitarian citizenship and the accommodations or exemptions sought. Consider, for instance, the discrimination laws encountered in the introductory discussion of Folau and like cases of service denials to gay couples or women seeking contraceptive treatments threatening their

equal standing (Hartley & Watson, 2018, 109-111). But even in more subtle or innocuous cases, exemptions and accommodations beyond the narrow approach look peculiar from the liberal-egalitarian perspective. Christine Hartley and Lori Watson summarise as follows:

> [i]f certain principles and laws must be justifiable to all reasonable persons as reasonable… then the idea of an exemption <…> seems peculiar. One requesting an exemption would saying something like "yes, that principle or law is reasonably justifiable to *me* <…>, and yet, given my particular worldview, I should be exempted from compliance (Ibid., 99).

In fact, it is precisely within this justification that the apparent innocuousness of broad approach accommodations and exemptions unravels. To illustrate, consider the Sikh exemption for *kirpans*. Though it is unlike the above discrimination example where the relevant identities lose their equal protection, the exemption is not costless. As Barry emphasises, "[u]nless a knife confers an advantage on its possessor, there is no point in having a law restricting the carrying of knives at all." (2001, 38). Differentiation then inherently conflicts with the rationale for the law: it must be that "unarmed citizens '(pleonastically) suffer adversely' if some other people are going around carrying weapons" (Idem.).

Having set out the core grounding of the narrow approach in the requirements of liberal-egalitarian citizenship and SEO we can conclude by returning to the burden-shifting objection to underscore how, these same principles seem to impugn broad approach accommodation and exemptions.

The earlier distinction between intrinsic and extrinsic burdens led to the question of who ought to bear burdens engendered jointly by individual subjective commitments and objective circumstances whether in the form of laws or free conduct of others. As the previous section demonstrated, salience alone does not provide the answer here. Nor, even more generally as the distinction between salience in general and salience for differential treatment beyond restrictive neutrality had evinced in Chapter 3. Indeed, as underscored by the discussion of indirect discrimination and legitimate rationale of the law, balancing considerations such as the significance of the commitment for the claimant versus the lesser significance for others is arguably beside the point. What matters is whether the rule in question is justified and whether it could effectively achieve its justified rationale whilst not burdening the relevant claimants.

Within the context of liberal-egalitarian citizenship, however, it seems that the differentiation introduced by accommodations and exemptions does lead to such considerations of comparative significance, at least implicitly, when it comes to burden-shifting on the horizontal

plane like in the case below. This creates a further complexity for the broad approach to the advantage of the narrow.

To avoid the more prominent concerns about public rationales versus private commitments, consider a conflict between private commitments. Take, for instance, the case of *Noah v Desrosiers* retold by Jones (2016, 517-18) where a Muslim stylist, Noah, hired by a hair salon refused to remove her headscarf given her religious commitments. For the employer, there were important business interests in stylists displaying their hairstyles as a kind of advertisement for customers. These mutually exclusive interests meant that satisfaction of one burdened the other. Now, as noted, being an indirect discrimination dispute, the central question was the proportionality of the headscarf removal requirement to the apparently legitimate aim of pursuing commercial interests through advertising hairstyles. The weight or significance of the removal of the headscarf for Noah compared to the salon's interest in their mode of advertising was purportedly beside the point. It only mattered that it was not strictly necessary or sufficiently significant that the advertising aims be achieved through this requirement as opposed to some other way.

The degree of confidence in such an assessment is worth contemplating. On the one hand, the proportionality of this requirement to the advertising aims seems less than, say, a requirement to work in closed footwear is for occupational health and safety (OHS) let alone using hair dyes or scissors and hairdryers when servicing clients. On the other hand, it is more proportionate than a requirement to wear sleeveless clothing or sunglasses which seem entirely incoherent with the aim of advertising hairstyles. Thus, setting aside, the extremes of incoherence and strict operational necessity, most assessments of proportionality prove difficult to make, which in turn leads to an implicit reliance on value judgments about the significance of conflicting interests. Suppose Noah were instead conscientiously opposed to working with animal-tested hair products but the salon's preferred product lines failed that standard. How would the proportionality test conclude? Clearly, if substitute compliant products are just as effective then the proportionality of using non-compliant ones might come into question. But then again, suppose the compliant products are pricier or there are other costs to making the switch. To what scale does proportionality stretch and, more importantly, why should it matter? Even if the compliant products are cheaper, there is always the matter of incommensurable subjective and intangible costs to any imposition. After all, there is almost always a way to render proportionality in favour of one claimant or another. Take the apparently clear-cut cases mentioned like the OHS closed footwear requirement. Even there, one might argue that there

is an alternative means to the OHS aim: one might exempt the objector in exchange for their undertaking of the risk and purchasing personal insurance, for instance.

All this simply reveals how proportionality operates as a search for "Pareto improvements" - making conflicting interests compatible or sustained so that some better-off (at least according to their own lights)" without making others "significantly worse off" (Jones, 2016, 528). Problematically though, much depends on interpretation and its limits. The salon was not precluded from other forms of advertising (e.g. photographs, mannequins, willing staff etc.) while Noah could adhere to her religious commitments in carrying out her employment. Yet, as just seen, all that rests on shaky evaluative foundations revealing the tensions between the broad approach and liberal-egalitarianism. If all citizens are equal then, provided their beliefs are not themselves immoral or incompatible with something like equal regard, each belief is on par and cannot be privileged over another. Jones puts it as follows: "[i]f your belief that *p* justifies the imposition upon me of a positive obligation in respect of your belief, why is that obligation not cancelled by my contrary belief that *not-p*?" (Ibid., 521). And so, in any legitimate case, the salon could just as well complain that being compelled to change its mode of advertising, product line, OHS policy or anything else, begs the question: why not instead leave the burden with the objector?

Ultimately, where it is a matter of adjudication or law rather than willing compromise, the evaluation of subjective significance claimed by each side must eventually be resolved by determinations of the scope of the relevant interest. In the present case, that would mean working out whether liberal-egalitarian freedom of conscience and religion entitles Noah to cover her hair and/or face? In parallel, however, there is the question of what the salon proprietors are entitled to in regard to their ends. Hence, as foreshadowed in Chapter 2, the answer to each question must necessarily engage with the other in a relativised scheme of liberties or entitlements thus yielding the problem of horizontal burden-shifting just noted about resolving the conflict one way or another.

Here, the narrow approach appears advantageous in reinforcing the liberal-egalitarian focus on ELC and SEO. Construing the ELC entitlements narrowly as guarding against non-neutrality or direct (including latent) discrimination leaves the conflicting claims to be determined in terms of fairness of SEO or what Jones distinguishes as the non-religious distribuend which often accompanies the religious or other more subjective distribuend (2020, 177). To clarify, the religious or subjective distribuend corresponds to the claimant's intrinsic burden or interest

whereas the non-religious or objective distribuend corresponds to some social primary goods, which the combination of a law and the intrinsic burden might block. In Noah's case, apart from the subjective distribuend of being permitted to wear a headscarf the rule (jointly with Noah's commitment) blocks the objective distribuend to income from employment (where uniform law or other employers impose similar rules).

From the standpoint of the narrow approach, apart from direct discrimination and targeted prohibitions on one's conception of the good, the subjective distribuend is generally satisfied to the extent compatible with the same right of others. Indeed, as Richard Arneson has stressed, integrity, moral freedom or whatever other category of salience there may be, the interest seems fundamentally difficult to impinge given the "ought implies can" constraint:

> [t]aken one way, one can always live one's life fully in harmony with one's moral convictions and commitment <…> Of the acts available for choice at a time, one can always choose the one that best fulfills one's moral convictions, <…> Given the choice of renouncing one's faith or being burned at the stake <…> one can refrain from renouncing. One's subsequent life will be short, but it will be a life lived in full harmony with one's moral convictions (2010, 1016-17).

For Arneson, this underscores the centrality of the objective distribuends such that the extrinsic burdens are not unjust so long as the society within which they occur is organised with SEO and Equal Liberties or the like. In such a society there would be a "moral right against freedom of conscience" or, more generally, a right against the practice of differential rights regimes such as through accommodations and exemptions (Ibid., 1018). Again, it is one thing to oppose a particular rule on grounds of fairness such that it should be amended or annulled for everyone and quite another to claim differential treatment based on an exclusively first-person standpoint of one's entitlements (Ibid., 1025-26). Thus, with the liberal-egalitarian background conditions secured, the horizontal burden-shifting will lose its prominence since there is no requirement of justice to accommodate or exempt for securing subjective distribuends beyond securing against direct discrimination or non-equal rights, not unlike expensive tastes with regard to the vertical plane.

In sum, starting with the core tenets of liberal-egalitarian-citizenship and SEO the narrow approach to the scope of accommodations and exemptions emerges as a natural implication. Where general laws, neutral and uniform in application, might distribute benefits and burdens in various ways, but so long as fairness in equal regard and SEO is preserved, accommodations and exemptions become problematic in several ways. Not only does the differential rights

regime undermine liberal-egalitarian citizenship, but it is superfluous to justice in the manner of the more general problem of "expensive tastes" and even gives rise to the burden-shifting objection. In the last case, it was seen that although differential burdens are an inherent fact of uniform laws managing competing social interactions, taking a broad approach to accommodations and exemptions results in the unenviable dilemma as to which citizens are to bear the burdens between equal claims to salience or in respect of objectively identical conduct. The viability of the broad approach therefore depends on reconciling liberal-egalitarian citizenship with differential rights in a manner that avoids the above charges. Only then might accommodations and exemptions be seen as a requirement of liberal-egalitarian justice. This is explored in the following chapter.

Chapter 5: Defending Difference

Building on the sketch the liberal-egalitarian framework provided in the previous chapter and its purported alignment with the narrow approach, this chapter canvasses arguments for how that framework may instead support the broad approach. As shall emerge, the most promising arguments for the broad approach mirror many features of those seen in favour of the narrow, but with key divergences on the interpretation of the requirements of liberal-egalitarian justice. These divergences prove intractable because they concern foundational premises and value presuppositions or "deep disagreements", as will be explained. This will in turn crystalise in the next chapter as the 'Coherence-Problem' and motivate the lateral solution turning from justice to political legitimacy to be developed in Part III.

5.1 External Perspectives

Before coming to the liberal-egalitarian case for the broad approach, it is worth briefly acknowledging the prominence of the broad approach within theoretical perspectives that oppose or are *external* to the liberal-egalitarian framework. Since it is the liberal-egalitarian commitment to state neutrality that fuelled the Puzzles and much of the motivation for the narrow approach, a straightforward pathway to defending the broad approach is by abandoning or re-interpreting this core liberal-egalitarian commitment. As already noted in discussing Laborde's argument for 'restricted neutrality', neutrality cannot be absolute or entirely value-free. That would be self-defeating, leaving liberalism with no grounds for restricting illiberal or unreasonable doctrines. Neutrality therefore is a distinctly "political virtue" or normative value which prescribes "what legislators<…> *ought* to do" (Waldron, 1993, 155, 157, emphasis added).

Yet, what should be the reason for citizens and legislators to prioritise neutrality over their actually held commitments? Why, in other words, ought one to be neutral between X, Y, Z when one holds only X to be right or true? The answer cannot be political expedience. That would be a fragile and unstable *modus vivendi* that falls short of establishing neutrality upon moral consensus as a normative value (Rawls, 2001, 192 ff.). For Rawls, at least, that moral consensus emerges from the fundamental ideas implicit in the public political culture represented in the constructivist device of the original position as a hypothetical contractualist framework (Ibid., 15-16, 33, 56, 78, 90, 114-134).

5.1.1 Liberal perfectionism

For perfectionist liberals like Joseph Raz, however, this remains underspecified or incoherent. It turns the project of political philosophy into "achieving noncoerced social unity and stability" (Raz, 1990, 14). But "why", Raz asks, "should philosophy contribute to these goals rather than others? Presumably because they are worthwhile goals" (Idem.) And so, Rawls's endeavour to avoid evaluative truths seems nevertheless to accept at least some, like the presuppositions just mentioned. The liberal-perfectionist critique targets this. Why be neutral amongst the various conceptions of the good particularly when it comes to those of little worth or without contribution to human flourishing? Since flourishing or well-being is tied to individuals living autonomously then the point of neutrality need not be about justification at all. It need only ensure an adequate and qualitatively meaningful pluralism of values – these being necessary for cultivating autonomy (Raz, 1986, 378 ff.). In Raz's own words: "it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones" (Ibid., 133). Thus, whilst that does not condone coercive political power except as permitted by something like the Millian 'harm principle' (Ibid., 412 ff.), it permits the state to act non-neutrally to promote or hinder certain conceptions of the good. So, if particular identities or groups are detrimentally affected by a general law, accommodations or exemptions might be an altogether valid solution of ensuring that their value commitments are protected (provided that the interests are not inhibitive of individual autonomy).

5.1.2 Communitarianism

Another notable challenge to liberal-egalitarian neutrality stems from 'communitarianism'. There are many strands of critique within this broad position but one key contention is with liberal-egalitarianism's atomised or radically individualistic conception of the self, which overlooks the collective identity of individuals as members of a 'community' and participants in communal, social life. Whilst liberal-egalitarianism can be recast, as Rawls shows, in terms of a *political* conception grounded in the implicit fundamental ideas of public democratic culture, this still remains a far too monolithic form of political community, preserving the privatised, unencumbered or atomistic conception of the self (Forst, 2002, 89, 110-111). Real, socio-historical, political communities are not like that, but comprised of multiple cultures in which individual are embedded and encumbered with socio-cultural identities as members of families, ethnicities, religious and perhaps national or other sub-cultures or groups.

If that is correct, the principles of justice should be more accommodating of community values and cultural differences. For example, while the surveyed liberal state-practice was construed as at odds with liberal-egalitarian political morality, from a communitarian perspective, with no overriding commitment to neutrality, the particularism of a political community's affinity for religious freedom might suffice to justify the practice.

5.1.3 Multiculturalism

Both liberal-perfectionism and communitarianism have therefore provided the theoretical resources through which liberal-egalitarian citizenship and its alignment with the narrow approach may be challenged. That, however, is not to say that either liberal-perfectionism or communitarianism cannot support the narrow approach on their distinctive grounds. Accordingly, these non-liberal-egalitarian perspectives in favour of the broad approach - whether grounded in liberal-perfectionism or communitarianism - have often been bundled together within the more general normative position of '**multiculturalism**'.

Multiculturalism concerns more than just specifically accommodations and/or exemptions. It encompasses an array of contested political and socio-cultural responses to the fact of cultural diversity or pluralism [135] – rather confusingly, also referred to as multiculturalism in contemporary public discourse (Balint & Lenard, 2022, 4-6). It has therefore become commonplace to distinguish between the normative or evaluative and factual or descriptive uses of the term (Horton, 1993, Kelly, 2002, Parekh, 2006, Song, 2020). Reflecting this, I will use 'multiculturalism' exclusively in the normative sense and refer to the descriptive sense as 'cultural diversity' (or plurality).

A further clarification should also be made about scope. Insofar as it refers to the fact of difference and its recognition in socially-mediated categories, cultural diversity appears to be a timeless and universal phenomenon. Differences between male and female sexes and their gendered norms, for example, have been a "basic building block of social organisation" in every society as have differences and concomitant expectations around age, ability, and relations of marriage or kinship (Barry, 2001, 19-20). The heightened social and political self-consciousness of cultural diversity, however, is a more contemporary development as reflected in the nascence of 'multiculturalism' theoretically and politically in Western liberal democracies of the 1960s and 70s (Raz, 1998b, 194-195; Kelly, 2002, 1-3; Crowder, 2013, 10).

[135] For a sample list of potential policy responses see Banting et. al. (2006), 56-57 (reproduced in Crowder (2013), 10) or Raz (1998b) 198-199.

As Paul Kelly reflects: [a]ll of human history has seen the movement of people across the face of the earth, but only in relatively recent times has this movement been characterised as 'border crossing'" (2002, 1).

5.1.3.1 Culture: the core and expansive conceptions

Multiculturalism then has been most prominently associated with its contemporary challenges of post-colonial migration and indigenous or national minority self-determination movements respectively corresponding to Will Kymlicka's seminal distinction between *polyethnic* and *multination* states (i.e. circumstances that can be simultaneously present in a single sovereign state) (1995, 6-7, 10-26). Whilst these are crucially different challenges with distinct solutions, or so Kymlicka argues (Ibid., 17), they both belong to a narrower, albeit common or emblematic, conception of culture loosely centred on observable practice or lifestyle differences attending ethnic, religious and (minority) national groups. Something like this conception of culture has been at the core of multiculturalism (Song, 2020).

Nevertheless, multiculturalism has also been associated with a more expansive reach represented by labels like the 'politics of difference' or 'recognition' (Idem.) reflecting a broader conception of culture that would include minorities or marginalised identities like LGBTQI+, women, blacks, persons with disabilities, or even "working class, atheists, and Communists" (Kymlicka, 1995, 18). This attests to the problematically amorphous concept of 'culture' that compounds multiple identities and discrete categories of concern (e.g. religion, language, race, ethnicity etc.) (Lenard, 2020, 35-39; Song, 2009, 177). Bhikhu Parekh has even proposed disaggregating cultural diversity into three principal forms: 'subcultural', 'perspectival', 'communal' (2006, 3-4).

Not to further delve into these conceptual analyses, I will adopt the more expansive view, taking '**culture**' (and its cognates) in the broadest possible sense, encompassing ethnic, gendered, religious, doxastic, and multiple other identities and practices. This seems appropriate not just because it fits with the non-category specific concerns of the Justificatory-Puzzle, but also since the remaining discussion will not be concerned with multiculturalism per se nor even all its principal forms. Rather, it will be a specific version of multiculturalism to be introduced in the following section as an 'internal perspective' to the liberal-egalitarian framework.

5.1.3.2 Summative Remarks

To conclude this section, we can summarise the general challenge of multiculturalism to liberal-egalitarianism – or, rather its (standard) interpretation as the narrow approach – and note its perfectionist and communitarian underpinnings. A useful formulation is offered by Kelly:

> even where resources and opportunities are equal, the members of a group are entitled to special rights if their distinctive culture puts them in a position such that they are in some ways less well placed to benefit from the exercise of the rights that provide the standard resources and opportunities than are others (2002, 5).

Consistent with everything said above, the entitlement to special or differential rights may be posited from either liberal-perfectionist or communitarian standpoints. Thus, in relation to the first, for example, Raz advances multiculturalism in connection with the "interdependence of individual well-being and the prosperity of the cultural group" and "value pluralism" which are the necessary ends and means of liberalism or individual freedom (1994, 174, 175-178). Meanwhile, in relation to the second, Taylor emphasises the communal character of identity towards which liberal-egalitarian citizenship as equal regard amongst individuals proves inadequate and inhospitable (1994, 28-32, 38-39, 43, 60-61).

As said, these external perspectives avoid the Justificatory-Puzzle (and Salience-Demarcation Puzzle) by abandoning the liberal-egalitarian framework in its commitment to a robust form of neutrality. They are only of interest therefore in reinforcing the connection between the Puzzles and liberal-egalitarianism and highlighting the distinctiveness of the internal perspectives in favour of the broad approach.

In light of that, one might crucially wonder about the value of studying these Puzzles when perhaps it is a defence of liberal-egalitarian commitments that should be the focus. Since the rationale for liberal-egalitarianism will be detailed in Part III, my provisional reply here can be stated by way of two points. First, whatever advantages external perspectives might offer, it remains valuable to understand the internal logic of any framework in addressing its own complications. Second, as the next section will show, there is room to argue that liberal-egalitarianism can embrace a multiculturalist form in response without morphing into perfectionism or communitarianism.

5.2 Internal Perspectives

How then might liberal-egalitarianism be redeployed in support of the broad approach to accommodations and exemptions?

5.2.1 Luck-Egalitarianism

One influential corrective to the Rawlsian picture of the narrow approach presented is what has come to be (pejoratively) labelled *luck-egalitarianism* (Anderson, 1999, 289). Being a pervasive force in human affairs, luck can greatly alter individuals' distributive shares in various ways. A brilliant investment plan before a global pandemic might prove unfortunate thereafter or, in the case of, say, sanitary products, vice versa. A terrible mentor may derail one's career prospects that under a remarkable mentor would have skyrocketed and so on. Accordingly, whilst they differ on specifics about the relevant forms of luck and 'metric' or 'currency' by which those effects are to be measured and adjusted, luck-egalitarians are united in their concern with compensating or otherwise accounting for the effects of luck on distributive justice (Knight, 2013, 924).

Some luck – whether good or bad – will be irrelevant or indifferently-positioned with regard to distributive desert whereas other forms of luck will not. The standard dichotomy revolves around agency or between that which is a product of *choice* (for which agents are responsible) and that which is a product of *chance* or *circumstance* (for which agents are not responsible) (Ibid., 925). These very roughly correspond to Dworkin's famous labels: **option luck** and **brute luck**, respectively (2002, 73 ff.). The intuitive appeal of all this can be seen in the previously discussed Rawlsian move from formal equality of opportunity to SEO, which aimed to correct the insensitivity of the first to unequal competition due to various natural and socio-economic (dis)advantages. Disabled facilities, welfare payments and publicly-funded education or electoral support, for instance, would all mitigate the effects of bad brute luck such as being born with a disability or into a low-income family. Likewise, taxing higher-income earners might be justified on the basis that some of their wealth is a consequence of (underserved) brute luck. It would not, however, extend to measures to counteract the consequences of option luck or choice such as to forgo the educational opportunities available to them. Compensating option luck would, after all, be the equivalent of subsidising 'expensive tastes', which, as noted, Rawls treats as irrelevant to SEO.

Yet, if these luck-based principles motivate Rawls's Socio-Economic Principle, then there are a number of inadequacies and inconsistencies from the luck-egalitarian perspective. Despite mitigating for family socio-economic circumstances and certain disabilities, the Socio-Economic Principle offers no provision for other chance differences in quality of health, natural intelligence or aptitude and talents which would, after all, be brute luck or "the outcome of the natural lottery" and "arbitrary from the moral point of view" (Rawls, 1971, 74 311-312). Meanwhile, if 'expensive tastes' do not warrant subsidies as chosen or option-luck, then the difference principle looks inconsistent in compensating the disadvantaged without regard to whether it might be purely a result of option luck such as refusing to re-train to gain (higher-wage) employment in a competitive job market. In short, the Socio-Economic Principle seems both over- and under-sensitive to the chance/choice distinction: sometimes undercompensating chance, sometimes overcompensating choice (Munoz-Dardé, 2015, 473-475).

The charge of inadequacy and inconsistency here, however, question-beggingly assumes that Rawlsians, and liberal-egalitarians more generally, are implicitly committed to luck-egalitarian principles. Yet, above appearances notwithstanding, this is far from certain. In fact, Rawls explicitly states that "the difference principle is not a principle of redress. It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race" (1971, 101). And, as Véronique Munoz-Dardé explains, there is no aim to neutralise the effects of brute luck, only to ensure that they do not become integrated as institutional or systematic disadvantages given their moral arbitrariness (2015, 475 ff.).

Exegetical matters aside, luck-egalitarianism does disclose avenues towards the broad approach to accommodations and exemptions on the liberal-egalitarian framework. If justice requires the rectification of brute luck (dis)advantages then differential rights might be justifiable in such cases. The previous chapter and point above have challenged that requirement, but even if it is granted, complications remain as to how exactly one is to discern the effects of brute luck and what the relevant metric or currency of equality by which to redress these effects. To see this, we need to consider a possible application of luck-egalitarianism to accommodations and exemptions. Needless to say, the literature on multiculturalism is vast and my selective focus will necessarily emphasise accounts more readily relatable to the liberal-egalitarian framework and proposed multiculturalist (re)interpretations thereof.

5.2.2 Luck-Multiculturalism

An innovative form of liberal-egalitarian multiculturalism with luck-egalitarian considerations is offered by Will Kymlicka. I will borrow the label **luck-multiculturalism** from Quong (2006) to discuss this hybrid position. In contrast to the multiculturalism of the external perspectives reviewed earlier, Kymlicka takes an instrumental understanding of culture as a resource necessary for the exercise of individual autonomy.

Importantly, autonomy here is not an end in the liberal-perfectionist sense but a capacity to rationally form or choose and pursue a life plan as well as being able to revise it (Kymlicka, 1995, 92-93). Culture not only furnishes options for the exercise of autonomy but renders them meaningful to us by providing, as it were, a "context of choice" within which to lead and scrutinise one's life "from the inside" (Kymlicka, 1989, 12-13; 1995, 81-82). This instrumental or ***resourcist*** conception of culture essentially makes it a primary good, "which people need, regardless of their particular chosen way of life" (1995, 214, n. 11). It follows that culture, like primary goods can be the subject of distributive justice.

From there, Kymlicka argues that liberal-egalitarian citizenship requires more than the narrow approach or protecting only basic associational rights - viz. freedoms of assembly/movement/speech/conscience/religion. These difference-blind rights are inadequate to protect culturally-specific interests marginalised by institutional practices of the dominant societal culture. Only the broad approach can address the burdens-inequality in such cases. Thus, if the above is correct and culture is a kind of primary good, then the broad approach seems necessary to ensure justice of equal access, especially where the inequality is not deserved or cured by being a product of choice or option luck.

Now there may be complications here as to just how one draws the distinction between brute and option luck. Being a post-colonial national minority culture is certainly not chosen, but immigration (excluding refugee asylum-seekers) is generally a matter of choice and therefore the culturally resulting burdens are a form of deserved bad luck not entitled to redress as a matter of justice (Quong, 2006, 55). Then again, just what is actually chosen can be a matter of dispute, as we shall further below, and in any case, much of this will probably be irrelevant beyond the first generation of immigrants (or even at all (Lippert-Rasmussen, 2011, 181 ff.)).

The more challenging objection targets the relevance of having equal access to one's *own* culture as opposed to another (dominant) culture? If culture holds value as a resource, the specificity of culture is not, strictly speaking, relevant (Ibid., 54-55; Waldron, 1992, 783-784)

and nor therefore are group-differentiated rights. Assimilation into the dominant culture could just as well furnish its specific meanings and valuable options for one's self-determination.

In response, Kymlicka stresses the magnitude of cultural bonds and the various injuries to self-respect that cultural severance carries (1995, 84-94). Certainly, cultural displacement or assimilation may be deeply burdensome, perhaps even destructive of one's whole sense of identity (Margalit & Raz, 1990, 447-449). Drawing on Kymlicka's linguistic metaphor of culture as "shared vocabulary" (Ibid., 103), we can at the very least (and rather synecdochally) compare it to the struggles of learning to operate in a foreign language. Yet, even accepting all this, the response proves inadequate. Apart from the well-known complications about acting on cultural reasons (Scheffler, 2007) or individuating a culture without reifying or essentialising in denial of its adaptive fluidity (Waldron, 1992), the response is inconsistent with Kymlicka's own resourcist position. When, in principle, any culture suffices, the insistence on a particular culture implicitly relies on extraneous non-instrumental considerations no matter how independently persuasive they may be.

5.2.2.1 Currencies of justice

The above connects to an important parallel problem about the *metric* or *currency* of distributive justice. By invoking the costs of assimilation, Kymlicka seems to treat culture no longer as just a resource, transitioning instead to considerations about outcomes or welfare. To get a grip on this, consider the difference between something like healthcare and health. Where some are unable to afford medical treatment because of bad brute luck, luck-egalitarianism might require a certain level of free healthcare – for example, a range of conventional treatments. Suppose, however, that benefiting from this, some citizens affected by bad brute luck are still struggling to maintain an average level of health. What shall we say here? Unless we are specifically concerned with attaining an equality of *welfare*, the resourcist view has little more to offer. The continued effects of bad brute luck on *health* notwithstanding, distributive justice as to the *resource* – equal *healthcare* – has already been fulfilled. Outcome inequalities are supererogatory to justice even if important pragmatically or charitably.

Given that members of minority cultures will be similarly dissatisfied with the burdens of accessing majority societal culture – all of which stands orthogonal as to whether equality of access to that societal culture is equal (for example, through generous assimilation programmes) – could Kymlicka's account perhaps fare better by adopting the ***welfarist*** currency of luck-egalitarian justice?

The above proposal returns us to the problem discussed in the previous chapter about expensive tastes. As explained, these so-called tastes are not expensive in some absolute sense as, say, the intrinsically costly time and opportunity costs of an elaborate daily routine or worship ritual. Nor are they expensive in the sense of being illegitimate or unreasonable even in relative terms within some framework like Equal Liberties where interests incompatible with the same right of others would be excluded or mutually limited through balancing, for instance. Rather, the expensiveness is relative to some mainstream or "ordinary tastes". Thus, in the earlier example comparing health and healthcare, the welfare or health outcomes might become more "expensive" where they require a vastly greater share of social resources to satisfy.

Recall Dworkin's example of the severe handicap (2002, 60-61). Suppose there were some machine that could improve the patient's health or welfare to some satisfactorily averaged level but the machine consumed so much energy beyond what could be generated that it would mean cutting power from all other uses. It is the problem of scarcity and the interests of others makes this an expensive equalisation. Again, relativity is in play here. Were there no scarcity but rather a utopian scenario of infinite resources, for example, health outcomes could be feasibly equalised. And as a matter of justice too: since without diverting anyone's share of resources, such interests of others would not be affected. Still, the stipulated costlessness notwithstanding, whether justice actually requires welfare equality remains questionable. Tastes could still be expensive in the sense of being supererogatory to justice even if not expensive in terms of feasibility or legitimate interests of others. The difference here is important because, while feasibility considerations can be stipulated in various ways and might even interact with justice, treating expensive tastes as those supererogatory to justice begs the question by presupposing precisely that which is in dispute.

Before coming to that dispute more directly, it is worth noting that even limiting ourselves to ideal theory where feasibility can be favourably hypothesised, the considerations of culture are not so compliant as the purely economic example just made. That is, even in the utopian scenario of limitless resources, natural and cultural variations complicate determinations of feasibility insofar as they are constituent of it. The very same objective conduct and its regulation may be regarded with vastly different cultural meaning (Waldron, 2002b, 4). Accordingly, when it comes to culture, welfare outcomes will remain unstable in an interdependent way no matter how a uniform rule or law is fashioned. Law, as noted, inherently alters the totality of interests in any area of social interaction with disparate effect but not thereby unjustly (Nozick, 1974, 272-273; Barry, 2001, 34-35; Arneson, 2010, 1021 ff.). It is

no objection to nuisance laws that they severely affect incessant party-goers or favour those seeking repose. Likewise, it is inconsequential that criminalising drink driving will restrict 'drink-drivers' but not teetotallers. Or that speed limits mostly affect those with a penchant for fast driving and smoke-free zones only affect smokers and so on (Barry, 2001, 34-35).

Variations in welfare cannot therefore all be problematic for justice. The very notion of option luck already serves to illustrate as much by excluding various outcome inequalities which individuals are held responsible to bear. Returning to the question of expensive tastes and justice then, it seems that the disagreement over currency as well as the characterisation between brute and option luck or even the relevance of luck itself can all affect the designation of a taste as "expensive". (Or, relatedly, whether an expensive taste ought to be nonetheless addressed as a requirement of justice.). Recall the earlier ABC company case where all staff had an equivalent amount of paid annual leave proportionate to hours worked. That non-discriminatory formula satisfies the narrow approach such that even pure brute luck like some having to work harder or longer to accumulate the same leave or failing to gain the same level of rest or personal satisfaction from the identical period of leave would be irrelevant. The *equality* of their *opportunity* for paid time off would be unaffected. In short, presupposing a resourcist currency of justice, those like Barry can argue that equivalent "purchasing power" (2001, 35) renders welfare considerations superfluous as expensive tastes irrespective of how engendered between brute or option luck.

5.2.2.2 Luck and Deep-Disagreements

But then the problem of expensive tastes either merges into the disagreement over the proper currency of justice or remains suspended in disputes about the relative baseline from which to refine either currency model whereupon luck or other considerations like feasibility might be determinative. Either way, the disagreements seem to reach into key theoretical presuppositions about value or foundational premises about what justice requires. I will call these **Deep-Disagreements**. Since I only mean to track Deep-Disagreements (resolution being a seemingly out of reach), I simply note how the dispute about currency appears to have these features and move to considering a parallel problem for luck itself.

Understandably, there is an intuitive plausibility to the idea that agents are responsible for the distributive fallout of their choices but deserve to be rescued from unfortunate accidents of chance. But, regardless of which currency is adopted, the idea of purely brute or purely option luck seems quite elusive and unstable, which makes it difficult to see why distributive justice

ought to be sensitive to such problematic distinctions. By way of illustration, consider Quong's case of "Dan" (2006, 57), a political philosopher with a penchant for opera. Dan's preference is relatively inexpensive in the city where opera is widely available. It turns out, however, that his dream profession is being a vet. This requires a countryside change. Yet, this relocation proves rather costly for Dan in relation to his preference for opera, which away from the city becomes a far more expensive enjoyment. Dan's case is an instance of extrinsic burden discussed in the previous chapter and again illustrates that expensiveness is contextual. Even taking Dan's preferences to be biologically or otherwise hard-determined, their "expensiveness" is not a result of choice or chance per se. This is because, on a deeper assessment, his taste for opera is expensive regardless of his choice to stay or relocate. Although opera is fiscally cheaper in the city, it is still an expensive taste inasmuch as it costs Dan to compromise on his sought-after career - itself an expensive taste by a parallel trade-off. Being a (rural) vet costs more vis-à-vis opera; cheaper opera costs more vis-à-vis compromising his career dreams and being city-bound.

Nor, besides the expensiveness, is it all that certain that choice itself (as option luck) should eliminate the requirement to compensate Dan's circumstantial troubles. This is because choices, even when freely embraced, are always in some sense responsive or adaptive to circumstance. It is not simply that none of us choses the primordial traits that coalesce into identity, but rather that navigating our identities through the social world via choices is not convincingly a matter of option luck. Often, it a result of "adaptive preferences" (Mendus, 2002a, 42). Thus, perhaps Dan's desire to be a vet is really just reactionary to the decay of modern life in late capitalism or the like. Either way, both the expensiveness of choices and the distinction between brute and option luck appears unstable and elusive because it requires a pre-institutional foundation (Idem.). Once more, this succumbs to Deep-Disagreement along with the case for consequent distributive entitlement, whichever pre-institutional cut of choice/chance one adopts.

5.2.3 Multiculturalism Relational and Dialogical

Given these complications with luck-multiculturalism, some have sought an alternative foundation that avoids luck altogether. Influential critiques of luck-egalitarianism from Sammuel Scheffler (2003, 21-24) and Elizabeth Anderson (1999, 313-314) advance "relational" equality as the more advantageous alternative for liberal-egalitarian justice.[136] The point of

[136] That, of course, need not mean that the two are mutually exclusive or incompatible (see Kolodny, 2014, 294, n.5)

equality, Anderson argues, is not correcting the distributive effects of luck or natural order but rather ensuring reciprocally respectful relations: distribution of goods aims for, flows from or is constitutive of such relations amongst equal citizens (Idem.). Recognising the above-described contextuality of expensive tastes and the problem of adaptive preferences or the difficulty of formulating non-oppressive, pre-institutional judgments of what properly constitutes chance/brute luck and choice/option luck, this *relational-egalitarian* approach looks to eschew these subjective value judgments in favour of an objective test for disadvantage in social structures (Ibid., 334-335).

No less than multiculturalism, *relational egalitarianism* encompasses a vast literature meaning that there are numerous specific proposals for what this requires amongst which is the liberal-egalitarian citizenship or SEO discussed in relation to the narrow approach. Here, I want to briefly sample two proposals as to how relational-egalitarianism might apply to culture in support of multiculturalism or the broad approach to accommodations and exemptions.

One such proposal, made by Jonathan Seglow, stresses integrity of identity as the vital test for mutual respect or relational equality amongst citizens (2019, 26 ff.). Seglow argues that since identity and its costs are both circumstantial and adaptive or revisable, liberal-egalitarian citizenship requires independent normative principles for determining how these costs are to be distributed in a fair framework of social cooperation amongst equals (Ibid., 18-20, 25-26). Integrity provides the answer because of its "agent-neutral value" and "another-regarding dimension" (Ibid., 28-29). To elaborate, the straightforward resourcist response to expensive taste – namely, the narrow approach – unfairly imposes greater burdens on some identities over others with regard to their participation with equal "full standing" within the same cooperative scheme (Ibid., 29). This is inconsistent with respecting them as equals (Idem.).

Whilst all this sounds generally plausible, it is doubtful that integrity has much relevance to the proposal nor that it necessarily sanctions the differential rights regime of the broad approach. The various earlier-noted problems of integrity all apply here: its contestable definition, problem of basis, and problematic perfectionism discussed in Chapter 3, along with its consistency with the narrow approach discussed in Chapter 4 (cf. Arneson, 2010, 1016-17). Meanwhile, given the parallel possibility of relying on integrity in the burden-shifting objection to differential rights, it may seem that Seglow's proposal is, at best, a defence of ensuring all citizens are able to equally access opportunities for social primary goods. But this is consistent with the narrow approach and so does not necessarily require the differential rights of the broad.

Seglow's response to objections about accommodating the illiberal or doctrinaire identities reveals as much with his moderating qualifications of integrity as being about "reasonable" identities and the pro tanto nature of the claims. Indeed, when it comes to "difficult cases" integrity offers little more guidance of principle than ensuring that general uniform laws do not undermine "key interests" (2019, 31-32; 34-35).

This suggests that integrity may be an unnecessary distraction from the underlying concern as to whether the minimal requirements of relational equality require broad approach accommodations and exemptions. An argument in the affirmative has been presented by Andrew Shorten whose account seeks to enhance the relational approach with a threshold requirement called "basic interests" that makes unequal burdens unacceptable (2010, 110-111). Conscious of the problems with basis or contentious value judgments in specific categories of salience for differential rights, Shorten posits a wider view whereby the content of basic interests is specified by relational effects or implications for liberal-egalitarian citizenship or "democratic equality" (Ibid., 114). Integral to this is the primary good of self-respect which may in certain conditions trigger "excusable envy" where the denial of some option or opportunity for some but not others causes injury or loss of self-respect (Ibid., 114). The broad approach will therefore be justified when basic interests are at stake which is determined by four necessary conditions (Ibid., 115-117). First, the options or opportunities lost must be distinctive to the claimant or a "special burden" or (dis)value to them. Second, it must be that in the absence of the law or rule the opportunity would be available. Third, it must affect relational equality or standing in relation to fellow citizens. Fourth, it must trigger alienation or "being 'torn' between cultural commitments and obligations towards the political community" (Ibid., 116) as "rival sources of normative authority" (Ibid., 117).

The third and fourth conditions are affected by considerable ambiguity. The third condition seems to require that the special burden impacts the burdened party's ability to perceive themselves as an equal citizen. A suggested case is the disregard shown toward minorities via legal pressures to integrate into the majority norms or the neglect of the group's interests in forming those norms (Ibid., 115). The complication, of course, is ascertaining when that occurs. Entirely subjective standards are volatile and beholden to exploitation by radical perspectives whereas an objective standard is both elusive and potentially reinforcing of the oppressive norms. Once more, reasonableness becomes key. Working out what is reasonable, however, depends on democratic dialogue not unlike the "dialogical consensus" model suggested by

Parekh for resolving demarcation problems such as those with luck-egalitarianism or his own notion of deep moral loss (2006, 241-242, 266-294).

Although Shorten insists that ascertaining special burden threats to relational equality is a "narrower question" than that of salience of various demarcating categories, he is not entirely clear about why that makes it more appropriate for dialogical resolution (2010, 116). To the extent that the narrow approach is also conscious of preventing publicly unjustifiable impositions and latent majoritarian prejudice or discrimination, it seems entirely capable of satisfying "reasonable" relational equality. Therefore, "reasonableness" will not necessarily exclude the narrow approach in favour of the broad.

A similar problem arises for the fourth condition. For although being torn between rival normative authorities may well be taxing on self-respect, alienating or straining one's commitment to the fair system of social cooperation, this only matters for reasonable cases, not illiberal or fundamentalist conflicts. Yet, if the rule is reasonable the strain or alienation cannot be of the severity suggested. Reasonableness will become clearer in Part III, but it suffices to say here that, by definition, reasonableness passes some normative threshold to preserve self-respect through reciprocal acceptability of the rule.

In sum, while the basic interests approach is certainly helpful in avoiding contentious demarcations or categories of salience by linking the justification for differential rights to relational equality itself its many ambiguities and appeal to dialogical determinations based on reasonableness makes it arguably consistent with the narrow approach of protecting from direct or latent discriminations. Thus, for all its radical reversals of the luck-egalitarian conceptions of distributive justice, relational-egalitarianism does not escape its own Deep-Disagreements even on threshold matters within the dialogical set-up as to what is reasonably required for relational equality.

5.2.4 Substantive Equality of Opportunity: A Broad Revision

Having seen how the liberal-egalitarian framework presented in the previous chapter in the Rawlsian account can resist luck-egalitarianism and is not necessarily in conflict with relational-egalitarian intuitions, perhaps the most direct way of arguing for the broad approach is an interpretive strategy. As noted, the Rawlsian account is not necessarily committed to the narrow approach as presented in the previous chapter. An effective strategy for the broad approach might then grant the key premises like SEO, but show them to necessitate a broad approach.

As the earlier discussion on the currency of liberal-egalitarian justice revealed, opportunity contends with welfare or outcomes. Since equalising welfare might require accommodations and exemptions to compensate for disparate impacts of general laws, proponents of the narrow approach like Arneson and Barry have favoured opportunity, the substantial equalisation of which relegates remaining disparities to the province of expensive tastes. That dispute on currency formed one of the Deep-Disagreements encountered so far. Yet, even if we were to eliminate this and the other Deep-Disagreement about the relevance and demarcation of luck, the concept of opportunity thus isolated nevertheless leads to its own Deep-Disagreement.

Recall that for Barry cases like the Sikh helmet exemptions or the Judaic/Islamic exemptions for *shechita*/*tadhkiya* to humane slaughter laws are classed as concerns with equalising welfare or expensive tastes. The law, according to Barry, does not foreclose their opportunity to ride motorcycles or slaughter animals for meat consumption any more than, say, butchery job requirements to process meats forecloses that career for vegan objectors (2001, 35). That is, the opportunity remains open so long as one is willing to avail oneself of it.[137]

5.2.4.1 Opportunity: Subject-dependent or objective?[138]

One might, however, question this depiction. Notably, Parekh has stressed that seeing opportunity in Barry's manner fails to appropriately respect cultural difference and the subject as bearer of that cultural identity (2006, 240-241). No matter how robust its commitment to neutrality, the liberal state cannot accomplish cultural neutrality because it cannot avoid embodying a societal culture (Ibid., 110, 201-202; Kymlicka, 1995, 111). Patten describes this aptly in terms of "cultural format" being the cultural forms through which public institutions are inevitably constituted (2014, 169). State institutions cannot, for example, operate without language or in every possible language, meaning that some official language(s) will be chosen to the exclusion of others (Ibid., 159-160; Kymlicka, 1995, 111-117). Similarly, political decision-making will require some procedural forms such as voting methods, electoral division, constitutional setup and so forth which affects representation of different groups and their cultural interests (Idem.).

Whilst this is sometimes characterised an important disanalogy between culture and religion – namely that unlike religion which can be privatized and disestablished no such neutrality exists for culture (Kymlicka, 1995, 111; Patten, 2014, 169), such a conclusion is premature given the

[137] Indeed, some Jews and Muslims have in fact changed their consumption to fit the law (see Barry, 2001, 35).
[138] This and the following subsection draws on my earlier work in Leontiev (2020).

many ways in which culture and religion are entwined (Jones, 2020, xviii, xxvi). An obvious case is public holidays many of which are originally religious festivals that have diversified into cultural traditions. Hence, disestablishment will not necessarily avoid this and like hybrid religious-cultural formatting[139] and so I will adhere to 'culture', as earlier defined.

Returning to the main thread, the impossibility of cultural neutrality in turn impacts specifically on how we construe opportunity. Consider, for example, the notion of opportunity in relation to the law of duress in marriage, typically stipulated in terms of a threat of imminent danger to life and liberty (Parekh, 2006, 248). This, Parekh contends, is culturally formatted to a Western family context and thereby culturally insensitive to certain non-Western family norms such as the threat of ostracism for refusal to marry, which is arguably sufficiently like duress despite being outside the stated definition (Idem.). In such a case, the definition of duress is effectively presuming an opportunity to refuse when in actual fact it might not be practically available not unlike in the way it is unavailable by appeal to the recognised form of duress. The presumed opportunity to refuse thus precludes the legal remedy of annulment outside the recognised form of duress.

These observations raise a challenge to Barry's depiction of opportunity in the relevant cases. On a culturally sensitive assessment, whereas, for some, the helmet laws foreclose the opportunity to (lawfully) ride motorcycles helmetless, for Sikhs, whose religious-cultural commitments preclude compliance, this is equivalent of foreclosing the opportunity to (lawfully) ride motorcycles altogether. In Parekh's summation:

> [o]pportunity is a subject-dependent concept<…> a course of action is only a mute and passive possibility and not an opportunity for an individual is she lacks the capacity, the cultural disposition or the necessary cultural knowledge to take advantage of it (Ibid., 241)

On this *subject-dependent* view of opportunity, cultural incapacity is for all practical purposes like physical incapacity. From the subject's point of view, sufficiently stringent cultural commitments are isomorphic to physical impairments inasmuch as one is hindered from availing themselves of the opportunity, perhaps even at considerable loss. Setting the plausibility of this comparison temporarily aside, there is at least the following consideration in support of this view over Barry's.

[139] Other prominent examples might be within family law (e.g. marriage and divorce), regulation of sex (e.g. age of consent, sodomy etc.), and bodily harm (e.g. circumcision).

Compare the original cases discussed with a modified version in which the relevant groups could lawfully engage in the relevant activity but only by paying a special levy or higher insurance premiums. In other words, the law permits helmetless riding or *shechita* and *tadhkiya* but imposes a hefty monetary premium. Surely, one might contend, this is the more accurate rendering of the expensive taste problem. After all, it is this version that more truly represents identical choice sets at differential costs. Has Barry then misrepresented the original version examples as being about welfare when they are in fact about opportunities? Does this not mean that his own commitment to SEO can at best only defend the modified version of the law but not the original?

Barry's response here is that there are in fact no material differences between the original and modified cases. Paying a premium and modifying or contravening one's deeply held commitments might sound very different but both are alike in that they are concerned with outcomes rather than opportunity. The key is the earlier comparison to physical incapacity. An individual unable to drive due to disability is distinct in their lack of opportunity from both an individual whose faith forbids driving and one who simply refuses to drive (Barry, 2001, 36-37) Only the disability case is a true no-choice scenario (Idem.).

Yet, surely certain cultural commitments especially those of faith are likewise unchosen. Even if one has willingly adopted some doctrine or converted to a particular religion there is room to argue that these authentically made choices stem from prior unchosen beliefs or revelations. Perhaps so, but then again beliefs and preferences are, in principle, revisable in ways disabilities are not. Being sensitive to evidence and reasons, people are able to scrutinise their beliefs and change them just as they can cultivate or change their preferences (Ibid., 36). Still, one might retort, all that does not mean one will necessarily succeed in the revisionary endeavour. Much like disabilities, beliefs and preferences are not entirely subject to the will (Idem.).

Whichever way one is inclined on these matters, however, actually proves irrelevant because whereas all that concerns the proper characterisation of a subject-dependent conception of opportunity, Barry is only really interested in an objective conception of opportunity (Mendus, 2002a, 33). That, however, should not be misconstrued as being about beliefs and preferences being chanced or unchosen.[140] Whereas the dispute about what is chosen or unchosen applies to the subject's encumbrance, what Barry is interested in is whether the encumbrance is really

[140] For Barry's corrective reply to Mendus on this point see Barry (2002), 215.

an *encumbrance to realising the opportunity*. Objectively-speaking, the disabled individual cannot drive at any cost, but the religious adherent (not to mention the merely reluctant individual) can, as a matter of fact, do so albeit at significant personal, even spiritual cost. Indeed, it is only the magnitude of the cost by which the reluctant varies from the religiously-encumbered. Opportunity is objectively there for both alike. And so, the crucial point is that a believer *can* avail themselves of the opportunity to drive (by violating their creed), yet the disabled person cannot avail themselves at all. Their (lack of) opportunity is not subject-dependent, but *objective*. Upon this, Barry concludes that it is not the law that prevents Sikhs from riding motorcycles, but the tenets of their religion (2001, 45); it is not the humane slaughter legislation but the adherence to *kosher* and *halal* norms that (choice notwithstanding) prevent consumption of legally-slaughtered animal products (Ibid., 35).

Barry's objective view of opportunity is certainly stringent. Surely, an opportunity only available at severe personal (or spiritual) cost is not a genuine opportunity at all. Indeed, this is precisely why some have seen certain deep commitments as genuine normative barriers to action distinguishable from mere preferences like that of a free-spirit biker who could wear a helmet but would simply rather not so as to gain a thrill (Jones, 2020, 165, 195). This makes it problematic to lean on the objective view in arguing that justice is met by equality of opportunity achieved this way.

Though concerns like this might be valid, from another perspective, they also highlight a noticeable strength of the objective view – namely that it provides a clear and consistent way of determining the existence or absence of opportunity compared to the subject-dependent view. This is not least because Barry reshapes the choice/chance distinction to avoid probing into whether cultural commitments are choice or encumbrance. Indeed, apart from this and the question of which opportunities are relevant to justice in the first place, the immediate challenge to the subject-dependent view is how to demarcate the contours of opportunity. For example, what constitutes the threshold proportion of subject-dependent and objective factors? If a religious prohibition eliminates opportunity on this view does the same hold for promissory prohibitions? Also, how is the burden threshold to be assessed? Is it only being able to do something at the cost of breaking a criminal law? How about a religious one? A moral one? Or that of losing one's home? Or alienation from one's voluntary association?

None of this is to say that these difficulties are insurmountable, but to reveal Deep-Disagreements on the nature of justice and opportunity involved here. Even upon favourably

clarifying the above concerns, the proposal to grant exemptions on the basis of equality of (subject-dependent) opportunity would then need to answer the other critiques about burden-shifting and inequalities between those who now have a special right or privilege where most do not. Granting an exemption for an individual to take a normally written examination verbally on account of their disability simply enables them to do what they could otherwise not do (which others can). This differs from relying on subject-dependent opportunity to grant exemptions to Sikhs to carry a *kirpan* or ride a motorcycle without a helmet because, as Barry points out, doing so does not result in Sikhs being enabled to do something that everyone else could do without the exemption, but rather doing something that others cannot do (2001, 38).

5.2.4.2 Objective Opportunity for the Broad Approach?

In light of these fresh prospects of Deep-Disagreement, a case for the broad approach that is compatible with Barry's objective view of opportunity holds significant promise. This is offered by Quong (2006) who, despite disagreeing with Barry's conception of opportunity, chooses to sideline any such dispute and to instead acknowledge, as I have, the unsuitability of these theoretical disagreements to resolving the questions of political justice (Ibid., 62-63).

Quong argues that even adopting Barry's account of opportunity and SEO as the standard of equality, the narrow approach falls short of that standard when general laws burden cultural commitments in certain cases. This is because the opportunity unavailable to the burdened might be construed not merely as that of access to the relevant distribuend, as so far discussed, but rather as the opportunity to "*combine their (reasonably cultural or religious pursuits with basic civic opportunities like employment and education*" as unburdened individuals can (Ibid., 62).

Compare two aspiring police officers: a Protestant and a practicing Jew working in a police department that requires all its staff to work a certain number of weekend shifts (Ibid., 64). While this might be a drag for the Protestant, for the Jewish candidate this is impossible without breaking their religious obligations on the Sabbath. Consequently, there is no real prospect for a Jewish candidate to pursue a police career. Barry's dismissal of this as a subject-dependent opportunity is too narrow because the opportunity, Quong insists, is not simply police employment but the opportunity of combing such employment with one's reasonable cultural commitments (Idem.).

By 'reasonable' here Quong means a fair share of opportunity relative to others. This ensures SEO remains equal. Thus, in the present scenarios, cultural commitments do not entitle to

additional time-off but only the choice of when to take their equal share of time-off regardless of any burden-shift to others (Ibid., 66). Call this the **Fair-Share-Rule**. In this way, the Jewish candidate would presumably be rescheduling their shifts without thereby accumulating an unequal share of time-off or other opportunity.

Quong's argument is an innovative re-conception of objective opportunity reinforced by the longstanding observation that *equal* treatment need not always mean *identical* treatment (Dworkin, 1978, 227; Nagel, 1991, 63-67; Kymlicka, 1995, 113; Shorten, 2010, 103). More than that though, it can be seen as a potential refinement to the earlier-discussed relational arguments drawing on the notion of key or 'basic interests' that SEO requires (Quong, 2006, 61).

There are, however, a number of questions that arise. Firstly, it might be doubted whether the Fair-Share-Rule is actually consistent with the 'no advantage' assessment considering that the whole problem arises from the unpopularity and lack of voluntary take-up of the weekend shifts. Leaving that aside though, there is, secondly, the matter of whether the distribution of weekend work could just as well be settled by consensual agreements? The fact of pluralism would suggest that there would be other candidates who would choose Saturday work if given other days off (on which they might have commitments) which those with Saturday commitments could fulfil.

Why should that matter considering it mirrors Quong's proposal? The significance is the voluntariness of the arrangement which discloses a critical dilemma for Quong's view. If everyone can voluntarily agree on a fair distribution of shifts or other goods the rule and considerations of accommodations and exemptions become irrelevant. Indeed, as discussed in the previous chapter concerning a like case of indirect discrimination, the legitimate ends and proportionate means test is precisely what makes the rule justifiable despite its discriminatory effects. Thus, as will be elaborated in the following chapter, if the rule is not justified accommodations and exemptions are rather beside the point: there ought to be no obligation on *anyone* to work the Saturday shifts.

Conversely, if the rule is justified then apart from the narrow approach insistence that the discriminatory effects do not, as a matter of justice, require remedy there is a further problem. Recall that Quong's endeavour was to show how something like Barry's objective opportunity becomes unequal when seen not in terms of a singular distribuend but a as plural or combined one. Accordingly, granting that the Jewish police officer has an objective opportunity to work

Saturdays, they certainly do not have the (objective) opportunity to do that *and* keep the Sabbath holy. Hence, the move from singular to compound objective opportunity proves crucial. Nevertheless, once we abandon the singular version, opportunity combinations and their comparisons grow complex in variants and commensurability.

Unlike the singular version whereupon the Jewish officer and others, like the Protestant, all have objective opportunity for Saturday shifts, on the compound version, virtually everyone is deprived of the opportunity set because of various combination alternatives. There is no opportunity to work Saturdays *and* X where X might be anything plausibly (and sincerely) done on a Saturday: spending time with the family, watching Saturday sports, going to the Saturday fairground, or whatever. Unless one is prepared to grant accommodations and exemptions to any sincere claim, one will need some way of demarcating the salient from the rest. That will most immediately lead back to the luck-egalitarian dichotomy and its discussed problems like differentiating choices and brute luck alongside the application to subject-dependent opportunity. Or, further back to the Salience-Demarcation Puzzle the depths of which have already been examined.

To avoid that, Quong appeals to the Rawlsian strains of commitment and reasonableness, including the Fair-Share-Rule, not unlike the surveyed relational-egalitarian approaches (cf. Lægaard, 2022). This again runs into the discussed obstacle of parity with the narrow approach. As will be further seen, where SEO is concerned – such as access to education – there will likely be convergence with the narrow approach. Attesting to that, Quong's class of mandatory exemption/accommodation cases (2006, 62-66) picks out precisely such interests. Meanwhile, his class of *permissive* cases (Ibid., 58-62) leaves room for reasonable disagreement, which will in turn be deepened by the burden-shifting objection given the incommensurability of competing legitimate interests and their equal standing as previously discussed.[141] Again, whatever else might be said of the above and about the comparative merits of Quong's broad approach or Barry's narrow, the Deep-Disagreement that Quong sought to avoid by adopting the objective conception of opportunity remains. If anything, it may have even augmented

[141] See Chapter 4 concerning the countervailing beliefs that *p* and not-*p* (Jones, 2016) and the right against freedom of conscience (Arneson, 2010, 1018). Quong's position might be especially problematic given that ensuring the Fair-Share Rule places no limit on the burden-shifting such that if there were many Jewish or Sabbatarian members the few that could work on Saturday would be perpetually burdened to work the unpopular shift (see Jones, 2020, 193, 201, n 33).

given the apparent incompatibility between the compound and singular versions of objective opportunity. [142]

5.2.5 Substantive Equality of Opportunity: A Balancing Approach

With the ever-mounting disagreement, one might wonder whether the divisiveness comes from the bifurcated presentation itself. Might it not be possible to have a third way or some kind of middle ground between the narrow and broad approaches? Hence, in concluding this chapter, I turn to a prominent contribution towards such a possibility from Alan Patten (2017a, 2017b).

According to Patten, what I have been calling the narrow and broad approaches are inadequate in capturing the normative logic of liberalism with respect to religious liberty and, by extension, cultural accommodations and exemptions. The broad approach with its presumptive relief of salient burdened interests fails to track responsibility for the burdens against background fairness (2017b, 137-142), namely SEO. As seen, once this is in place, it is difficult to see why the differential burden is unfair simply by its existence. An independent condition is necessary (Ibid., 142), which, if valid, may end up as a revision to the background conditions. The narrow approach is more coherent in this regard, yet over-reaching in severely restricting individual liberties beyond what is required by fairness and underspecified in its view of the fairness of the background conditions (Ibid., 143-144). In short, neither approach is acceptable but the narrow appears closer to the mark, needing refinement.

Central to that task is the principle of *Fair Opportunity for Self-Determination* (**FOSD**) (Ibid., 144; 2017a, 209). Patten states it as follows:

> Each person should be given the most extensive opportunity to pursue and fulfil her ends that is justifiable given the reasonable claims of others (2017a, 209).

FOSD is not absolute but limited in two key respects. First, it is *internally* limited by the *reasonable* claims of others (Idem.). Second, it is *externally* limited as a pro tanto principle that must compete with other reasons, all things considered, to restrict the liberty it grants (Ibid., 212).

Specifying the internal limitation requires answering: (i) which others have standing, (ii) the determination of 'reasonableness' and (iii) when it justifies a restriction to FOSD (Ibid., 209). Focusing on (iii), Patten points out that once we eliminate claims that are unreasonable we are

[142] This is implicit but Quong would otherwise not construe the Jewish candidate as being *unable* to pursue a police career requiring Saturday work. Rather, it would be described as a choice (even if a very dire one).

left with two principles for operationalising FOSD. We can look for an independent standard of fairness upon which to resolve conflicting reasonable claims: e.g. a fair contest to allocate university admission or job vacancies (Ibid., 210). This matches up with the substantive fairness of background conditions mentioned. Sometimes, however, such independent standards are unavailable. For example, public thoroughfares cannot be entirely allocated to either vehicles or pedestrians and there is no independent way for assigning the right of way other than "pure balancing" the reasonable interests of motorists with those of pedestrians by dividing the usable road area into sections (Ibid., 211).

External limitations, meanwhile, are also subject to pure balancing considerations which might be called *external balancing* to distinguish them from the *internal balancing* just outlined. External balancing of FOSD involves weighing the importance of FOSD itself over other considerations plus the importance of the subjective ends which FOSD enables in the relevant case (Ibid., 216). The first-mentioned weighing simply accounts for reasons that the liberal state may have for restricting FOSD such as non-ideal circumstances or feasibility constraints (e.g. an official language, it being unfeasible to have all languages as official) and, more controversially, paternalistic or perfectionist concerns about valuable or worthless options (Ibid., 211-212). The second-mentioned weighing, meanwhile, is more crucial because it goes beyond generic considerations to highlight the weight of particular interests enabled by FOSD (Ibid., 216-217).

Together, these internal and external (pure) balancing considerations arguably refine the narrow approach by better-specifying its underlying normative rationale and offering resources for correcting its overreach in denying differential rights like exemptions and accommodations. Internal balancing might yield accommodations or exemptions where the competing FOSD of some is more or equally weighty as for others and there is no independent standard for resolving the conflict. External balancing would do likewise where the competing interest is not the reasonable FOSD of others' but a general, public measure such as the prohibition of a narcotic substance (Ibid., 214-215).

Whilst the neatness of the internal/external division seems highly questionable given the likely FOSD interests in every public measure, Patten's overall point retains its force. FOSD and balancing do seem to capture the underlying logic by which to mediate between the narrow and broad approaches. If the reasonable disagreements already encountered are anything to go by, balancing will often be extremely difficult and Patten's account provides no further

guidance.[143] That a theory is indeterminate in these respects is, however, no grave flaw concerning the overall proposal (Lægaard, 2023, 574).

A more important concern therefore is with the idea of balancing itself. That pursuing a balancing approach of this kind is incoherent will be a major preoccupation of the next chapter. Presently though, it is worth highlighting that whatever the concrete determination of the balancing might be, the balancing itself might be inappropriate as a middle ground resolution between the narrow and broad approaches. This is because it is effectively a resolution that forestalls the deeper problem. To illustrate, recall the introductory case of Folau. Given the weighty interests of LGBTQI+ persons to equal dignity and the weighty interests of religious citizens to manifest their faith, a balancing approach might seek to grant exemptions to anti-discrimination laws provided the effects do not prove too severe. But that would render both of the reasonable interests subject to circumstantial contingencies. We can imagine, for example, that in a large and diverse community the effects of the discriminatory expression might be far milder compared to that of a smaller and more homogenised one where being LGBTQI+ could be far tougher. On the balancing approach, the results might differ accordingly. In the smaller community religious freedom would need to give way whereas in the larger it can have more scope and vice versa. The implication will then be that persons in various communities claiming identical rights will be granted them to vastly different degrees entirely due to their position vis-à-vis the contingencies described.

That rights are so contextually determined may, of course, be deemed an acceptable implication. After all, conflicting rights must be balanced in some way to afford equal respect to each of the relevant parties (Waldron, 1993, 222-223). Still, the reliance on contextual considerations not only erodes any principled basis to the competing reasonable interests, but also risks undermining equal respect when different citizens are subject to differential rights regimes depending entirely on contingent circumstances of residency or composition of a community and so forth. This ad hoc feature of the balancing approach may therefore be objectionable particularly if a more stable principled resolution is available. Surely, the balanced opportunity given to the competing interests will be entirely unsatisfactory as a justification for the restriction or the exemption/accommodation here in failing to properly address the underlying grounds. It will hold little consolation or respect for either claimant (Bespalov, 2020, 240-241).

[143] For a potentially applicable balancing framework for religious exemptions see Billingham (2017b).

Lastly, but perhaps more importantly, even if none of the above is decisive, the balancing approach cannot entirely avoid the controversy between the narrow and broad approaches since whatever reasonable interests it recognises as requiring balancing already engages it in an implicit judgment as to the reasonableness of those interests based on some background conception of fairness. The problem is not the mere reliance on a background conception – that is inevitable and necessary – but rather that that in making the judgments the balancing approach risks collapsing into either the broad or narrow approach rather than being a genuine alternative (Lægaard, 2023, 575).

In sum, although given the Deep-Disagreements traced at virtually every step of the debate the balancing approach or some other compromise of permissiveness between the two competing approaches might sound appealing, its promise of overcoming Deep-Disagreement is volatile. As the next chapter shall show, however, properly refined, the Justificatory-Puzzle is most complicated not by the Deep-Disagreements themselves but by the formal difficulty or Coherence-Problem that favours the narrow approach, at least in form.

Chapter 6: Justice at an Impasse

Reflecting on the debates over the broad and narrow approaches within the Justificatory-Puzzle, this chapter introduces the 'Coherence-Problem' to demonstrate that the Deep-Disagreements over the requirements of justice are indeed intractable and not simply curable by balancing or an otherwise permissive stance between the two approaches. In particular, the Coherence-Problem reveals how properly conceived, in its most robust form, the Justificatory-Puzzle crystalises the Deep-Disagreements into a formalistic version of the narrow approach such that accommodations and exemptions are precluded whatever the residual burdens or related concerns flagged by the broad approach. This will confirm that considerations about justice seem inadequate to furnish a conclusive determination of the Justificatory-Puzzle.

6.1 Preliminary Distinctions

Properly understanding the Coherence-Problem requires clarifying a number of key concepts starting with exemptions and accommodations. Back in chapter one, these were defined via their legal operation in terms of Free Exercise.

From a normative standpoint in relation to the Justificatory-Puzzle, these formal differences are both an under-differentiation and an unnecessary one. The formal legal distinction concerning whether the protection granted is a limitation to some general law or to the exercise of liberties within the law by others does not, for example, reflect the various types of normative rationales or underpinnings for the grant of such protections.

6.1.1 Exemptions Diversified

In that regard, Perry Dane (2018) has analysed some eight distinct ideal types of exemptions organised into three larger rubrics. The analysis, however, can be read in terms of accommodations just the same as I will try to reflect.

The first type arises when the state recognises its subject's normative conflict between its laws and a competing source of normativity (Ibid., 147). This is the "quintessential" or most basic, paradigm case (Ibid., 146). Where this is refracted in institutional form, we get the second type: "institutional autonomy" (Ibid., 149). Most familiar in ministerial exemptions, this type aims at defining the extent to which (normatively salient) voluntary associations might be exempted

(or accommodated) from general law in relation to their internal rules and practices (Ibid., 148-150).

Beyond that, exemptions (and accommodations) might also manifest "modesty" of three types: instrumental, empirical, and normative (Ibid., 150-157). These types convey the state's recognition of the pluralistic normative order whereby its chosen legal means, empirical assumptions, and normative value judgments are likely to be contestable. So, for example, notwithstanding its instantiation of the first type, the exemption to humane slaughter regulations might at the same time also be about empirical (or even normative) modesty, recognising the weight of counter-claims to the empirical finding that, say, stunning is more painless compared to severance of the carotid arteries (Ibid., 153) or the controvertible meaning of "humaneness" itself.

Lastly, exemptions (and accommodations) sometimes also arise from a concern about comparative fairness and neutrality (Ibid., 156-163). This relates to a vast variety of cases ranging from those encountered throughout the discussion of the Salience-Demarcation-Puzzle and Special-Status-Problem to issues of cultural formatting and incidental burdens or disparate impacts on minorities. Essentially though, the focus seems to be on implications of the normative conflict identified in the first (paradigm) type on justice or fairness in specific contexts.

Dane's analysis is instructive but need not be considered exhaustive or decisive. There may be more or alternative taxonomies. The point here is only that there is nothing of normative significance to the formal legal division introduced in chapter one. This in turn additionally elucidates how it might also be unnecessary. To demonstrate this, I propose to reflect on the concept of legal exemption. Up to this point, the discussion has simply relied on the apparent clarity of the conventional usage. That, however, obscures the philosophical nuances and the more normatively-relevant substantive sense of exemptions (and accommodations) which should be extracted from various formal concerns.

6.1.2 Exemptions: Substance, not form

Exemptions are normally understood as a specifiable limit to the application of an otherwise general rule. For example, all may X *except for* A(s), or all may not Y *except for* B(s). Inherently then, exemptions create differentiation between those to whom the rule applies and to whom it does not. The differentiation, however, might occur in more than one way (cf. Raz 1975/2002, 87-88). Sometimes it will occur internally within the rule itself, by what might be

called an *implicit exemption*, and, othertimes, externally via an *express formal exemption*, which is the most familiar, recognisable kind. For illustration, compare these respectively as (V1) and (V2) below.

(V1) "compulsory voting for all citizens aged 18 and over without a criminal record."

(V2) "all citizens must vote;

a. Citizens under the age of 18 are exempt;

b. Citizens over 18 with a criminal record are exempt."

Importantly, where a rule already contains internal differentiation, adding a formal exemption creates an additional layer of differentiation. Thus, if V1 is paired with a formal exemption such as: "except for Anglicans" the effect would be that voting for Anglican citizens older than eighteen is not compulsory unlike for all other citizens over eighteen. Since differentiation can occur more than once, and in different layers, analysing an exemption requires a clear identification of the differentiation (if any) internal to the rule itself and then whether this rule (including any internal differentiations) is applied uniformly or subject to formal exemptions.

The basic, but significant upshot here is that any case against exemptions need not be construed as mandating that laws must be always universal in form nor that where an internally differentiating law is applied uniformly there can be no question about exemptions. We are not limited to express forms of exemptions but may construct the exemption from the internal differentiation of the rule itself. It would not matter whether the differentiation in the above rule occurred through a formal exemption for Anglicans or an implicit one such as (permissively): all Anglican citizens over eighteen *may* vote or, in the reverse (impermissive) articulation: all Anglican citizens over eighteen *must* vote.

What ultimately matters then is the essential concern with differentiation. This is what unites the various types of exemptions discussed and also accommodations. It is not the conventional sense of exemptions and accommodations but a technical one which aims to capture the normatively relevant substance. Yet, the distinction between implicit and formal exemptions still matters in at least this: when discussing exemptions, the validity of the rule (including any differentiations therein) must already be established. As shall become pronounced below, any discussion of exemptions or, albeit to a less obvious extent, accommodations, can only properly commence from a common ground about the validity of the rule (including its internal differentiation) in respect of which the further differentiation in question occurs. The validity

of an exemption to an invalid rule is indeed a rather specious concern. In sum, the technical substantive sense of exemptions and accommodations requires identification of a (presumably) valid rule and some differentiation in question.

Armed with these clarifications, the trivial sense in which exemptions and accommodations are problematic (as a layer of differentiation beyond what is valid for the rule) becomes evident. Yet, from the debate so far between the narrow and broad approaches it is also evident that, at least for some, there is a sense in which differentiation *beyond or to the valid rule* is permissible or even mandatory. I emphasise the italicised phrase to stress that the properly construed stance of the broad approach towards exemptions and accommodations (in the substantive sense just outlined) is not that the rule is invalid by, say, being illegitimate or unjust but that both the rule and the further form of differentiation is required (as a matter of justice). In Simon Caney's helpful formulation, the stance is comprised of three inseparable claims: "(1) there is a good case for a rule, (2) there is some reason for exempting some from this rule, *and* (3) this reason pertains only to some and not to all" (2002, 84). It is the principled existence of such a stance that exposes the trivial sense as trivial. However, as the discussion of the Coherence-Problem will evince, there is a deeper rendering or substantiation of something like this trivial sense that seriously challenges the coherence of exemptions and accommodations, cementing the Deep-Disagreements between the narrow and broad approaches.

6.2 The Coherence-Problem

With differentiation as the essential feature of accommodations and exemptions, going beyond the above trivial sense requires explaining what kind of differentiation is permitted and why? Part of the task is immersed in the Salience-Demarcation Puzzle with the matters of coverage and basis discussed in Chapter 3. If race, gender, age, or religion, say, can provide a justifiable coverage and, critically, basis for salience for differentiation, then that may warrant the relevant category of accommodations or exemptions. This, however, will be subject to the underlying Justificatory-Puzzle as to whether differentiation on whatever given basis is permissible against a valid rule (or, particularly, (legitimate) general law).

6.2.1 Rule-and-Exemptions

In essence, the Coherence-Problem denies that any such permissible differentiation is justifiable without falling into incoherence. It holds that the aforementioned claims (1)-(3) cannot be coherently combined whatever one's answers are to the requirements of justice and the particular coverage and basis of differentiation proposed. Although he does not specifically refer to it in my terms or within the dialectic I describe, Brian Barry offers what is perhaps the most influential formulation of the **Coherence-Problem**. His argument runs as follows. Either the law is legitimate and just – in which case there is no further principle for differentiation to its uniform application – or it is not – in which case the law itself ought to be amended or repealed in order to be legitimate and just (Barry, 2001, 39). The intermediate position of legitimate, neutral and uniform general rule plus exemption ("**rule-and-exemption**", for short), therefore, is fundamentally incoherent (Ibid., 33, 39, 41-50). In line with the 'rule-and-exemption' label, I will also primarily speak of "**exemption(s)**" as a shorthand for "exemptions and accommodations" or the yet more clunky references to differentiation beyond that internal to the rule.

All this may strike as counterintuitive or even absurd. The rule-and-exemption approach, after all, seems patently sound in many instances. How then, could it possibly be so sweepingly dismissed as incoherent? Is it not entirely coherent to have a rule-and-exemption set up such as, for example that in laws prohibiting certain narcotic substances there be exemptions for medical use, or that in laws proscribing the bearing of firearms there be exemptions for military or police personnel? One could lean on the substantive sense of differentiation outlined above to deny these as examples of the relevant kind of exemptions. But since the substantive sense does not itself specify where the rule with its internal differentiation ends and the exemption begins it actually reveals precisely the force of the objection. Yes, it was stipulated that the substantive sense rests upon an agreement (even for argument's sake) for identification of rule and exemption, but if that is so then the Coherence-Problem is either always trivially true from the moment a rule-plus-exemption is identified or otherwise never meaningfully arises if all the differentiations are within the rules themselves.

6.2.2 Key Distinctions: Pragmatic and Principled; Public and Cultural

If the Coherence-Problem is not to be an empty formalism we must have some account of rule validity so as to determine whether some proposed basis for exemption is defensible or not within that matrix. This will reveal how not all exemptions are impugned by the Coherence-Problem which does in fact allow something of a rule-and-exemption approach, but only within a specifically defined field. Two distinctions are critical to clarifying all this.

The first is between **pragmatic-exemptions** and **principled-exemptions**. By pragmatic-exemptions I mean exemptions which are ad hoc (not rule-universal). They stake no normative claim to being required or justified, claiming only expedience upon merits case-by-case. A shopkeeper might, for example, waive the 'no-late-refunds-rule' to avoid protracted argument or losing future custom, a government might exempt some illegal immigrants from deportation orders to avoid untimely riots and so forth. *Principled-exemptions* stand in opposition to this by their rule-like manner and normative claim in view of the relevant conception of justice or political morality. This makes them evaluable on the merits of their proposed principle rather than particular obtaining circumstances.

The second distinction is the most crucial to properly understanding which principled-exemptions will be valid in their principle so as to be considered internal to the rule regardless of how the rule might actually be formulated. Such principled-exemptions are for the purposes of the rule-and-exemption not really exemptions at all, but internal determinants of the rule. How then is the distinction to be made? The key is whether the exemption is *extraneous* or *endogenous* in relation to the legitimate rationale or objective of the rule or law in question. With regard to liberal-egalitarianism (at least in the mainstream, political, form to be elaborated in Chapter 7) what is endogenous to the legitimate rationale will effectively be that which is *publicly justifiable*. For this reason, I will refer to these "exemptions" based on *endogenous* principles as **public-principled-exemptions**. Meanwhile, *extraneous* exemptions coincide with the various principles belonging to "culture" in its broadest sense, previously outlined.[144] These *principled*-exemptions will therefore be called **cultural-exemptions** (in lieu of the more convoluted 'cultural-principled-exemptions'). Exactly what is "publicly justifiable" will be addressed in the next Part, but for now an illustration will suffice to elucidate the distinction here. Consider something like public safety or harm-prevention as a legitimate (publicly

[144] These might also be framed as equally broad 'volitional exemptions' being those grounded in an individual's objection to comply with the rule for whatever reason (May, 2017, 193).

justifiable) rationale. Such a rationale might ground the legitimacy of the following example laws:

(L1) Prohibition on harmful substances.

(L2) Prohibition on possession of firearms in public.

In relation to each of these laws, compare the following exemptions (however formally integrated):

(PPE1) Medical use of harmful substances prohibited in L1 is permitted.

(PPE2) Possession of firearms in public is permitted for police and military personnel.

Against the following:

(CPE1) Use of harmful substance(s) prohibited in L1 is permissible for use for cultural purpose XYZ.

(CPE2) Possession of firearms prohibited in L2 is permissible for (sincere, peaceful) firearms enthusiasts.

Notice that CPE1/CPE2 are not endogenous or otherwise complimentary to the relevant rationale in the way of PPE1/PPE2. Whatever value underpins CPE1/CPE2 it is not one constitutive of the publicly justifiable rationale but rather counteracting or diluting of it.

6.2.3 Coherence-Problem Rebooted

With these distinctions the Coherence-Problem emerges more robustly as a concern about rationale- or principle- coherence between the rule and exemption which also illuminates that the demarcation of the two is not empty or self-servingly ad hoc. The distinctions allow us to make a reformulation of the following kind. We can now say that the Justificatory-Puzzle applies to all *principled-exemptions* (not pragmatic) and the Coherence-Problem underlines that the only valid (or coherent) principled-exemptions are public-principled exemptions.

In light of that, we can see Barry's concern as being with the incoherence arising from a tension between, on the one hand, there being a reasonable, legitimate public objective or rationale which the law seeks to implement whilst, on the other, there being a claim which, despite accepting the aforesaid nevertheless holds that there are sufficient reasonable grounds to limit the law's objective by carving exemptions or accommodations to it. Such a stance seems problematic in simultaneously accepting and denying the importance of the legal objective.

Barry's summary of the human slaughter regulations is instructive here: "(if we did not believe [animal welfare is better served by stunning], there would be no point in having the restrictive policy that makes stunning the rule)" (Ibid., 43).

An obvious objection now arises. Why must we construe the attainment of the particular end in such absolute terms? Animal welfare is important, *but so are* kosher and halal practices; perhaps there is a road safety rationale for crash helmets but there is also one in respecting the rights of certain minority groups. Why should it not be possible for the law to operate with multiple rationales and balance them by accepting a somewhat lower than maximal bar of achievement of the legally sanctioned objective owing to the counter-purpose vying for the exemptions? (cf. Maclure & Taylor, 2011, 74-75).

Much here depends on the particular case. There will be those like the *kirpan* exemption where the objective is of a zero-sum nature, as Barry explains (2001, 38). If possession of bladed articles in public compromises public safety then even a single instance of possession introduces the safety-compromising risk whether it materialises or not. As such, counterarguments that those not ill-intentioned are no threat while legal prohibition will not succeed in stopping the ill-intentioned anyway are irrelevant: possession carries risk regardless of intention - tragically often proved by unplanned alcohol-induced violence exacerbated by the possession of the dangerous article (Ibid., 53). Hence, the objection seems blunt against zero-sum nature legal objectives.

Beyond these, the substantial reason exemptions may not serve as counterbalancing purposes is essentially a definitional one contained in the public-principled/cultural dichotomy. The dichotomy, it will be recalled, already takes into account the multiplicity of legal rationales but insists that the relevance of any balancing is restricted to internal differentiation within the rule. Thus, medical exemptions to prohibited narcotics is not identical to the harm-prevention rationale but nonetheless endogenous to it in alleviating harms of pain or ill-health. Hence, it is a public-principled-exemption (part of the rule). On the contrary, a cultural interest for the prohibited substances is extraneous to the said rationale – even opposing it. Whether the rationale is zero-sum or progressive, extraneous rationales undermine or dilute the legal objective. Each animal slaughtered without stunning, each unprotected head injury, or dangerous article undermined the relevant public value at stake.

This answer, however, simply shifts the earlier objection to another plane. Even if we can loosely operate upon intuitions as to what is endogenous and extraneous to some rationale, if

some rationales are simply excluded as "cultural" then the controversy turns to how the distinction is drawn. Why, in other words, are the cultural interests not publicly justifiable? For if the division is simply shadowing the narrow approach then that seems again self-servingly ad hoc. Naturally, proponents of the broad approach accept all the premises of the narrow meaning that there will be no disagreement about cultural interests being public-principled-exemptions when they concern guarantees of basic rights and liberties constituting the social primary goods and protection from non-neutral or directly or latently discriminatory rules. But thereafter the Coherence-Problem seems either formalistic and circular (being definitionally true once the lines of dichotomy are agreed) or simply collapsing into the earlier debates between the narrow and broad approaches. To illustrate the point, examine the following case.

Sunday Closure Laws:

Consider the restrictions on Sunday business hours in many Western liberal states.[145] These laws do not violate basic rights and their apparently public justification might be something like providing a day of rest for every six working days. Hence, there seems to be no principled basis for exemptions such as for Sabbatarians or Orthodox Jews incidentally burdened by double income-loss stemming from the Sunday closure laws and their cultural and/or religious commitments to Saturday rest.

Being extraneous to the rationale for Sunday closure laws, the Coherence-Problem seems to apply here. On closer examination, however, it could be argued that the apparent injustice motivating the cultural-exemptions claim points to the flaw in the public justifiability of the law itself. After all, if the justification is simply to ensure a day of rest for every six worked, then the choice of Sunday as the designated day of rest appears arbitrary (at best) or even some form of latent majoritarian cultural oppression. This would indicate that the day of rest for each six worked should be left undesignated. In substance, this arrives at the same conclusion as what granting exemptions to all claimants would do.

Admittedly, the above turns more complex if the relevant rationale is a uniform day of rest every six days. Still, the relevant upshot remains that if exemptions claims can sometimes rely on considerations about justice to show overreach in the specificity of the law then insofar as cultural-exemptions seek substantially the same result the Coherence-Problem looks formalistic. All aforementioned Deep-Disagreements about justice seem revived in whether

[145] For a classical reflection see Mill (1859/2001, 83-84).

some exemption is required by justice and thereby public-principled or superfluous to it and thereby "cultural".

That may be so, but it need not derail or embarrass the Coherence-Problem, which, as stated, cements the Deep-Disagreements into its form. Principally, it shows that the Deep-Disagreement cannot be evaded by diluting or balancing the legitimate rationale without incoherence. The case for exemptions, in other words, must fit into the case for the overall regulatory rationale. The point is particularly resonant if we bear in mind that each law is fundamentally an instance of coercive political power that Barry invokes in terms of sufficiency of the underlying principles in relation to public importance to be (legitimately) legally sanctioned (2001, 39). Either the principle is of sufficient public importance as to warrant pursuit through deployment of legal/political power (and this can be done legitimately) or it is not (cannot). If it is, it ought to be uniformly applied to achieve the aim as far as possible, if it is not – and critically – if there is something of greater importance such as what a case for exemptions might reveal, then being coherent requires repeal or amendment to the law, but not retaining the law plus granting exemptions.

So, for example, it may be that a cultural objection to the prohibition of peyote reveals some flaw in the law itself such as its objectionable paternalism. Then, instead of a rule-and-exemption approach, the correct response would be to repeal or amend the law to allow access for everyone, not just Peyotists based on their particular commitments. Again, it is the differential application of the rule to some but not other that gives rise to the incoherence. In principle then – and confirming that the Coherence-Problem entrenches the Deep-Disagreements – there is possibility to develop the Coherence-Problem towards a broad approach position.

A recent paper by Aurélia Bardon, for example, advances that liberal-egalitarianism can be difference-sensitive since: "generally applicable rules can be modified in response to concerns about the religious freedom of specific individuals or groups, and the new modified rule can apply to everyone in the exact same way" (2023, 494). Mirroring judicial practice discussed in relation to indirect discrimination[146], Bardon's argument convincingly highlights how, beyond neutrality, publicly-justifiable rules that carry incidental disparate burdens should be assessed for "necessity" – whether the rule is a necessary means to achieve the publicly-justifiable rationale – and "sufficiency" – whether the rule is a proportionate restriction on liberty relative

[146] Section 4.2.

to the importance of the rationale (Ibid., 492). It remains doubtful, however, that this will make any difference in favour of the broad approach. Firstly, sufficiency (and necessity) are a feature of the narrow approach as noted of Barry above. Secondly, given the pluralism and Deep-Disagreements with which public justifiability must contend and the aforementioned common baseline of the narrow approach for all liberal-egalitarians, it is exceedingly unlikely that the necessity and sufficiency tests would extend much further into the broad approach. Cementing the Deep-Disagreement, the Coherence-Problem therefore appears to default toward the narrow approach – at least in general (I leave aside speculation as to whether there could be cases that raise Deep-Disagreement or challenge the relative contours of the narrow approach).

That the Coherence-Problem seems to tilt towards the narrow approach does not, however, mean that the Deep Disagreement has been settled. Indeed, it remains ongoing in relation to the various matters of justice discussed in Chapters 4 and 5 and the Coherence-Problem does not affect this such as to offer a compelling case for the narrow approach or a decisive advantage over the broad approach. Rather, the tilt and the Coherence Problem more generally is most critical in relation to the elimination of the middle ground. Recall here the discussion of Quong's Fair-Share-Rule in the police Saturday shifts scenario. The Coherence-Problem directly bears on the way the scenario is framed. If there is really a pluralism of commitments such that different staff prefer different shifts and a voluntary swap can be arranged, there is arguably no need, or rather, public justification for the rule at all. Compelling is unnecessary where a voluntary arrangement solves the problem. Yet, if, as Quong stipulates, it does not, then there is still the option of incentivising the unpopular shifts rather than compulsion. Ultimately though, if the context proves sufficiently dire that a publicly justifiable rationale for having the rule arises then even allowing cultural commitments to have their weight has little bearing, making the Fair-Share-Rule incoherent.

Likewise, if the cultural commitments are of sufficient weight to impact on the requirements of justice, they might justify overturning or amending the rule. This is exemplified in the convergence between the narrow and broad approaches in cases where SEO falls into question. Thus, in cases like *Mandla v. Dowell-Lee*[147], where a Sikh boy was unable to access equal educational opportunities without contravening their commitment to wearing a turban, Barry seems aligned with Quong's position on "mandatory exemptions" to protect "civic" opportunities (2006, 62) and other broad approach proponents like Maclure and Taylor (2011,

[147] [1983] 2 A.C. 548 (*Mandla*).

75), making room for exemptions (2001, 61-62; 2002, 213, 215). Still, such convergence simply reveals that public considerations are key: it is the dire situation of having competing public interests in granting institutional autonomy to an independent school whilst addressing indirect discrimination and SEO. In that regard also, the Coherence-Problem subsumes Patten's proposal of balancing FOSD into its form whereby the balancing must occur in the context of public-principled-exemptions. Unless the cultural interests are directly pertinent to the public justifiability of the rule as, for example in the *Mandla* case, they are irrelevant to the balancing.

Understandably, there remains a core controversy about why cultural commitments cannot in their own right be public-principled-exemptions. Though culture may be particular there is also a general sense of culture as a good not unlike the Rawlsian ELC that all could reasonably recognise as publicly justifiable to protect much like the stock public interests of health or safety. And even failing that, it might furthermore be wondered why the *exclusive* commitment to publicly justifiable rationales even where a non-publicly justifiable rationale might be in some way useful and not especially detrimental to the publicly-justifiable rationale? The complete answers to both these questions will be developed in the next Part but there is an adequate response available even without delving too deeply into liberal political legitimacy.

Regarding the first, the various considerations for the narrow approach can all be deployed to suggest that culture as a publicly-justifiable good is already accounted for and the incidental burdens therefore are not really attributable to the general law but to the private commitments held. Had the law directly prohibited the turban or *kirpans* but not knives things would be different, but where there is a neutral rationale, culture in the general sense is arguably protected by the fundamental liberal-egalitarian scheme of equal rights. Liberalism, is, as Daniel Weinstock puts it, already "*by its very nature minimally multicultural*." (2015, 309).

Moving to the second, it is crucial to again emphasise the earlier point about sufficiency. Where there is no sufficient public reason (and need) to legally sanction the relevant objective, there is no normatively relevant reason for the law. Those supportive of the objective may pursue it (consistent with the equal rights of others) even without the legal requirement. Those supportive may even be the majority – serving an important reminder the public justification may be unavailable even on majority support and that not all that is desirable or just needs pursuit through institutional, legal-political, means.

The earlier distinction between principled and pragmatic exemptions comes into play here too. The absence of public-principled-exemptions still allows for pragmatic ones if deemed

necessary or expedient. These will be relevant for non-ideal theory as Barry specifically mentions in relation to pragmatic exemptions for "prudence or generosity" to address structural or historical reasons for Sikhs of the Ramgarhia "'caste'" being employed in the construction industry and needing to be exempt from hard hat regulations (2001, 49). Given the many possible non-ideal theory considerations, liberal-egalitarians may effectively turn into multiculturalists in public policy or political terms. The theoretical differences, however remain such that the availability of more optimal solutions could eventually replace the case-by-case pragmatic multiculturalism and, in any event, not extend it to new cases (Ibid., 50-51).

6.3 Summative Remarks

In concluding this Part, the key observation has been one of Deep-Disagreements about the requirements of liberal-egalitarian justice. Starting with the Rawlsian framework of Equal Liberty or liberal-egalitarian citizenship and the Socio-Economic Principle for SEO we have traced vast divergences on how these fundamental ideas are construed. Are these, for example, to be luck sensitive? And, if so, based on what demarcation of luck? What is the relevant currency of equality? Is it welfare or resources? What do these comprise? And what, in any case, is the relevant threshold for equality in these principles or their expression of equal respect considering the complications of defining opportunity (or welfare) and the problems of burden-shifting by differentiation?

Apart from the intractability of these Deep-Disagreements, their framing within the Coherence-Problem shows them not readily dissolved by balancing or like mediating proposals. To differentiate the application of a rule in ways that do not apply to everyone is incoherent with the publicly-justifiable neutral rationale for the exercise of legal-political power. If sufficient for this exercise, the rationale cannot be diluted or undermined by non-public, particularist concerns associated with cultural-exemptions.

As such, the Deep-Disagreements are effectively entrenched in a rather disconcerting manner. On the one hand, as proponents of the narrow approach point out, differentiation undermines justice through unequal regard and burden-shifting. On the other, those supporting the broad approach highlight the injustice of unequal burdens that impact considerably, in practical terms, on opportunities available to certain (minority) groups. This in turn motivates resistance to the Coherence-Problem as being counter-intuitively stringent and tilted to the narrow approach.

Though I have countered some of these counter-intuitive allegations, the tensions and impasse around liberal-egalitarian justice remains.

In the final Part, I will complete the examination of the Justificatory-Puzzle in relation to (dis)establishment with its closely-related shared question encountered here about the exclusion of cultural considerations from the publicly-justifiable principles or rationales. I will then propose a way of addressing the broad approach concerns (along with the narrow) that avoids or circumvents the Deep-Disagreements on justice and the Coherence-Problem. Such a resolution, I submit, is possible, if the Puzzles are recalibrated in terms of the liberal problem of political legitimacy.

Part III Legitimacy and Its Limits

Chapter 7: Religious Reasons and Liberal Legitimacy[148]

At the end of October 2023, around the Barossa Field west of Cape Fourcroy – or, more precisely, out there between where the red tint of the disliked one whom the spears had found oozes under the turquoise shallows into the big deep and Everywhen[149] where Old Woman is blindly digging ever-further through the narrows with her stick – there, the water is not at rest and its heaving grows closer from the Sea Country because the ancestral passage that cares for Nguyu and Yermalner has been disturbed. It is not the oncoming monsoon season, which meets the horizon of November with habitual regularity in the tropical far north. It is the irregular construction of a 262km concrete-coated carbon steel gas export pipe (**the Pipeline**) the presence of which would, amongst other things, "disturb Ampiji" the "caretaker of the land and the sea" who "patrols the coastline around the Tiwi Islands and also travels into the deep sea."[150] Or so goes one of the pleadings made by the three Aboriginal Tiwi Islanders as Applicants in the recently decided case of *Munkara*.

The nearly 300-page judgment covers a complex range of substantive administrative and environmental law, evidentiary and interpretive matters (the procedural and interlocutory matters being addressed in separate judgments!) all of which centre on a prohibition of activity carrying "any significant new environmental impact or risk<…>nor provided for in the environmental plan in force" [at 7]. The environmental risks in question were those stemming from the proposed construction of the Pipeline through areas where it would harm and potentially destroy significant elements of Tiwi cultural heritage – both tangible and intangible.

Whilst this formulation transmits the essence of the legal claim, "cultural heritage" [at 4], it fails to capture the underlying meanings of what is at stake for the Applicants. Taking the pleadings as factually true, the harms to the ancestral caretakers alone would hardly be intangible cultural heritage. They would be somewhere in the class of trespass, nuisance, grievous assault, or even murder. After all, if the seabed, the straits and waters are living beings

[148] This chapter (from 7.1 onwards) is predominantly based on my earlier work appearing as Leontiev (2024).
[149] Otherwise known as 'the Dreaming' or, more popularly, 'the Dreamtime' – see Swain (1993) Ch 1 for further discussion.
[150] *Munkara* (per Charlesworth J. at 14). All subsequent references to this judgment will be provided in text by paragraph numbers in square brackets – e.g. "[at ##]".

then encumbering or crushing them with the Pipeline fits that description. Moreover, if these beings sustain the ecological lifeforce and intergenerational continuity of the people then again the object of the harm is hardly the abstract form of culture in the way that simply destroying a (purely pictorial) rock painting might have been.

The decision against the Applicants in *Munkara* ultimately turned on the evidentiary flaws in their case. Their factual claims were found inconclusive or insincere. This raises its own controversies about applying evidentiary standards and proofs of non-Indigenous law to Indigenous contexts, but at least the troublesome matters raised above were therefore avoided. Philosophically though, these matters remain relevant. For what if there was sincerity and sufficient evidence? How is the liberal state to respond whilst remaining neutral as to the empirical and value disagreements between the various stakeholders? What, if anything, can it hold true or as a valid reason for taking some course of action or decision?

Absolute neutrality, as previously emphasised, is implausible; some form of epistemic and value baselines cannot be avoided. For yet another illustration with respect to the above, consider the apparently innocuous reference to the "risk" to cultural heritage [e.g. at 10]. Natural as that may seem given the suit was filed two days prior to the Pipeline's scheduled commencement, it may yet be a temporal distortion. Traditional Aboriginal perceptions of time are "multidimensional" rather than linear meaning that the future construction still holds significance relative to the "dream time" which transcends linear sequences of past-present-future (Janca & Bullen, 2003, 40-41).[151] The risk might have already partly materialised. It is this, alongside the imminence of ancestry in the natural world and its interactive forces, that the opening passage aimed to convey by stylising the facts in the judgment whilst striving to avoid trespassing any further on the authentic cultural fabric beneath.[152]

All this is to highlight the rather palpable distance between liberal state neutrality, approximated by the legal formulations, and the non-neutral, cultural, spiritual or religious dimensions to the same set of circumstances sparking the litigation. The distance gestures towards the potential significance of Establishment and the contest between exclusivism and inclusivism. Whilst Establishment was discussed within the Salience-Demarcation Puzzle regarding the salience of religion and its analogues for special constraints, within the

[151] This notion of time might be metaphorized as "'a pond you can swim through -up, down, around'" or explained in terms of the Aboriginal saying "'It is not important *when* things happen, it is important *that* they happen'" (Janca & Bullen, 2003, 41).
[152] It is for these reasons that I have avoided directly naming the spiritual actors being referenced.

Justificatory-Puzzle, it was largely sidelined by the primacy of Free Exercise or differential rights (accommodation and exemptions). To some extent, this reflects that the issues between the narrow and broad approaches and between exclusivism and inclusivism run in parallel or replicate each other. As far as promoting or hindering religion or other categories of salience goes, neutrality and the Deep-Disagreements about the requirements of justice would seem to apply all the same.

Yet, as a case like *Munkara* reveals, Establishment extends to a potentially broader field than accommodations and exemptions. In the first instance, every accommodation and exemption is at the same time a law in its own right. Accordingly, the very regulation of various public and political affairs irrespective of whether they constitute differentiation or not – such as the construction of the Pipeline – involves factual and value judgments about the various circumstances bearing on the decision(s) made. Thus, although the substantive conception of exemptions outlined in the previous chapter might, in part, blunt these observations by merging them into the Deep-Disagreements over the key requirements of justice, Establishment may yet be relevant for understanding what considerations underpin neutrality and presumptions of the Coherence-Problem – namely its demarcation between cultural- versus public-principled-exemptions or its taking the question of the law's legitimacy as either presumed or merged into the Deep-Disagreements on justice. Liberal neutrality upon which the minimal common ground of the narrow approach fuelled the Coherence-Problem itself depends on jurisdictional boundary marking and initial value judgments to the exclusion of others, as discussed in Chapter 3, and seen in the carefully framed conditions of fairness necessary for Rawls's contractualist foundations for the two principles of JAF.

Questions of Establishment, in other words, might be relevant as part of questions of political legitimacy. They are integral to clarifying how the critical distinctions between that which is public and that which is cultural or private is drawn. Specifically, if "cultural" or non-public legal rationales are not ruled out by the constraints of Establishment (within the liberal-egalitarian framework of neutrality), the Coherence-Problem might fade in significance. If the narrow approach is not the minimal common ground upon which the field of public-principled exemptions is agreed, then perhaps cultural-exemptions could, in various cases, be reconfigured as public-principled exemptions. It is exclusivist-inclusivist debates about Establishment in its broad sense of the normative role of religion (and analogous categories) in public affairs of the state that are therefore relevant and indeed the focus of the most contemporarily prevalent or mainstream theory of liberal political legitimacy to be addressed.

Legitimacy might, of course, itself seem irrelevant. Did the Coherence-Problem not show that either legitimacy is in question (in which case exemptions are hardly the point) or exemptions are in question (in which case legitimacy must be presumed)? Turning to legitimacy to circumvent Deep-Disagreement and resolve the Puzzles may then rightly appear absurd.

This Part will, in spite of that, argue for precisely that possibility and its practical significance as a lateral solution to the Puzzles. The key to this will be developing a more finely-granulated account of the predominant liberal theory of political legitimacy and extending it towards a largely untheorized domain I call 'modal legitimacy'. This will be the task of Chapters 8 and 9. The present chapter, however, lays an important grounding for that by introducing the mainstream paradigm of liberal political legitimacy with its foundational concepts and their bearing on Establishment contested by exclusivism and inclusivism. Contrary to recent suggestions otherwise, it will demonstrate this contest to be fundamentally connected to an internal conceptual disagreement within the mainstream paradigm about how legitimacy is to be understood. To start then, I turn to the exclusivist-inclusivist dispute.

7.1 Liberalism and the Exclusivist-Inclusivist Divide

Parallel to the narrow and broad approaches to exemptions and accommodations, liberals and others have been split between exclusivism and inclusivism[153] in relation to Establishment and the normative role of religion (and analogous categories) in the political or "public" sphere.[154] In essence, ***exclusivists*** exclude or deny religion any normative political role while ***inclusivists*** oppose such categorical exclusion in various ways and degrees. Occurring on a spectrum, the characterisations of any position as one or the other confusingly depends on the object of comparison, which in turn means that a position could be simultaneously characterised in both ways relative to various others. Furthermore, like with the broad and narrow approaches, there is both a split between liberal-egalitarians internally and against other (external) liberal and non-liberal perspectives. Indeed, there is even no *necessary* correspondence between the narrow/broad and exclusivist/inclusivist stances as Schwartzman (2012, 2017) has aptly taxonomized.

[153] Sometimes alternatively rendered in terms of "exclusionist(s)" / "exclusionism" and "inclusitionist(s) / inclusionism"; see Boettcher (2005).

[154] This is far from a simple notion, of course, but it is not one necessary to address here. For clarity though, while "public" could be construed as somewhat broader than "political" (cf. Rawls 1993/2005, 442-443), in general usage, I will treat these interchangeably.

Here, it also becomes problematic to refer to liberal-egalitarians, however, because the label does not track liberal positions on political legitimacy relevant to these debates. Accordingly, the proper contrast to make invokes the contemporarily predominant or mainstream paradigm of liberal political legitimacy variously known as 'political liberalism', 'public reason liberalism' or ***justificatory liberalism***, as I will refer to it. Justificatory liberalism, to be outlined further below, is most commonly contrasted with comprehensive or perfectionist liberalism as opposing forms of liberal political legitimacy (***liberal legitimacy***, for short) as well as non-liberal theories of political legitimacy.

Fortunately, when it comes to justificatory liberalism, there is an identifiable traditional alignment with exclusivism in opposition to external inclusivist critique.[155] Only in more recent decades has there emerged a distinctive justificatory liberal inclusivism. This allows us to anchor exclusivism in what might be referred to as the "standard view"[156] of justificatory liberalism in reference to which the deviations towards inclusivism can be contrasted. As shall emerge, the exclusivist-inclusivist debate *within* justificatory liberalism holds direct relevance for Establishment with crucial implications for Free Exercise and the debate between the broad and narrow approaches.

7.2 Exclusivist Justificatory Liberalism: The Standard View

For all its multifaceted complexity, the exclusivist-inclusivist debate *within* justificatory liberalism has a determinate origin in justificatory liberalism's fundamental commitment to public justification as a necessary condition of political legitimacy. Variously heralded as its "moral lodestar" (Macedo, 1991, 78) or "clarion call" (Eberle, 2002, 54), this is a condition that legitimate exercise of political power must be acceptable to all who are subject to it, in some qualified sense (elaborated below).

Though there are many formulations (and labels[157]) for this condition I will endeavour towards a more or less generic one in terms of the **public justification principle:**

[155] See Eberle (2002) or Wolterstorff (2007) as examples.
[156] See Eberle (2015); March and Steinmetz (2018) 204.
[157] Notably, the "liberal principle of legitimacy" (LPL) (Rawls, 1993/2005, 217), but also the public justification requirement (PJR) (Bird, 2014), qualified or reasonable acceptability principle (RAP) (Billingham and Taylor, 2022).

PJP: Political-exercise is legitimate/legitimated if and only if (iff) it is publicly justified or capable of being publicly justified (i.e. *publicly justifiable*).

A few clarifications on the above terms, starting with **political-exercise**. This is commonly associated with coercion inherent in political power (Rawls, 1993/2005, 68). Coercion, of course, is itself a complex concept, but the definitional debates within the literature need not bear on the present discussion which will adopt a maximally capacious view. This includes direct forms (e.g. enforcement or legal sanctions) or more general structural features of a political regimes (e.g. constitutional provisions, economic and social-institutional arrangements etc.) (Wong, 2020, 238). Expanding coercion with the latter features proves especially important in demonstrating how coercion in political power differs from background or individual coercion against prominent suggestions otherwise, including William Edmundson's famously provocative claim that legal-political power is not coercive (1998, 95-124).[158] There has also been challenge to the necessity of associating all political power with coercion though.[159] Again, I will accommodate this by taking a generic view whereupon political-exercise could apply to any political decisions, endorsements, proposals, laws, moral rules or "something else" (Wendt, 2019, 40). Similarly, while sometimes the scope of political-exercise is limited to some particular subset of the foregoing[160], I take no stand on these matters here. Accordingly, my references to 'political-exercise' are intended as a generic placeholder not limited in scope even when referring to 'proposals' and/or 'laws', 'rules' etc. in discussing concrete examples.

Likewise, I will take **legitimacy** (and its cognates) in a broad sense to mean something like (morally) "permissible" or "proper" though not necessarily just (Quong, 2011, 131-135).

This brings us to **public justification**. Although theorised in a plethora of ways, the essential idea lies in its distinctiveness vis-à-vis the ordinary concept of justification, sometimes termed 'rational justification' or justification *simpliciter* (cf. Eberle, 2002, 62). Whereas ordinary (rational) justification appeals to external standards such as correctness or truth (Idem.; Wendt, 2019, 40), in *public* justification the (justificatory) reasons offered must be in some sense "adequate or sufficient" for acceptance by each relevant addressee *by their own lights*– that is,

[158] I indirectly return to these matters in Chapter 9 (9.1.2) in arguing for the normative uniqueness of political power. For an interesting argument in favour of coercion that appeals to the structural features see Anderson (2010).
[159] See Bird (2014) 195-198; Lister (2013) 18; Quong (2014) 271-275. Regarding the "political" per se, see Gaus (2011) who extends public justification more broadly to "social morality" (2-14).
[160] Rawls, notably, regards PJP as applying only to a subset of political-exercise, namely "constitutional essentials" or matters of basic justice (1993/2005, 214).

according to their individual **perspective** or **belief-value set** (D'Agostino and Vallier, 2014). By way of illustration, justifying the prohibition on meat consumption upon the reason that it is unhealthy, morally wrong, or sacrilegious might adequately justify the prohibition for some belief-value sets but not those with contrary beliefs such as meat consumption being of irreplaceable nutritional value, morally permissible or religiously mandated. A public justification would therefore mean finding reasons that are congruent with beliefs within all relevant perspectives such as, for instance, if meat consumption posed a risk of harm due to a viral outbreak or environmental hazard, accepted by all relevant perspectives as an adequate or sufficient reason.

Just what is sufficient for acceptance and by which addressee(s) forms the locus of theoretical complexity that cannot – and need not – be resolved here. Instead, a few clarificatory remarks are provided to identify the kind of standard of acceptance that might be required. What matters here is not *actual* acceptance or unanimity, but a hypothetical or *idealised* one. This might involve idealising the scope of the *constituency* whereby not every member of the political community counts as an addressee for public justification, but only those that meet some qualification(s) (Enoch, 2015, 118). Hence, whereas references to 'political community' or 'polity' might denote an actual constituency, "the public" tends to be a technical term for the relevantly-qualified constituency. Idealising might also involve the epistemic attributes of the addressees to correct for reasoning or informational flaws (Idem.). These modes of idealisation get expressed in various ways though perhaps most common is to speak of *reasonable* (and *unreasonable*)[161] person(s) or **member(s) of the public (MOPs)**, as their idealised surrogate counterparts, or even in terms of what is *reasonably/unreasonably* acceptable/rejectable. Reflecting that these are technical designations or terms of art, I will mark them with *italicisation* throughout and sometimes replace references to *reasonableness/unreasonableness* with less suggestive terms like *qualified/disqualified* (cf. Estlund, 2008, 44).

In brief then, public justification is justification relativized to each *reasonable* or *qualified* perspective comprising the *public* and attains where the justificatory reasons are sufficient for qualified *acceptability* and/or *non-rejectability*. And so, defined this way, the exclusivism-inclusivism debate within justificatory liberalism is fundamentally about the justificatory adequacy of religious reasons for public justification.

[161] See, notably, Scanlon (1982) 111ff. ; Rawls (1997) 805-806.

Exclusivism, as noted, is best anchored in the so-called 'standard view' of justificatory liberalism which adopts what has come to be known as the '**consensus model**' (view or conception) of public justification. It is therefore also known as 'consensus justificatory liberalism' or 'consensus-PJP'. This will be detailed below, but for the overall picture of the standard-view, we can appropriate Kevin Vallier's presentation in the following triadic sequence (2014, 52):

Consensus-PJP

(1) PJP → public justification → **Public-reason-requirement**
(2) Public-reason-requirement → **Exclusion**
(3) Exclusion → **Restraint**.

Taking each in turn, public justification, as mentioned, aims to make political-exercise acceptable to each qualified perspective. Controversial or divisive reasons therefore seem inherently unsuitable compared to reasons that are mutually *accessible* and/or *shareable* amongst all relevant addressees. Accessible reasons appeal to common or shared evaluative standards (Vallier, 2011, 264-265). Shareable reasons, meanwhile, need not be the very same or identical[162] nor even actually shared provided that they *could* be (hence "shareable"[163]). Shared and/or accessible reasons are what constitute **public reason(s)** on the standard view generating the public-reason-requirement or that public justification must comprise exclusively public reason(s).

Reasons that are not shareable/accessible are in that sense 'non-public'. In Rawlsian terms, these reasons are '**sectarian**' or '**comprehensive**' because they are rooted in private or esoteric metaphysical, moral or other philosophical worldviews (collectively, '**comprehensive doctrines'**) harbouring ultimate values or '**conceptions of the good'** (Rawls, 1993/2005, 19-20; 129, 180).[164] I will use comprehensive and/or sectarian reasons interchangeably in referring to non-public reasons, as defined.[165]

[162] This captures the difference between what Quong (2011), 264, calls "weak consensus" and "strong consensus". My references throughout will refer only to the "weak" version.
[163] See Vallier (2015a) 4. Since the distinction is not crucial to my discussion, references to shared are taken to include shareable unless stated otherwise.
[164] See Rawls (1993/2005) 175.
[165] I recognise, however, that the two labels relate to different concerns and comprehensive reasons need not be sectarian insofar as they can participate in an overlapping consensus as public reasons.

To the extent that religious reasons are substantially sectarian/comprehensive in nature, they will not be accessible to or shareable by MOPs and thereby incapable of constituting public reason(s). Thus, failing the public-reason-requirement, religious reasons are, on their own, insufficient to attain public justification for political-exercise, which results in their *justificatory inadequacy* or **Exclusion**.

Exclusion of religious reasons in turn suggests a form of what I have above labelled '**Restraint**'. By Restraint, I am referring to the (variously-specified) moral duties said to be owed by MOPs to one another in the course of public reasoning, or, more precisely public deliberations and/or political decision-making (e.g. voting where the MOPs are franchised citizens or judicial and executive/administrative orders in the case of MOPs in government or public office). Restraint has a prominent place in the standard view and for its inclusivist critics. This awaits elaboration below. For now, our outline of the standard view comes to a conclusion.

7.3 The Inclusivist Challenge

The standard view of justificatory liberalism has attracted much criticism on account of its exclusivist stance towards religious reasons. There are several types of inclusivist objections.[166] In this section, I will outline, in very generalised, and partly synthesised, form, two prominent ones: the 'semantic-objection' and 'unfair-burden objection'.

7.3.1 Semantic-objection

The semantic-objection targets the equivalence drawn between non-public reasons and religious reasons for Exclusion. The equivalence is problematic in two ways. First, religion, as discussed, is definitionally elusive and unstable as a conceptual category. The undetermined, universalistic sense identified in Chapter 1 proves unmanageably overinclusive while the conventional sense is imprecise and potentially under-/over-inclusive. Unsurprisingly, perhaps with the exception of Robert Audi's cautiously-qualified nine-point attempt (2000, 35; 2011, 72), few of the prominent liberal treatments of religion actually venture to define it. Yet, as the discussion of Laborde's disaggregative proposal has shown, this arguably need not matter. Religion need not be strictly coextensive with non-public reasons. This admission constitutes the second way to the semantic objection. For most exclusivists, however, this is hardly an

[166] Patrick Neal (2009), for example, has identified four distinct types of objection. Vallier (2014) 48 has a slightly expanded list.

objection since, as already evinced, religious reasons need not be *unique* in being subject to Exclusion. All non-public reasons are Excluded wherein religion forms but a subset. Religion or faith seems to naturally find its way there as a historically divisive phenomenon: steeped in intra-faith theological and liturgical disputations across ever-fragmenting denominations, not to mention the fathomless rift between the theist and atheists, the faithful and agnostic.

Perhaps so, but religion might then also encompass a sufficiently public dimension. Beyond the caricatures of religion as private revelation or esoteric dogmas "backed-up by threats of hellfire" (Waldron, 2002a, 20) religious reasons can make sophisticated connections to the broader moral reflections within background public culture such as on the value of life or human dignity (Waldron, 2012, 852-854). Key liberal public reforms: abolition, desegregation, refugee asylum – even liberalism itself – have been propelled by religiously-inspired arguments (Waldron, 2021, 93-94).

All this though is simply to underscore that exclusivists cannot be loose with religion, but must identify the discretely non-public aspects of it. Accordingly, the semantic objection is manageable with the relevant tools like those already noted from Laborde (2017) or March (2013) who specifically develops a public justification typology of religious reasons. We do not need to delve into these details, however. Instead, following Robert Talisse, we can simply stipulate a narrow focus on non-public or *strictly* religious reasons (2015, 54-55) being those that are purely comprehensive/sectarian. For simplicity, I will continue to refer to "religious reasons" but intend this strict kind (unless indicated otherwise).

7.3.2 Unfair-burden objection

The unfair-burden objection claims that "citizens of faith" or religious MOPs are unfairly burdened compared to their secular or non-religious counterparts. Being unable to appeal to religious reasons means that religious MOPs are effectively required to split their identity and repress their true convictions when participating in political life. This identity-splitting and privatisation of their faith seems not just repressive, but a form of self-alienation and violation of integrity (Vallier, 2012, 149, 155-157). Alongside these burdens, and partly as a consequence thereof, religious MOPs stand unequal relative to their secular counterparts in terms of accessibility and ease of participation in public life (Greenawalt 1995, 63, 120; Eberle, 2015, 32-33). In sum, religious MOPs seem unfairly disadvantaged compared to secular MOPs and burdened by being unable to present and act on their authentic and deepest convictions in the public sphere.

While the burden here seems evident, there may be credible suspicion about whether there is unfairness. Public reason, after all, is not to be confused with secular reason (Audi, 2000, 67-69). As Rawls emphasises, secularism itself relies on comprehensive/sectarian doctrines in a way that public reason does not (1997, 775). It follows that even secular MOPs are burdened in relation to their (secular) non-public reasons. Indeed, one might even go so far as to say that the only truly unburdened MOPs would be those whose belief-value set is entirely comprised of public reasons—a rather fantastical breed of MOP with purely public or political values!

Nonetheless, inclusivists will point out an apparent asymmetry here. Although *some* secular reasons are excluded as non-public, others which are public will not be. Conversely, *all* religious reasons are non-public and thereby *all* excluded (Eberle, 2015, 32-33). To be sure, the asymmetry does not depend on the aforementioned qualification of religious reasons in the strict sense since there is no corresponding idea of "strictly secular reasons": it is *always* the "religious" element that accounts for the exclusion as sectarian/comprehensive.

One exclusivist response might be to simply downplay this worry.[167] A more placatory alternative, is to stress the capaciousness of Restraint. In his later work, Rawls emphasises that being a moral, not a legal, duty, Restraint (or "duty of civility" as he calls it) imposes no restrictions on freedom of speech and concerns only public deliberations about ""constitutional essentials" and questions of basic justice" within the "public political forum" (1997, 767-769). This forum relates to certain roles and stages of political deliberation and decision-making: for example, when serving as a public official or voting in referenda and elections, and engaging in related political activities such as policy lobbying or electoral campaigning (collectively, **political-advocacy**). Consequently, Restraint does not apply to personal and social deliberations amongst friends and family or within civil society (e.g., churches, universities, civil associations, etc.) (Idem.). Lastly, the 'wide view of public political culture' means that even within political realm public political deliberations (e.g., discussion of voting intentions) MOPs can appeal to religious reasons (or similarly otherwise restricted reasons) subject to the famous proviso that 'in due course we give properly public reasons' (i.e., reasons of the non-restricted kind) (Ibid., 776, 783-784).

Loosened this way, Restraint can mitigate a considerable degree of the unfair-burden objection. Still, it does not constitute a complete defence. After all, the above-noted asymmetries will

[167] In Stephen Macedo's notorious quip, if some feel "silenced" or "marginalised' <…> I can only say "grow up!"" (1997, 21).

persist in relation to political-advocacy and public service, which are still significant dimensions of political life. If even after the concessions made, Restraint remains vulnerable to the unfair-burden objection in salient areas of politics, the tensions between the standard view and its inclusivist detractors appear entrenched or deadlocked. Each side claims to hold the reasonable balance proportionate to the force of the other's reply (Vallier, 2014, 84-85; Billingham, 2018, 353).

7.4 Inclusivist Justificatory Liberalism: The Convergence Model

A significant innovation against this backdrop has been the emergence of 'convergence-justificatory liberalism'. Although much of the above debate concerned (3) Restraint, the directedness of Restraint towards religious reasons has in fact nothing to do with Restraint itself. That instead stems from (1) – the public-reason-requirement whereupon (2) Exclusion follows in respect of religious (and other non-public) reasons. It is therefore the public-reason-requirement that becomes central to the distinction between the exclusivist standard view of justificatory liberalism with its consensus model and the inclusivist '**convergence model'** of public justification (or convergence-PJP).

To explain, whilst both the consensus and convergence models understand public justification in terms of public reason(s), they radically differ on the definition of public reason(s). Specifically, proponents of the convergence model question the public-reason-requirement in its limitation to accessible/shareable reasons when *intelligible reasons* could just as effectively attain public justification to fulfil PJP. Intelligible reasons need not be shareable nor even mutually accessible. They need only be recognisable as intelligible reason(s) for the relevant MOP relative to that MOP's evaluative standards (as opposed to the evaluative standards of others or shared ones) (Vallier, 2015a). Nevertheless, they can still attain public justification if and when they *converge* in support of (or against) some political-exercise. For instance, political-exercise P is supported by A for reason R_a and by B for reason R_b (D'Agostino, 1996, 29). More vividly, in Allen Hertzke's case retold by Eberle (2007, 432-546), the Trafficking Victims Protection Act (**TVPA**) – a law to combat global sex-trafficking – gained support from both progressive feminists and conservative Christians who despite being polarised and in the absence of shared reasons converged on the TVPA for "distinct and incompatible reasons" (Ibid., 435).

The crux of the difference between consensus and convergence then essentially springs from different conceptions of public reason, revealing its ambivalence between the various kinds of justificatory reasons discussed. In order to avoid confusion, I will henceforth use '**convergent reason(s)**' to denote intelligible reasons which converge whilst retaining the term '**public reason(s)**' for shareable/accessible reasons.

With these clarifications, we can see that if public justification can be attained by convergent reasons then PJP need not necessitate Exclusion and if there is still a role for Restraint it is not one that concerns non-public reasons, thereby seemingly avoiding the inclusivist objections. In short, it is by dropping the unduly restrictive limits on public reason – namely, the public-reason-requirement – that convergence theorists offer a way to reconcile justificatory liberalism and inclusivism about religious reasons (Gaus & Vallier, 2009, 61-62).

The reconciliation proves considerable but not complete. Most evidently, averting comparative distinctions between justificatory reasons proves significant against the "unfairness" component of the inclusivists' unfair-burden objection. Eliminating the problematic dichotomies "secular/religious, public/private, or political/comprehensive", convergence-PJP treats all intelligible reasons alike in determining public justifiability by a convergence of relevantly-qualified perspectives (Ibid., 71).

Even so, that still leaves inclusivists room to complain that convergence-justificatory liberalism nonetheless does not allow religious reasons to publicly justify *except by convergence with non-religious reasons* (Eberle, 2015, 43). Admittedly, this flows both ways, but on the whole, it is far more likely that what is endorsed for secular reasons could be also endorsed for religious reasons but not vice versa. This asymmetry imposes a limits on the reconciliation.

Moreover, convergence does not necessarily abandon Restraint. That may sound peculiar given that without Exclusion, Restraint seemingly has no content. Besides the necessary application to non-intelligible reasons, Restraint remains relevant in relation to voting for political-exercise. Being actual (not idealised) and (typically) majoritarian (not unanimous) voting outcomes do not track convergent reason(s). Accordingly, to help ensure that political-exercise enacted through voting is one that could be supported by convergent reason(s), there may be grounds for Restraint in the form of only voting for political-exercise one sincerely believes could be supported by convergent reason(s). This may, for example, preclude voting for any political-exercise only justifiable upon religious reasons (although this will be contingent upon the existence of (relevantly-qualified) non-religious perspectives in the public (Gaus & Vallier,

2009, 61-62)). There might also be contention about whether this kind of Restraint applies to all MOPs or only to those with greater influence over outcomes such as elected representatives or public officials (Gaus, 2010, 23-24; Vallier, 2014, 184-196). Nevertheless, what emerges here is that there is a form of Restraint pertinent to convergence given that voting and political decision-making – especially at the level of public office – otherwise lacks a mechanism to ensure that only political-exercise backed by convergent reason(s) is enacted/applied. Whatever its exact form, I will refer to this mechanism as **convergent-Restraint** to distinguish it from the various more and less permissive forms of Restraint on the (standard view) consensus model.

Since convergent-Restraint coupled with the contingent limitation that religious reasons (in a reasonably pluralistic polity) will not constitute convergent reasons, justificatory liberalism will not attain complete inclusivism.[168] However, the level of inclusivism allowed by convergence-PJP is certainly not insignificant. Or so the proponents of convergence claim. One such indication is that the convergence model allows religious reasons to count in illegitimating political-exercise. Thus, just as the conclusive reasons of *reasonable* secular MOPs could illegitimate any political-exercise by non-convergence where there are only religious reasons in support, religious MOPs could do so for their conclusive religious reasons even if there would otherwise have been a convergence by various secular reasons.

At first glance, this appears a powerful challenge to the Coherence-Problem concerning accommodations and exemptions. This is because it reveals that the legitimacy of the law as the starting point of the Coherence-Problem might be too simplistically reliant on the assumption of exclusivism via the (standard view) consensus model. Yet, if the burdened groups can invoke their religious or cultural reasons to prevent (convergence) public justification, the legitimacy of the law cannot be so presumed but must be in each case tested by convergence-PJP. Formally, the Coherence-Problem point still stands insofar as legitimacy renders further differentiation incoherent, but the idea that the narrow approach is somehow a default minimal common ground is replaced with a more dynamic view of legitimacy that might equally favour the broad approach.

The picture is more complex, however. In the first instance, it requires not simply adopting the convergence model of public justification but adopting it in some more *exclusive* way that precludes public justification by (non-convergent) public reason(s). We might grant that,

[168] Of the kind that might be available to non-liberals or liberals uncommitted to PJP.

however, to see the yet deeper problem. Appealing as it may be in delivering mutual safeguards from various majoritarian dogmatic impositions, it also seems like a recipe for anarchy since a single relevantly qualified MOP can illegitimate political-exercise that would otherwise have been publicly justified by convergent-reason(s).

Countering this, are mechanisms like bargaining and/or nesting political disagreements.[169] This involves something like considering various proposals of political-exercise as part of an eligible set such that failure to converge on one implies (and results) in a default to another. To take the simplest example, if there is no convergence on either driving on the left or driving on the right the default is either unregulated driving (on any side) or a blanket prohibition on driving. In this way, there may be convergence on prohibition as favourable to unregulated driving and convergence on either left- or right-sided driving (perhaps put to a procedural resolution like majoritarian voting) as favourable to the blanket prohibition and so on. Naturally, there are further complications to this[170], but, for present purposes, it shows how through these processes political-exercise might secure public justification by convergence despite initially conclusive reasons against it by some MOPs, including religious ones.

If that is correct, then even adopting an *exclusively* convergence model of public justification will sometimes engender the earlier dynamic of the Coherence-Problem – that is, a legitimate law (by convergence) with some desiring to be exempted for religious (and/or cultural) reasons. And though I say 'sometimes' given that much depends on how the above processes of bargaining, nesting, convergence play out, it seems unlikely that there would be convergence on some political-exercise without it also having support on the balance of public reasons(s) (Lister, 2011, 359). After all, as repeatedly observed, exemptions claims typically *do* recognise the legitimacy or public rationale for the law, which even the relevant objector has a reason to support (just not a conclusive one given the incidental burdens on them). For this reason, proponents of convergence typically defend convergence of an *asymmetrical* form.[171]

In its (standard) symmetrical form, public justification applies the same standards of justification for both determining whether political-exercise is *reasonably* acceptable and whether it is *reasonably* rejectable (Vallier, 2011, 263). Conversely, the *asymmetrical* form means that different standards can be used for acceptability and rejectability (Ibid., 263-264).

[169] For a more detailed overview see Gaus (1996) 180-182.
[170] For an interesting discussion see Lister (2010).
[171] A potential exception is Boettcher (2015) who defends convergence along with consensus as a *hybrid* Rawlsian view. Prominent defences of asymmetric convergence are Gaus & Vallier (2009); Gaus (2010); Vallier (2011); (2014).

Combining the convergence model with this asymmetry feature, it is argued, could potentially allow for religious MOPs to rely on their conclusive religious reasons to claim exemptions and accommodations to otherwise legitimate general laws. Asymmetry would enable blocking impositions of political-exercise (whether justified by public reason(s) or convergent ones) where the objector has *reasonable* grounds against imposition even if those reasons are exclusively religious such that they would not have been capable of being public or convergent-reasons (Gaus & Vallier, 2009, 62-64). To emphasise, this blocking can occur upon religious reasons alone even where there are absolutely no secular reason(s) against the imposition.

The problem that arises, however, is that the idea of rejection seems ambiguous between a rejection of the political-exercise in general, for everyone, or an accommodation or exemption against it (Lister, 2010, 165-166). If it is for everyone then it seems to be a straightforward case of political-exercise such that asymmetry should have no relevance or in any case is cancelled out by others' reasonable rejections to the reasonable rejection. Conversely, if differential as an accommodation or exemption, then, first, it seems nonetheless a political-exercise (exemptions too being laws) without relevance for asymmetry, and, second, even if not, the Coherence-Problem and Salience-Demarcation Puzzle is revived. Is the cultural-exemption coherent and does granting it effectively lead to an anarchic complication of each (*reasonable*) objector being self-exempting?

It seems therefore that the most promising contribution of the convergence model to resolving the Puzzles remains its claim to greater inclusivism over consensus such that legitimacy might be more fluid between the narrow and broad approaches. There is also a contingent implication for Establishment to be seen in the last section. For now, however, I turn to an important counter from defenders of the consensus model in relation to the comparative advantage claimed.

7.5 Consensus-Convergence Parity?

More recently, proponents of the consensus model have mounted a counter to the advantages claimed by convergence theorists in relation to its greater inclusivism. This is worth investigating because, if sound, the distinction between the two models becomes irrelevant in relation to the Puzzles under consideration.

The counter starts from the observation that despite redefining the public-reason-requirement, what ultimately counteracted the inclusivist unfair-burden objection is not the convergence

model per se that but the deviation from Restraint as conceived on the standard view. Yet, if so, then there seems nothing inherently exclusivist about consensus as opposed to the form it takes within the standard view. Provided that the consensus model can compatibly reform the standard view Restraint into something like convergent-Restraint, it too could offer a like accommodation of inclusivism.

It is precisely this move that some consensus theorists have sought to make. Aurélia Bardon, for example, has plausibly argued that there is nothing essential to the standard view that should lead one to endorse its form of Restraint (2018, 651-657). Accordingly, it is open to consensus theorists to meet the objections of inclusivism by going even further beyond the aforementioned Rawlsian concessions and adopting a "limited" Restraint (Ibid., 650). Unlike what might be called general Restraint or the "direct method" (Vallier, 2014, 51), which applies to all MOPs, limited Restraint (or "indirect" method (Idem.)) only applies to MOPs who directly influence political-exercise – viz. public officials such as legislators, judges, and other office holders with executive or administrative powers (Bardon, 2018, 650).

To be sure, limited Restraint is not identical to convergent-Restraint, which could vary between general/direct or limited/indirect even if it mostly leans towards the second – applying where one justifiably believes that one's vote or political-advocacy contributes to the imposition of political-exercise (Vallier, 2015b, 153). Nevertheless, as some convergence theorists have themselves conceded, limited Restraint could likewise counter much of the unfair-burden objection by allowing MOPs (other than public officials) to freely appeal to their deepest convictions even if comprehensive/sectarian in character. This is because limited Restraint secures Exclusion without the unfair-burden costs of direct method Restraint. In Vallier's summation, it allows non-public reasons "into the political process, but does not let them leave" (2014, 51). Furthermore, as Bardon stresses, in applying only to the *roles* of public office limited Restraint only imposes burdens by voluntary assumption, meaning that religious MOPs can avoid being burdened simply by "not becoming public officials" (2018, 650).

Convergence theorist might object here that even if it unburdens citizens, there is no alleviation for religious public officials who are inequitably more burdened than their secular counterparts. Nor does the voluntary assumption matter since if some bear greater integrity costs in pursuing and holding public office, this is unfair and inconsistent with the liberal ideals of public offices being equitably open to all. The objection itself has force, but not in the comparative context

since convergent-Restraint would itself be liable to this objection. As such, consensus via limited Restraint so far looks capable of equalising the advantage claimed by convergence.

A more difference-focused challenge might be that unlike convergent-Restraint, the limited Restraint of consensus remains vulnerable to internal contestation against the (general) Restraint of the standard view (Vallier, 2014, 51-52). The arguments effectively turn on whether the conventional Rawlsian picture of citizens as democratic equal co-rulers (cf. Rawls, 1993/2005; 216-218) withstands the posited realities of representative democracies wherein citizens exercise but a negligible degree of political power (Bardon, 2018, 653-656). While, as indicated, I think a plausible case might be made, this all again turns out to be peripheral. Firstly, convergent-Restraint must also rely on such arguments in leaning towards indirect method (limited Restraint). Secondly, as Paul Billingham observes, the common assumption here, namely Restraint being established by reference to its instrumental function vis-à-vis Exclusion, is itself contestable if Restraint is justified on intrinsic grounds (2018, pp. 350-351). One way or the other, there is no apparent advantage.

If anything, the above considerations would suggest that consensus and convergence can reach an on-par inclusivism because the leanest or minimal form of Restraint seems equally available to both provided it can be defended from the standard view and the hitherto undiscussed intrinsic justifications. Sound as that may be, this conclusion rests almost entirely on a significant assumption about the instrumental (if not intrinsic) necessity of Restraint, which despite significant theoretical resources agitating for critical revision, has remained astoundingly unquestioned almost as if an inviolable premise. Overturning this assumption in the next section reveals the deeper salience between consensus and convergence as determinative of the exclusivist-inclusivist valence in justificatory liberalism.

7.6 Public Justification Un-Restrained

So far, the underlying constant has been the opposition between Restraint and inclusivism. Remarkably, the considerable and consequential differences between consensus and convergence on public justification and the public-reason-requirement seem reduced to merely establishing the possibility of convergent-Restraint – one not substantially more inclusivist than consensus limited Restraint. More remarkably still, despite having the theoretical resources to do so in minimizing Restraint, neither model seemed to exploit these resources further towards altogether severing Restraint. While there may be various ways of accounting

for it, this assumption of Restraint's necessity appears irrevocably entrenched, being taken as a foundational given. At one point, Bardon even tellingly confirms as much in her unelaborated assertion: "there can be no justificatory liberal alternative to limited restraint for public officials" (2018, 650).

As Christopher Eberle observes, despite being so widely held across many justificatory liberal accounts, this assumption that PJP entails or otherwise implies Restraint, receives virtually no direct explication (2002, 114-159). That, of course, need not mean there is none. Indeed, as alluded to earlier, the case for Restraint may rely on intrinsic or instrumental grounds. Since our focus is not Restraint, it will suffice to consider two prominent proposals to highlight that Restraint is by no means a straightforward assumption to make.

7.6.1 Restraint intrinsic and instrumental

A prominent *intrinsic* justification is that of **respect**. Seminally articulated by Charles Larmore, respect advocates for Restraint by appealing to our distinctive capacity as persons to act for reasons, which effectively entitles us to receive sufficient reason(s) (public or convergent, as the case may be) when subjected to the incidents of involuntary political association (1999, 605-608) - viz. political-exercise. Resonant as that may be, there is a two-fold problem. Not only does respect seem to base Restraint on reasons which themselves might violate Restraint, but (even granting those), it still begs the question: why should complying with respect require or take the form of Restraint? (Eberle, 2002, 109-116, 146-151; Wall, 2002, 390). Arguably, respect is already properly afforded by conscientious civic engagement whether or not one ultimately succeeds in furnishing a public justification for political-exercise (Eberle, 2002, 84-108).

Turning to the instrumental case, it is often framed in terms of **stability**. This essentially holds that (i) appeals to non-public reasons have destabilising effects and (ii) Restraint prevents or considerably reduces those effects, thereby promoting stability. Much like with other forms of instrumental reasoning the soundness of this argument largely depends on its empirical claims and their interpretation. These are too elaborate to discuss here, but have been shown to be highly contestable (Eberle, 2002, 152-186). More crucially though, instrumental appeals to stability do not explain why stability ought to be an individual end or one that cannot be more directly and robustly secured by structural institutional mechanisms rather than Restraint?

As noted, however, these arguments are primarily rationalisations of the implicit assumption. Accordingly, it might just be that the most compelling case for Restraint is warranted by the

structure of PJP itself? That is, if one accepts that PJP leads to Exclusion and Excluded reasons (non-public or non-convergent, as the case may be) have no justificatory capacity, Restraint may seem plausible. After all, if political-exercise justified decisively upon Excluded reasons cannot satisfy PJP to gain legitimacy, is it not rather pointless to rely on such reasons in furnishing public justification?

Reviving the earlier arguments for limited Restraint, the above justification could be restricted to the higher level of public officials, leaving us precisely with Bardon's above-quoted remark with which we began: that limited Restraint is fundamentally inseverable from justificatory liberalism's commitment to PJP. Challenging this limited instrumental justification requires a more elaborate response.

7.6.2 Public justification: abstract and procedural

That begins with noting what appears to be a critical ambiguity within PJP with regard to public justification or rather two ways it might be understood. Public justification might be taken to be an abstract relational property pertaining to when there are reason(s) for political-exercise that render it justified or, more precisely, *justifiable*. Call this the **abstract-sense**. Yet, it might also be construed as the activity or process by which MOPs (or public officials) actually publicly justify political-exercise – i.e. process of furnishing (non-Excluded) justificatory reasons. Call this the **process-sense**.

This ambiguity is not unfamiliar. Vallier, for example, characterises it in terms of public *justification* versus public *deliberation* (2014, p. 35; 2015b, *passim*) and Bardon as "PJ-Legitimacy/PJ-Civility" (2018, p. 645). Yet, despite their acute awareness and cogent elaboration of it in developing their minimalist forms of Restraint against the impugned tendency to conflate PJP and Restraint, both curiously underestimate the fuller import of the distinction.

While it is plausible that (limited) Restraint can play an instrumental role in ensuring that each political-exercise has been furnished with justificatory reasons that satisfy PJP, it is in fact not strictly necessary when PJP is taken to refer to public justification in the abstract-sense. To see this, imagine a controversy over some political-exercise such as a public revenue-financed large construction project: for instance, a dam.

Dam Justification Scenarios:

Suppose in voting for the measure the majority party public officials appeal to a non-public reason such as personal revelation or religious scriptural commandments. To make it more acute, it may even be a majority judgment on these grounds in a judicial review or constitutional challenge to the law. Does this failure of Restraint mean that the political-exercise has not been publicly justified and is therefore illegitimate?

The answer, unsurprisingly, depends on the above distinction. Taken in the process-sense, since the reasons furnished are non-public, by stipulation, the answer is 'no'. Yet, when it comes to the abstract-sense, things are less clear. The answer depends on the totality of reasons that there might be for and against constructing the dam. If, for example, all this occurs within a political community located in the desert, then perhaps the religious reasons actually adduced might indeed be the most salient considerations for the dam. Conversely, if there is in fact water to be dammed, other reasons arise. For example, economic or environmental reasons like water security or irrigation benefits. Then, even though advancing (non-convergent) religious reasons fails public justification in the process-sense, public justification in the abstract-sense is not thereby failed. Religious reasons aside, there may be public reasons that apply here *even if no one actually pronounced them*. It is this potentiality in the abstract-sense that my above use of *publicly-justifiable* intends (in the suffix) to convey.

Now if political-exercise can be publicly justifiable and therefore legitimate by PJP irrespective of Restraint, then the process- and abstract-senses are far more mutually independent than even those pressing the distinction have recognised. More critically, this means that the question of what is publicly justifiable is entirely severable from and more fundamental than that of how and whether it has been (process-sense) publicly justified. Restraint is certainly instrumental to the second, but has no bearing on the first. When it comes to the abstract-sense it is Exclusion and whether the public-reason-requirement is to be modelled by consensus or convergence, which is determinative. And, as already observed, it is with regard to Exclusion that consensus and convergence models diverge in their potential for inclusivism.

The above point is worth emphasizing because it underscores how within justificatory liberalism minimizing or even eliminating Restraint does not enable the consensus model to embrace inclusivism, understood in the abstract-sense. Thus, Bardon is entirely consistent in her defence of exclusivist justificatory liberalism and commitment to the consensus model. The problem instead lies in the confidence that the potential for each model to reach similarly

minimal levels of Restraint equalizes consensus and convergence as both exclusivist, in the minimal sense that justificatory liberalism must be. The abstract-sense, however, reveals a dimension of public justification upon which Restraint has no bearing. Considering public justification in the abstract, we are concerned with the totality of conceivable justificatory reasons for the political-exercise in question. It is this which gives indication of how convergence justificatory liberalism can be inclusivist in ways unavailable to consensus therefore rendering the choice between these models pertinent in determining the extent to which justificatory liberalism can be inclusivist.

Return, once more, to the desert version of the dam scenario. Given the stipulated controversy – viz. the political-exercise in question (constructing the dam with public revenue) – offering *only* religious reasons would fail to publicly-justify and hence legitimate the political-exercise on either model in the *process-sense*. (For consensus, religious reasons fail the public-reason-requirement; for convergence, the stipulated controversy rules out convergent reasons). Things are different on the *abstract-sense*, however. As noted, the desert environment plausibly eliminated many of the candidate accessible/shareable reasons that could have satisfied the public-reason-requirement of consensus-PJP. Consequently, without the existence of alternative public reasons, the religious reasons offered leave the political-exercise publicly unjustifiable irrespective of what sectarian/comprehensive reasons there might be in support of the dam. And yet, in emphatic contrast, on the convergence model, these religious reasons may nonetheless still suffice to make the dam publicly justifiable in the abstract-sense. All that is necessary is for all intelligible reasons to converge (i.e., that there be convergent reason in support of the dam). Thus, if the majority had religious reasons and the minority were utilitarians or in some other way supportive of majority-preference satisfaction, there could be public justification for the dam on entirely religious (or other sectarian/comprehensive) convergent reasons.

7.6.3 A Domain of Difference

From this, it emerges that although consensus and convergence may attain equal levels of inclusivism when it comes to limited Restraint, this pertains to the narrow domain of comparison: the process-sense. At the more fundamental level of the abstract-sense, which concerns what is, in principle, publicly justifiable, it is Exclusion, not Restraint, which proves operative. Consensus justificatory liberalism will here Exclude the very reasons that, on the convergence model, might publicly justify as convergent reasons. The abstract-sense of public

justification therefore preserves the differences between the two models with direct implications for determining justificatory liberalism's alignment possibilities between exclusivism and inclusivism

It might be objected that all this moves too fast and there are various ways in which the abstract-sense and process-sense are either more equal or intertwined than presented. For instance, whereas the dam scenario starts from public justification in the process-sense being failed, that overlooks the instrumentality of the process-sense in preventing (abstract-sense) publicly unjustifiable political-exercise. Had the judges practised limited Restraint they would have overruled the dam in the desert, for example. Without at least limited Restraint, justificatory liberal polities might be eroded by illiberal majorities or otherwise unstable. Granted, but this question is distinct from that of working out whether the political-exercise in question is publicly justifiable. Indeed, as the comparison of models in the desert version just illustrated, the judges, say, applying Restraint presupposes an answer to what is publicly justifiable in the abstract-sense, which in turn requires an account and model of public justification

Still, it may be countered that the distinction is less neat than that. Without the process-sense of public justification, how can we even form what is publicly justifiable in the abstract-sense? Is it not through the process of actually offering one another reasons and publicly deliberating the matter that reveals to us what reasons (in the abstract-sense) there are? Were all MOPs to be appealing to esoteric reasons would it even be possible to discover what shared – for example, economic or environmental reasons there might be? And, in any case, who decides what model is correct and what is publicly justifiable in the abstract-sense if each MOP only has their perspective to go by?

Again, these are valid concerns but they merely point to the fact that there are multiple ways of theorizing public justification. On some accounts the abstract-sense must be highly sensitive to the actual make-up of a constituency and its deliberations whereas on other accounts that may have zero bearing because the constituency is entirely idealized.[172] That and how exactly one idealizes are all deeply contested internal questions beyond present scope. What matters here is that the abstract-sense can be independent of the process-sense occupying a reflective, philosophical standpoint about what reasons there are and which matter for public justifiability. As such, it is not immune to controversy and historical and/or cultural particularity. From our

[172] A notable version of this is the 'internal conception' of justificatory liberalism advocated by Quong (2011, 138-145) in contrast to what he calls the 'external'.

contemporary standpoint, we can disagree about whether, say, investing in divination is publicly justifiable precisely because there is no certainty in the connection between divination and preventing various maladies. Conjecturally, if, in antiquity, such a certainty dispelled any doubts then perhaps from *that* historical-cultural standpoint a case for public justifiability could be made much like we make between the dam and, say, its economic benefits. In short, though not uncomplicated, the abstract-sense is conceptually distinct and plausibly severable from the process-sense without incoherence.

7.7 The implications and the relevance of models

Contrary to recent suggestions of parity, extricating public justification from Restraint and distinguishing between its abstract and procedural domains (what I have labelled the *abstract-sense* and *process-sense*) unveiled the deeper, material differences between consensus and convergence. Unlike convergence, the Exclusion of non-public reasons by consensus limits public justification in the abstract-sense because it removes the possibility of public justification by a convergence of religious or other non-public reasons. Of course, in contemporary pluralistic societies that possibility is rarely, if ever, enlivened given the array of public and non-public reasons. This, however, is a contingent social fact that obscures the deeper theoretical, structural difference that convergence may, on alternative social facts, publicly justify in the abstract-sense that which consensus cannot, no matter the compositional changes of the perspective or MOPs in the constituency.

In that regard, we have already encountered the implications on Free Exercise in the above discussion of the Coherence-Problem. There, convergence varies from consensus in being more fluid between the narrow and broad approaches. There is no tilt or presumption towards a narrow approach as the minimal common ground. Both by compositional variations in constituency and even in more principled ways through the operation of bargaining and nesting processes, convergence allows legitimacy to attain or be blocked by non-public (i.e. non-shareable, non-accessible) reasons. To reiterate, this does not thereby overcome the incoherence of the rule-and-exemption approach, but it does mean that religious reasons could therefore, in principle, block convergence to illegitimate the construction of the Pipeline in *Munkara*, or legal prohibition on *peyote*, helmet mandates, humane slaughter regulations and laws in various other scenarios examined. In brief, though it depends on the various factors

mentioned and the level of idealisation, there is nonetheless some room for convergence to make a difference to the Puzzles via legitimacy.

The most immediate link to Establishment is found here too in that convergent reason(s) may legitimate laws that have non-public, religious rationales. Again, this is subject to contingencies in the composition of the constituency but, in principle, there is no bar to Establishment in this sense of aiding, sponsoring or constraining and hindering religious commitments. When it comes to institutional form too, convergence may allow more possibilities than consensus although neither model need necessarily impose disestablishment or other forms of secularisation. There is no need to delve into this further, however, for, as seen, within justificatory liberalism at least, the implications largely flow from the degree of exclusivism or inclusivism as to religious reasons and this corresponds tightly with the choice of model.

In light of this, the conceptualisation of liberal legitimacy between consensus and convergence justificatory liberalism matters. Consequently, if the proposed solution to these Puzzles is not simply the volatile yet, in principle, possible one of convergence, the alternative possibility still requires investigation. This will be taken up in the next chapter.

Chapter 8: Legitimacy and Its Limits

The previous chapter concluded by demonstrating how the contest between exclusivism and inclusivism within justificatory liberalism as the mainstream paradigm of liberal political legitimacy is fundamentally tied to how one conceives of public justification between 'consensus' and 'convergence'. Whilst parity was a possibility with Restraint this pertains only to what I named the 'process-sense' of public justification. Being about the admissibility of religious reasons in public deliberations, this is not the fundamental sense of public justification. That, rather, is the 'abstract-sense' which concerns the *justificatory capacity* of religious reasons to publicly justify and here parity is precluded given the distinctive conceptions of what counts as a public reason between the models. Consequently, focusing on this abstract-sense, this chapter pursues the answer about Establishment or whether religious or other cultural reasons can satisfy PJP to legitimate political-exercise. The answer, as the previous chapter evinced, requires deciding between consensus or convergence for conceptualising public justification. This is a challenging question because, as shall unfold, it is ultimately entangled with the internal logic of justificatory liberalism and political legitimacy itself. If, however, there is a sound basis within that in favour of one model, the question of Establishment might escape the Deep-Disagreements via a legitimacy-oriented solution. Achieving that will be the ultimate end of this chapter. In the process, the animating rationales for both models and justificatory liberalism will be uncovered alongside the necessity and outer limits of legitimacy in relation to the Deep-Disagreements on justice encountered in Part II. The response to those limitations will require a more finely-granulated approach to be detailed in the final chapter as the solution of the Puzzles for Free Exercise as well. All that, however, commences from an existential encounter engulfing consensus, convergence, and PJP itself.

8.1 A troubled contest

The schism between consensus and convergence has emerged as one of the "most important sources of disagreement among public reason liberals" (D'Agostino & Vallier, 2014). Unsurprisingly then, it involves multiple dimensions with wide-ranging implications beyond

exclusivism and inclusivism.[173] There is, however, an important difference across this divide and a related problem that arguably dwarfs all other matters of comparison because it concerns the very viability of justificatory liberalism, whichever model between consensus or convergence one elects. Although the two models seem in dispute over whether PJP can be fulfilled by public reason(s) or convergent reason(s), their divergence is more accurately about the disqualification of convergent reason(s). For whereas convergence theorists could, in principle, vary between limiting PJP to only convergent reasons or (more commonly) allowing *both* convergent *and* public reasons, consensus theorists, by definition, oppose convergent reason(s) within PJP. This restriction is the crux of the feud and illuminates a vital complication variously known as the problem of **incoherence** or **self-defeat**.

8.1.1 Self-defeat

The charge of incoherence or self-defeat has been levelled at justificatory liberalism in various forms (e.g. Raz (1990, 1998a); Wall (2002, 2013); Enoch (2013, 2015)). In essence, it holds that PJP fails to evade controversy despite its own prescription to do so. There are effectively two elements to this (Lister, 2018, 71). The first is ***controversy***: there is disagreement about the validity of PJP or that legitimate political-exercise must be publicly-justifiable rather than, say, based on actual consent, truth or correctness of its underlying principles as comprehensive liberals or liberal (and non-liberal) perfectionists might assert. PJP then seems just as controversial as some of the comprehensive doctrines it seeks to exclude as bases of legitimate political-exercise. The second is ***self-application*** or *reflexivity*: since PJP requires that controversial principles be publicly-justifiable if they are to be legitimate political-exercise, PJP requires itself to be publicly-justifiable. The combination yields self-defeat since PJP cannot satisfy its own requirement to be publicly-justifiable without circularity or question-begging – that is, relying on public justification to justify the requirement of public justification.

Given that controversy is no stranger to normative theories, it is the self-application element that exacerbates towards self-defeat. A natural defence therefore is to resist PJP's self-application. One obvious manoeuvre is to argue that PJP applies to political-exercise but since it is not itself political-exercise, there is no self-application. The success of this response in part

[173] To list but a few, consensus has been impugned as arbitrarily epistemically restrictive (Gaus & Vallier, 2009, 58-59), failing to honour reasonable pluralism and liberty (Vallier, 2011) and being potentially circular and inadequately politically action-guiding (Vallier & Muldoon, 2021, 224). Convergence meanwhile has been charged with having problems with 'sincerity' about justifiability to others (Quong, 2011, 265-273), 'asymmetry' towards the status quo or political inaction (Lister, 2010, 168-169; 2011, 353) and defaulting to anarchy with potentially nothing being publicly justifiable (Lister, 2018, 70).

depends on how one construes self-application, but given the consensus model's above-mentioned *public-reason-requirement* or restriction of public justification to public reason(s) alone, a crucial comparative advantage might be claimed here by proponents of convergence. Since the public-reason-requirement operates as a kind of political-exercise as to what can/cannot publicly-justify/legitimate, by not espousing it convergence arguably averts self-defeat by imposing no first-order restrictions that would trigger self-application. To explain via Gaus's analogy, convergence renders PJP to political legitimacy what the principle of falsifiability is to scientific validity ("a meta-claim, justified in the philosophy of science, about what constitutes a normatively sound scientific argument" (2011, 227-228)). Consequently, there is no self-application or self-defeat.

Two issues arise here. The first is whether the above really holds such that convergence can really avert self-application and self-defeat. The second is whether there is any comparative advantage attained. That depends not only on the first-mentioned issue, but also on whether consensus can likewise avoid self-defeat by shedding either self-application or controversy, thus neutralising any advantage even if convergence succeeds as outlined above.[174] It is not my intention to delve into these matters, however. While self-application and controversy are dually necessary for self-defeat, what is crucially overlooked is that they are not balanced components. Refuting controversy renders self-application redundant but not vice versa. Controversy can persist on its own and, as I outline below, poses a far more trenchant existential challenge to both consensus and convergence justificatory liberalism.

8.1.2 Controversy

Whether PJP reflexively requires its own public justification or not, it remains the basis for legitimacy of political-exercise through public justification. As the consensus-convergence divide attests, PJP requires *specification* - including some **test(s)** for determining when public justification attains (Wall, 2013, 164; Billingham & Taylor, 2022, 675-676). Apart from the identity and relevant class of justificatory reasons (e.g. what reasons there are? whether any constitute convergent or public reasons?), this, as outlined in the preceding chapter[175], also involves questions of the **standard** of what counts as *reasonably* acceptable, and to whom (i.e. the composition and/or idealisation of the *public*) and so on. Most importantly, since public justification is not concerned with *actual* acceptance or unanimity, but the hypothetical or

[174] For an argument against self-application see Bajaj (2017), for that against controversy see Quong (2011) Ch 5, Ch 8, 230-243.
[175] See 7.2

idealised, how one idealises MOPs is arguably the determinative factor as to whether political-exercise is publicly-justifiable to the relevant *public*.[176]

Now, these matters of specification are just as controversial as PJP itself and this engenders a dilemma. On the one hand, attempting public justification of any test(s) sparks regress or anarchy, whilst, on the other, turning to rational justification leaves controversy entrenched by supplanting PJP to render it superfluous. Either way, incoherence or self-defeat looms large – all without the need to establish self-application of PJP in the aforementioned manner. A scenario can convey this more concretely.

Substance Regulation:[177]

Alexa, Bart, Cindy, and Dean are all engaged in a controversy over how to regulate narcotic substances in their political community. Each has rational justifications for their favoured law ($L_{1\text{-}4}$) but despite sincere engagement with one another no actual unanimity on any L emerges.

Cindy, a utilitarian, and Dean, a theist, are not justificatory liberals. Instead, they hold what might be described as a "**right reasons view**", namely that political-exercise is legitimate whenever it is rationally justified by truth or correctness as the right course of action (Billingham, 2017a, 546). To be sure, the right reasons view can operate at first and second-order levels: the mere fact that some L is rationally justified might not necessarily mean it is justified for (coercive) political-exercise. For simplicity, however, we can assume a unified coincidence of the two such that whatever L is rationally justified is also that which can be legitimate political-exercise.

Alexa and Bart are justificatory liberals. Despite their common commitment to PJP, rejecting the right reasons view, Alexa and Bart disagree on specification and have different tests of public justification (T_1 and T_2, respectively). Consonant with the above point that controversy is problematic for both models alike, it does not matter whether their tests differ as to consensus and convergence or simply upon, say, method of idealisation of the *public* or what a *relevantly-qualified* MOP could *reasonably* accept or not *reasonably* reject. Alexa and Bart might, for example, both conclude that utility and divine commands are not *shareable* reasons to meet the public-reason-requirement or instead that these cannot be convergent reason(s) because they

[176] The italicised terms of art were previously explained in section 7.2.
[177] The structure of this example draws on Wall (2013) and Billingham (2017).

conclusively support different, mutually exclusive, *L*s without any substitute *L* as compromise (and the default position in the absence of any *L* is also *reasonably* rejectable for some MOPs).

Suppose then that Alexa and Bart disagree on whether Alexa's L_1 (an autonomy prioritising deregulatory option) or Bart's L_2 (a health-prioritising, more regulatory option) satisfies PJP. As mentioned, the disagreement between T_1 and T_2 could occur in any number of ways. If the two tests, for example, are both consensus tests that merely diverge on where the balance of public reason lies then a procedural resolution might suffice to decide between autonomy and health as shareable and hence (on both *T*s) publicly-justifiable rationales. Similarly, if different idealisations lead Alexa and Bart to different orderings as to what *L* can be supported by convergent-reasons, but the tests can agree as to which *L* are in the eligible set (the range of what political-exercise could command convergent reasons) then again a procedural solution might suffice.

If, however, the tests differ such that Bart thinks autonomy is neither a public reason nor could L_1 be within the eligible set of convergent reasons given MOPs like Dean[178] whilst Alexa thinks in corresponding ways about health and L_2, then each of them may consider the other's *L* not publicly-justifiable and an illegitimate political-exercise not unlike the way they think of Cindy and Dean's *L*s.

Notice that the controversy between T_1 and T_2 structurally resembles the first-order controversy about $L_{1\text{-}4}$. The conclusions of T_1 and T_2 do not merely reflect Alexa and Bart's conceptions of PJP, but are likely shaped by their first-order rational justifications for their preferred *L*. How either might idealise the MOPs of the *public* will typically (though not necessarily) reflect their own belief-value sets and standards of acceptability. Thus, if one considers that no relevantly-qualified MOP could possibly *reasonably* reject health, or autonomy, or rank it beneath some other good then one's test for PJP is likely to conclude such rationales as publicly-justifiable. In principle, whatever directly supports *L* can be repackaged into whatever supports the *T* that will publicly justify *L* such that the contests between tests for public justification could alarmingly become a proxy for first-order contests about political-exercise.

How then should the disagreement between T_1 and T_2 be resolved? Whilst these structural similarities with the disagreement over $L_{1\text{-}4}$ might suggest that PJP applies to require a resolution via public justification (Wall, 2013, 167-168), technically there is no PJP self-

[178] The assumption being that Dean would think theological correctness trumps autonomy.

application at this level since tests are not themselves political-exercise (Billingham, 2017a, 549-550; Bajaj, 2017, 3139-45). Accordingly, one could turn to a rational justification for the proposed *T* for assessing the public justifiability of *L*s but this seems to subvert PJP insofar as the public justification required for first-order political disagreements in effect becomes facile if the test by which public justification is assessed is not itself publicly justifiable. Worryingly, public justification might become substantially indistinguishable from a right reasons view like Cindy or Dean's which rely directly on rational justification for *L*.

More vividly, consider Alexa's test idealising the *public* in such a way that autonomy is a public reason or that even a theist like Dean holds a conclusive reason for deregulation because, say, the scripture might, on closer reading, emphasise deciding for oneself. If the only reason Alexa can give for this test is that it is correct in respecting autonomy we might wonder whether there is much distance left with the right-reasons view which would simply directly adopt autonomy as a true value upon which political-exercise is legitimate. Substitute autonomy for utilitarianism or divine command and the distance towards Cindy and Dean has effectively diminished. Or, seen in reverse, imagine if Cindy or Dean were to sincerely formulate a test idealising away actual disagreement with utilitarian or religious doctrine. Dean might, for example, advance that any *relevantly-qualified* person(s) could or would *reasonably* accept the historical religious testimony as good evidence and therefore correctly infer the reliability of religious scripture and so forth making religious reasons (shared) public reasons. Or, through idealisation, giving every MOP a conclusive reason upon which L_4 might become (convergently) publicly justifiable on this test, T_4. In support of this test Dean can advance all the very same rational justifications for his religious beliefs as he would in arguing for L_4 in the first instance.

One might therefore try the alternative horn of the dilemma and revert to public justification for the relevant test for PJP. This, however, is no more promising. First, there is the palpable regress: publicly justifying some test itself requires a test which, if controversial, requires public justification and hence yet another test *ad infinitum*. Second, PJP itself is controversial so when justificatory liberals purport to restrict someone like Cindy from enacting her favoured L_3 because it is not publicly justifiable, they need to be able to demonstrate that to Cindy. That is, PJP must be demonstrated as the correct principle of legitimacy despite Cindy's actual perspective against this, in favour of utilitarianism (as a right reasons view of legitimacy). Responding to such actual rejection of PJP requires idealisation. But, being part of the specification of PJP, idealisation, as just noted, is itself part of the controversy. In what is

perhaps its least controversial form, idealisation roughly corresponds to the ordinary language sense of 'reasonable'/'unreasonable', namely failing to exercise rational faculties (Larmore, 1999, 601-602). Plausibly, irresponsiveness to reasons obstructs the possibility of being offered sufficient reason (Lister, 2018, 67). Yet, whilst this will disqualify certain fringe dissenters like psychopaths, fanatics, or the stubbornly contrarian, it will not succeed in attaining public justification with regard to dissenters who *are* responsive to the reasons they *do* hold (Wall, 2002, 389).

Disqualifying this kind of dissent requires the more technical and hence controversial sense of idealisation. Being reasonable in the ordinary language sense, if Cindy were to ask why her perspective is *disqualified* or idealised to modify or purge its PJP-opposing beliefs and the only available response is one invoking epistemic and/or normative/motivational elements integral to justifying PJP then her disqualification looks objectionably ad hoc or self-serving (Enoch, 2013, 171; 2015, 123).[179] Moreover, the justification for PJP becomes trivial (Wall, 2002, 389). If being *relevantly-qualified* just is accepting PJP then, of course, PJP is *qualifiedly* acceptable, by definition. And since any test for public justification integrates some (controversial) idealisation, it seems that the discounting of *disqualified* perspectives or certain beliefs/values therein cannot be challenged other than *unreasonably/disqualifiedly*.

Now, it might be countered that justification need not go all the way down, but must stop somewhere (Quong, 2011, 313-314). If there are sound grounds to idealise qualification around PJP in some cogent, plausibly neutral specification then so be it (Billingham, 2017a, 556-557). Discounting the *unreasonable* perspectives is justified.

But what kind of rational justification might we give for this? What, in other words, shall we advance as the ground or basis of PJP and justificatory liberalism? Consider what is probably the most prominent positive basis for PJP – respect for persons (van Wietmarschen, 2021, 353).[180] Seminally expounded by Larmore (1999), respect for persons – or simply ***Respect*** – stems from the demand for justification for coercion without which one would be treating persons "merely as a means" rather than as ends by "engaging with their distinctive capacity as persons" (Ibid., 607). Setting aside the complications about Respect and coercion[181], this seems laden with controversial sectarian doctrines of Kantian (or neo-Kantian) origins (Wall,

[179] Or for that matter, a T or anything else disputed.
[180] Some other notable bases for PJP include: 'civic friendship' (Lister, 2013), democratic co-authorship (Bird, 2014), the requirements of justice (Quong, 2014).
[181] See, for example, Lister (2013); Bird (2014); Quong (2014).

2002, 390). It is therefore hard to see what reason those who do not accept these premises would have to accept PJP. Meanwhile, simply insisting on PJP seems incongruent with the animating rationale of Respect and, for that matter, justificatory liberalism. And even if Respect were accepted, there is the further complication of why discharging Respect should entail PJP? Why does one not show Respect by striving to impose only the correct or most rationally justified and undefeated political-exercise?

An important final counter might be pressed here that all of the above has simply missed the point. Has the earlier evasion of self-application been forgotten, namely that it is not PJP or some test that needs to be qualifiedly acceptable but only the political-exercise in question? Hence, rather than seeking convergence on some single test for public justification by a (problematically regressive) process of convergence, might we not instead turn to a '**conjunctive approach**' whereupon public justifiability can simply be a matter of passing all the relevant tests (Billingham, 2017a, 549; Wall, 2013, 168)?

The conjunctive approach offers some hope. Not only does it avert the incoherence of supplanting PJP with a controversial test, but it also does not risk the infinite regress of attempting a public justification for tests (e.g. convergence about convergence or idealising so that all qualified perspectives share reasons for the public-reason requirement – or even converge on it for disparate reasons). If all tests can be satisfied, as the conjunctive approach recommends, then political-exercise will be publicly-justifiable from all relevant perspectives. This also rightly recognises that even those who do not accept PJP might nevertheless have direct reasons for/against some political-exercise as their test and these direct reasons might be included in determining public justifiability (Vallier, 2016, 355-357).

Inauspiciously, this proves a false hope. Being concerned with all tests and/or direct reasons as there may be, the conjunctive approach collapses into actual unanimity where the problem of anarchy awaits. That is, there are few (if any) instances of political-exercise which will ever pass all tests/reasons as abound in a political community. Conversely, if the conjunctive approach retains an idealised standard so as to discount some actual dissent that *unreasonably* blocks unanimity then this requires a test thereby reviving the stated dilemma.

Whatever one concludes about self-application then, the controversy of PJP presents its own existential challenge for justificatory liberalism irrespective of model. Neither consensus nor convergence can publicly justify themselves or PJP without some form of controversial idealisation the justification of which either enters regress or triviality or else lingers in anarchy

without any conclusive interpersonal justification. A rational justification, meanwhile, would, risk subverting or otherwise displacing the animating commitment of PJP because even though not itself an instance of political-exercise, the principle determining what ultimately is or is not legitimate could just as well be a controversial right-reasons view.

It is precisely in awareness of this and the inherent controversy of rational justifications for PJP, like encountered with Respect, that reticence about the basis for PJP has been prominent as the strategy or "method of avoidance" to "stay on the surface philosophically speaking" (Rawls 1985/1999, 395) or what Raz, more disparagingly, dubbed "epistemic abstinence" and "shallow foundations" (1990, *passim*). To be sure, the evasive strategy here need not imply that there are no answers, but rather that they are left intentionally omitted so as to be found by each of us for ourselves according to our *reasonable* perspectives (Rawls, 1993/2005, 128-129) – what Quong prominently defends as "buck-passing" (2011, 232 ff.). As the conjunctive approach has shown, however, that will ultimately still rely on idealising or *disqualifying* certain perspectives that have only reasons to reject PJP. In that regard, if one is not to be trivial or circular, being more explicit about the basis for PJP makes sense albeit leading to controversy like a right reasons view. To be sure, some justificatory liberals may find that since controversy over legitimacy and normativity more generally is pervasive and part of the fact of pluralism, then averting self-application and thereby self-defeat leaves nothing especially troublesome here about controversy (cf. Billingham, 2017a, 557ff.). Granted, but recalling that the animating rationale of justificatory liberalism is to respond to controversy by rising above it or seeking a "higher-order impartiality" (Nagel, 1987, 215-216), relapsing into controversy with regard to tests and PJP itself would nevertheless seem to frustrate the core ambition or spirit of justificatory liberalism.

In light of all that, it seems that if there is any way of discerning amongst various possible rational justifications for PJP or its specifications and models we must first understand what is the point of justificatory liberalism or its commitment to PJP in the first place? Only if we know what Respect, or other bases for PJP (or even avoidance), more specifically aim at can we assess specifications of PJP, including consensus and convergence.

8.2 What is the point of public justification?

As just stated, the structure of the problem informs that of the solution: the answer to the question "why PJP at all?" must cohere with the answer "why PJP conceptualised in such and such a way?" (and vice versa). Let us take these in turn.

8.2.1 Why PJP?

Thomas Nagel's classical jest about Robert Frost's definition of a liberal as "someone who can't take his own side in an argument" (1987, 215) contains a certain challenge: why not abandon PJP and embrace controversy? Apart from the above-detailed inevitability of taking a side even if that side is "[y]ielding to consensual views" or "deferring to the judgment of others" (Raz, 1998a, 27), there is the sheer confoundment as to why an eminently reasonable contractualist justification such as discussed for Rawls's JAF, should need additional justification by an overlapping consensus of reasonable comprehensive doctrines (Raz, 1990, 4-5; Quong, 2011, Ch 6, esp. 166-170). Why, in other words, should justification depend on (*reasonable*) agreement rather than solely the truth or the cogency of the reasons furnished?

The reason, as the earlier example of Dean's T_4 attests, is that not every rational justification is alike, or, more fundamentally yet, even cogency and truth seem insufficient. Exercising (coercive) political power based on something being correct or true fails to achieve what Rawls famously calls "stability for the right reasons" (1993/2005, xxxvii) – that is, an acquiescence to the law or political regime for moral rather than merely prudential reasons. Now, though there may be various specific bases for this, serving as rationales for PJP, what matters at present is what function is aimed at or achieved by public justification regardless of the possible rationales that may be adduced for it. In that regard, the point of PJP seems to be something like subjective congruence with political-exercise, which stands in contrast to an expectation that one's background beliefs and values are to be compromised or abandoned when incompatible with the undefeated rational justification. Whichever way this reflects Respect or other bases notwithstanding, this function is manifest in the very mechanics of addressing (public) justification *to* others (Eberle, 2002, 63-64). Following Steve Wall, we can refer to this as PJP's **reconciling function** (2002, 387).

For illustration, consider a disagreement between Dean and Cindy over something like enforcing warning labels on certain dangerous substances. Suppose Dean dissents because of his scepticism about science. Should such an objection block the legitimacy of this apparently correct, rationally justified, measure? Tempting as it may be to contest the premise of the

question since disagreement presumably vitiates the characterisation of correctness, this response is not sustainable. For there must, in principle, be some matters admitting good indications on available evidence. To deny even this would constitute a contestable scepticism or metaphysical stance about truth that justificatory liberals cannot consistently espouse.

Supposing then that on the best available evidence Cindy holds an undefeated justification, why should PJP stand in the way of overruling Dean if he is incorrect? Of course, PJP might allow *disqualifying* Dean's perspective but if the *disqualification* is on account of Dean's incorrectness that would effectively merge PJP with Cindy's right-reasons-view. Translated into the language of PJP, Cindy's right-reasons-view would effectively be something like always *disqualify* the incorrect as identified according to the right view. Presumably then, PJP must look beyond mere correctness. For instance, it may be that his scepticism aside, Dean's perspective could be congruent with Cindy's proposal because he holds basic moral considerations for avoiding material risks to human life which outweigh the original objections.[182] If so, then discounting Dean's actual disagreement would not be about correctness but the moral considerations he has failed to account for in his judgment.

Should reconciling be the functional aim of PJP, we can also find an important negative case for responding to right reasons view objectors to PJP. This case is captured by the relational idea of **reciprocity** whereby those who do not endorse the reconciling aim of PJP cannot without practical inconsistency complain about not being adequately reconciled to PJP. To explain, though reciprocity is not itself publicly justified to *disqualified* dissenters, it discloses how the dissenters' refusal of public justification entails that *by their own lights* no wrong is done to them from impositions of publicly justifiable political-exercise (even if the basis for *qualification* is arguably ad hoc) (Lister, 2018, 81-82). This is because the right reasons view endorses the very same course of action against rationally defeated dissenters (Idem).

Thus, the reconciling function and reciprocity indicate a partial, negative, response to the hypothesised protestations of Cindy and the apparent inconsistency of relying on a rational justification for PJP. What it does not explain, however, is how this function and reciprocity is properly or most coherently pursued. How, in other words are we to respond to the example of Dean adopting a test on which all *qualified* perspectives could or would accept religious

[182] In this instance, recognising risk does not depend on agreeing with the scientific assessment but only conceding that the disagreement itself indicates potential for fallibility of his alternative and so relatively uncostly risk-aversion should prevail. Refusal to recognise fallibility would arguably make the dissenter entirely incapable of reasonable disagreement.

evidence and testimony for scriptural truth thereby making his proposal publicly-justifiable. Is there any room for making principled evaluations amongst various possible tests for PJP? Can it be judged that Dean is offending reciprocity because his test is merely a guise for advancing his religious comprehensive doctrine rather than aiming at genuine reconciling tests?

That could be right, but second-guessing subjective intentions cannot serve as the principle by which to distinguish tests not only because it is not always reliably transparent, but also because it can be deployed to discredit virtually any test. Indeed, beneath the rich theoretical manoeuvres against commitments to any sectarian/comprehensive doctrines, justificatory liberalism nevertheless seems systematically aligned with the substantively liberal conceptions of the good like those promulgated by comprehensive or perfectionist liberals (Weinstock, 2006, 234-236). Again, subjective intentions aside, tests skewed towards substantively liberal political-exercise seem just as insidious in their claims to reciprocity. Reciprocity therefore appears to be too formal a principle for discerning between controversial tests without the apparent incoherence of adopting one to the exclusion of others. Might there, however, be some more substantive principle that evidently coheres and compliments these formal rationales for PJP? Finding such a principle would enable us to distinguish between various specifications and tests according to their congruence with it.

8.2.2 Why consensus? Why convergence?

It has been observed that convergence on some political-exercise without there also being a positive indication on the balance of public reasons will be "rare" (Lister, 2011, 359). The converse seems to be more common, however. A positive indication on the balance of public reason(s) might obtain without thereby all relevant MOPs obtaining conclusive intelligible reasons in support of the political-exercise. Indeed, convergence has been characterised as the more libertarian or regulation-averse model given that every MOP must conclude the political-exercise preferable to the default for it to be publicly justifiable by convergent-reasons (Lister, 2010, 153-156; Gaus, 2011, 506ff.). Much depends, however, on the specification of PJP and the level of idealisation and abstraction in constructing MOPs and the political-exercise respectively. We need not be distracted by the various details here since the comparison we are interested in is between consensus and convergence as general, representative ideal-types. Additionally, if the observations just made are correct, the ways in which convergence might still not obtain despite consensus are even less relevant. This is because, even with its more libertarian tilt, convergence would match consensus in the public justification of fundamental

liberal rights and related political exercise at a sufficiently abstract, constitutional, level. Neither model will *necessarily* sway too radically from the other regarding these liberal constitutional structures unless tweaked in certain ways.

What is often overlooked, however, is that the above assessment is only guaranteed within the diversity of perspectives typical in contemporary pluralistic polities. Removing or even diluting the pluralism, however, proves immensely revealing. Recall that a feature of Dean's religious test was its reliance on thick idealisation to attain the unanimity of all *relevantly-qualified* MOPs. Without this heavy idealisation, pluralism precludes convergent reasons or the balance of public reasons either on Dean's test or favoured law.

Within a more homogenised or, perhaps modestly diverse polity, however, everything starts to shift. A homogenised polity, for instance, might take the once commonplace form of all MOPs holding theistic comprehensive doctrines whereas stipulating there to also be some utilitarian and libertarian perspectives, for example, would increase the diversity to a moderate degree. In either of these polities, the subsisting perspectives will not require thick idealisation to converge upon Dean's law or test, but in a crucial difference to be elaborated on below, this is not the case for consensus. It is not simply the absence of public reasons within the moderately diverse polity, it is that public reason(s), whether shareable reasons or mutually accessible evaluative standards, should not obtain even in the homogenised polity.

Before coming to that, however, we can start by looking at a specific disagreement within a modestly diverse polity by concretising the example further and turning it towards, say, educational, policy in the following case.

Curricular-Creationism:

Suppose the various theistic, utilitarian, and libertarian MOPs are considering the proposal about the inclusion of Creationism on the school curriculum (**Curricular-Creationism**). Suppose further that apart from the support of the various theistic perspectives, the utilitarian and libertarian MOPs do not find the proposal impermissible or incompatible with their belief-value sets. Utilitarians might, for example, find Curricular-Creationism increases overall utility given the theistic majority whereas libertarians could endorse it as an aggregate increase to individual liberty, say. Controlled as this scenario is, it is not inconceivable and can still entertain actual disagreement. After all, even if their belief-value set is not incompatible with the proposal such that including Creationism is deemed impermissible or wrong, some might still find that they have a reason against Curricular-Creationism that defeats reasons in favour.

Perhaps although Creationism would be ok, they would nevertheless prefer more school time dedicated to, say, maths or sports.

Ascertaining whether there are convergent reason(s) for the proposal or not becomes increasingly complex here because of the various possible proposal options and combinations thereof. Actual disagreements are often resolved in these ways with proposals being bundled, bargained or compromised and/or put to some agreed procedural solutions like a vote. But actual resolution by even the most morally sound procedures is not equivalent to legitimate resolution (unless one's conception of legitimacy is purely procedural[183]). Consequently, idealisation matters in working out the range of legitimate, publicly-justifiable, proposals which can in turn evaluate the legitimacy of any actual resolution by voting or other political process.

The complication, as previously explained, is that in not being actual, various ways of idealising and constructing the scenario can lead to radically different indications about what would be legitimate. In principle, a convergence test here could idealise robustly to conclude that Curricular-Creationism could not be supported by convergent reasons because properly informed rational MOPs would have no conclusive reason to incorporate the teaching of logically and/or scientifically suspect doctrines. Perhaps, in principle, idealised MOPs would not even have theistic beliefs. I highlight these conclusions merely to show the extremely open possibilities of idealisation, *in principle*, available to convergence (and consensus). Beyond that, I set them aside as atypical and instead focus on the more representative forms of idealisation in each model, as ideal-types.

In that regard, the representative version of convergence adopts "moderate idealisation" as a core distinguishing feature over consensus and the right reasons view in that it expresses a respect for authentic plurality by tracking actual subsisting perspectives in the polity (cf. Gaus & Vallier, 2009, 54-59). Even so, this still leaves many possibilities as to how moderate idealisation would operate in relation to whether the MOPs of the present moderately diverse polity could each have conclusive reasons in favour of Curricular-Creationism to make it publicly-justifiable by convergent reasons. Insofar as we are concerned with a representative ideal-type though, we can reduce the multiple considerations into a far more simplified form

[183] This would still however be vitiated by the question of what is it that enables the procedures to legitimate whereby a further appeal to procedures triggers infinite regress while substantive principles would beg the question.

that conveys how convergence with moderate idealisation would plausibly support Curricular-Creationism given the subsisting perspectives.

For this, we can start by broadly distinguishing between dissent that is **principled** or based on the belief-value set holding the proposal impermissible or otherwise incompatible with it and dissent that is **unprincipled** where the belief-value set lacks such incompatibility with the proposal. Relatively speaking, conceiving unanimity despite principled dissent requires more idealisation than unprincipled, and arguably beyond what moderate idealisation intends. Accordingly, in the present scenario of moderate diversity, there opens a pathway to convergence on Curricular-Creationism because of the absence of principled dissent amongst subsisting perspectives (as characterised above). As mentioned, there may still be actual dissent because of some higher-ranked preference, but unless that preference is robust enough to constitute a defeater and thereby turn into a form of principled dissent, the actual dissent remains amenable to moderate idealisation and therefore yielding convergent reasons for Curricular-Creationism or, likewise, Dean's test or law. Admittedly, the principled/unprincipled distinction is very rough and might itself require idealisation to establish. Nonetheless, it is useful for demonstrating how homogenised or even modestly pluralistic polities might plausibly allow (typical, moderately idealising) convergence that would not be possible in the standard contemporary pluralism of modern polities. A test or law that would otherwise be characterised as motivated by sectarian doctrines might be publicly-justifiable by convergence in the less pluralistic, but conceivable, polities imagined.

What about consensus? As foreshadowed, contrary to what may seem, different levels of pluralism should not alter the composition of public (accessible/shareable) reasons. In a polity as just described, or sufficiently adjusted to remove any secular perspectives[184], the divine commands may appear to be mutually accessible/shareable amongst all MOPs, but they cannot thereby be deemed *public reasons*. That would be to misconstrue contingently accessible/shareable reasons for those that are structurally so by their free-standing character.

To explain, the contingent accessibility/shareability of the religious reasons here does not make them *public* because they remain rooted in comprehensive/sectarian doctrines. This is not to deny that there may be internal controversy amongst consensus theorists about these matters such that some might deny the point just made. Without engaging in these internal debates, I

[184] If this is somehow objectionable, the scenario could be redescribed to include secular perspectives but have religious perspectives also be divinely utilitarian-oriented and the shareable reason be utility-maximisation etc.

offer a similar response to that made for convergence earlier about my concern with representative ideal-types. Just as versions of convergence that idealise too thickly undermine the distinctiveness of convergence compared to, say, consensus or right reasons views, rejecting the structural, free-standing character of view accessibility/shareability of public reason for one that follows subsisting perspectives threatens the distinctive possibilities of consensus. In short, subject to being fairly representative of each model the distinctive possibilities guide the formulation and comparison of the consensus/convergence ideal-types.

Determining consensus in the present scenario then requires seeking whether Curricular-Creationism could be supported on the balance of properly public reasons such as, for example, that education should proceed on the best available explanations (call this reason '**best-education'**). Obviously, whether best-education is a shareable or mutually accessible reason might be challenged and, in any case, will not on its own settle Curricular-Creationism unless there are some shared evaluative standards for judging whether Creationism counts as such an explanation. Perhaps there needs to be a higher-order principle for resolving disagreement between the different evaluative standards about education here. This is all very far from simple. Nevertheless, so long as there is ascertainable indication about Creationism one way or another there would be a public reason(s) for or against the proposal. What is absolutely crucial to underscore is that in virtue of being disentangled from each comprehensive/sectarian perspective, the ascertained public reason would have potential to be public not just for *this* particular polity but potentially for *any* polity. Thus, conceived in this way, consensus could in principle discount Dean's proposal and test irrespective of the composition and plurality of a polity and simply on the grounds of being rooted in comprehensive/sectarian doctrines.

The differences in application to Curricular-Creationism and, by extension, Dean's test and law, disclose two discrete kinds of aim that roughly correspond to the ideal-types of consensus and convergence identified above. Whereas convergence aims to discern the possibility of idealised unanimity on the basis of convergent reasons amongst subsisting perspectives within a particular polity (call this, **commonality-aim**), the mechanics of consensus inadvertently orient it to reasons independent of which perspectives are so present or absent and thus towards

any (*qualified*) perspective(s) (call this, **ideality-aim**).[185] Illustrating with regard to Curricular-Creationism, the commonality-aim renders the proposal publicly-justifiable because of contingently subsisting (moderately-idealised) perspectives whereas the ideality-aim would only do so if there are public reasons based on all conceivable perspectives (subsisting or not).

The key question that arises is whether either of these aims can be said to internally cohere or fit better with PJP's functional aim of reconciling dissent complimented by reciprocity. This will likely appear as a rather pointless inquiry since each aim seems broadly capable of fulfilling the reconciling function of public justification. After all, neither promotes appeal to controversial rational justifications or seems any more flagrantly ad hoc in its idealisation than the other – at least not more than what has already been noted in discussing controversy and self-defeat.

Evincing the difference therefore requires a deeper understanding of what reconciling is for in relation to legitimacy. Calibrating public justification against other principles of political legitimacy will reveal the comparative advantage of the ideality-aim in cohering with the possible rational justifications for PJP given its functional aims.

8.3 Public justification and Legitimacy

What then is the relationship between public justification and legitimacy? How does public justification differ from other theories of legitimacy liberal or otherwise? As critics have often remarked, there is a striking peculiarity to justificatory liberalism's endeavour to secure legitimacy upon neither consent nor truth.[186] Correspondingly, PJP can be particularised as asserting that (**i**) to be legitimate, political-exercise requires proper justification; and (**ii**) proper justification is (exclusively) public justification. While both the purported inadequacy of truth according to PJP and its inescapability according to the problem of self-defeat have been touched upon, less has been so far said about consent. Surely, if reconciliation is the functional

[185] A similar distinction of aims or "projects" has been recently elaborated by Vallier and Muldoon in terms of the *"diversity* view" and "*coherence* view" of justificatory liberalism (2021, 211, 213). According to Vallier and Muldoon, whereas the diversity project aims at public justification to "moderately idealized real-world people" taking justificatory reasons as it finds them amongst actual perspectives subsisting in a polity, (Ibid., 216-218), the coherence project is concerned with public justification to *reasonable* MOPs defined by stipulation as accepting a free-standing or political conception of justice, which implies that only shared reasons as justificatorily adequate (Ibid., 214-215). Whilst there is some salient correspondence between coherence and the ideality-aim and diversity and the commonality-aim, in these respects, it is not perfect insofar as the ideality-aim need not be restricted to a well-ordered society or ideal liberal polity (unlike the coherence project), but can have real-world applications in a historically relativized sense, as shall be seen.

[186] E.g. Raz (1990); Enoch (2013), (2015).

aim of PJP, would it not be more effectively achieved through securing actual unanimity or consent?

8.3.1 Actual Unanimity

The immediate response to the above suggestion is the threat of anarchy. The virtual non-existence of actual unanimity in politics would likely render all political-exercise illegitimate. That practical concern, however, falls short theoretically. If we were to bracket the anarchy problem and hypothesise actual unanimity to be attainable, would PJP's reconciling function not require seeking actual unanimity instead of the idealised unanimity aimed at by public justification? Moreover, the correctness of claim (i) might also be challenged despite its initial plausibility. To explain, being a human enterprise and subject to mutability amongst possible forms rather than a fixed or natural occurrence, political-exercise does seem an appropriate target of justification (e.g. to why this form and not that) making claim (i) facially plausible. Claim (i) unites justificatory liberals and other liberal and non-liberal 'political moralists' – to borrow Bernard William's label (2005, 1-3). But, as political voluntarists point out, justification also seems distinct from – and insufficient for – legitimacy, which being a subjective relation requires the subject's actual consent (Simmons, 2001, 122-156).

If these challenges are to be resisted, then the reconciling function, with its apparent gravitation towards political voluntarism, cannot be the exclusive concern of PJP. Nor, as it turns out, can it even be the exclusive concern for political voluntarism. Although consent is often leaned on as something of a panacea in normative theory, with a magic-like force creating obligations where there were none or transforming the moral character of acts from wrong to right or impermissible into permissible (Hurd, 1996, 121-124), that magic has remained more intuitively compelling than explicated.[187] What is clear, however, even amongst its adherents, is that consent is never really straightforward or conclusive. Internal puzzles arise about what is or counts as consent, under what conditions is it valid or potent in its mentioned normative effects let alone the relevance of and/or mode of its expression.[188] If consent is not to be determined by some naïvely descriptive sociology, it must interact with normative constraints

[187] Some of the closest candidates for a direct explanation come in the form of starting assumptions. For example, its basis in natural liberty (Simmons 1979, citing Rousseau 1762/1950, 61-65); equality (Hampton, 1997, 28-34, citing Aristotle) or a commitment to autonomy (Hurd, 1996; Alexander, 1996). It has even been suggested that consent just is analytically obligation-assuming much like promises which just are the assumption of the obligation to keep that which one promised: "in the same way as someone who puts on a coat has a coat on" (Pitkin, 1966, 47).

[188] For further general reference see Dougherty (2021); and more specifically, Weale (1978); Bolinger (2019); Tadros (2016).

by which to, for example, discriminate between valid consent and that coercively extorted or manufactured by indoctrination or deceit (Simmons, 2001, 132-135).

Now, if consent is subject to normative constraints then actual consent does not matter in and of itself (which would be question-begging anyway). It matters for certain normative reasons. If it matters for reasons of personal autonomy, say, then consent that is not properly informed and freely-given becomes ordinarily void. Likewise, where autonomy requires protection (e.g. an unconscious patient unable to consent to emergency treatment) the absence of actual consent might be immaterial. Properly speaking, it is not actual but normative consent that legitimates – especially in the political context where actual unanimity is rare and yet collective decision of some kind is unavoidable. Normative considerations about morality or justice remain relevant in the background and ultimately determinative of whether actual consent is legitimating or not as normative consent. Thus, as David Estlund points out, actual non-consent (i.e. refusal to give consent) might, much like actually furnished but normatively-nullified consent, be morally irrelevant to the assertion of claims and obligations when these are justified in the absence of consent (2008, pp. 124-127).

Nor is normative consent always sufficient. No matter how normatively flawless actual consent or the circumstances for implying it might be, the actual outcomes remain subject to further normative evaluation. Would, say, unanimous elimination of a social welfare system or (conversely) property rights be legitimate? Further, to really underscore the theoretical difference in play, imagine everyone actually agreeing that actual unanimity legitimates. Impressive as that may be, it would amount to no more than a practical victory for political voluntarism in that there would be no one actually around to challenge it. Theoretically, however, the contest cannot be settled other than by appeal to competing truth claims (namely, whether actual unanimity does or does not legitimate), meaning that even voluntarists must implicitly rely on truth at this level.[189]

Where all actually agree on voluntarism (or anything else) a public justification may seem unnecessary, but to conclude so would be mistaken. Just as idealisation serves to normatively object to certain forms of actual unanimity, it can also normatively supplement a lack thereof. Imagine actual unanimity being broken by a single dissenter on a whim. That would compromise the voluntarist standard, but not necessarily PJP so long as the dissenter's

[189] Contrast this with what would essentially constitute a public justification for voluntarism – viz. all *qualified* perspectives accepting that actual unanimity legitimates.

perspective remains congruent with the political-exercise in question. In this way, PJP renders critical evaluation of actual endorsement or rejection possible meaning that a political-exercise being *actually* endorsed by many, all, few or even none will, in principle, have no bearing on whether it is publicly justifiable or not (Talisse, 2015, 54). Idealisation effectively drives a wedge between actual endorsement and justifiability to show how political-exercise "might be justifiable to all even though it in fact enjoys little or no popular support" (Idem.)[190]

8.3.2 Commonality & Ideality

Given that the reconciling function does not, on its own, guarantee legitimacy even if there were actual unanimity, reliance on justification is essentially unavoidable even on the voluntarist standard. The controversy over PJP and its specifications too revealed that a rational justification might be required at least if triviality or circularity of publicly justifying PJP or its tests is to be averted. Yet, rational justifications are controversial, nor immune from infinite regress or being authoritarian. There may well be no requirement for reconciling anyone to the true or rationally undefeated justification whether for a test or even directly some political-exercise (according to non-justificatory liberals at least). So, if justificatory liberals are to insist on the reconciliation function and defend it with rational justifications (including with reference to specific modes or tests for it), then the rational justification furnished should at least itself cohere with the reconciliation function, if it is to be compelling.

With that in mind, we might venture to compare the commonality and ideality aims as specifications of the reconciliation function to see if either might be easier to justify or at least integrate into a justification for public justification as necessary to legitimacy because of something like the reconciliation function backed by reciprocity.

As the illustrative scenario of Curricular-Creationism evinced, it is the commonality-aim that seems closer to the political voluntarist ideal of legitimacy based on actual unanimity. It stops short of embracing actual unanimity not merely for its rarity but that it might be normatively flawed through imperfect processes and informational constraints. Suppose the theist groups supporting the proposal are deceived into thinking that enacting it would cause secularists to be less likely to support various community priorities. Like in the original scenarios, the utilitarians and libertarians follow suit, their conclusive reasons changing in response to the

[190] Talisse perceptively adds: "to claim that a law is *justifiable* only if it is *endorsed* is to deny that coercion is ever permissible; and that is the philosophical anarchist's position, not the liberal's. Laws indeed *force* people to do what they otherwise would not do <…> the justificatory liberal claims that force is morally permitted only when it is justifiable (Idem.).

circumstances. Actual unanimity, or perhaps more realistically, a majority vote would then attain against Curricular-Creationism and in favour of only teaching science, say.

Either way, since the resulting political-exercise above is apparently not one within the range of what everyone had convergent reason to support, it is not publicly-justifiable and hence illegitimate on the convergence view. Recalling, from the preceding chapter, the distinction between the process-sense and abstract sense of public justification we can see how though actual unanimity might involve all having (intelligible) convergent reasons in the process-sense, convergent reasons in the abstract sense do not occur since upon moderate idealisation the MOPs have convergent reasons based on their belief-value sets for Curricular-Creationism, but not the resulting political-exercise. The commonality-aim then, essentially seeks to reflect actual unanimity or, rather, the kinds of political-exercise that could have secured it within the specific polity under ideal conditions as the *public* of moderately idealised MOPs, excluding *unreasonable* and/or unprincipled dissent.

However, being this way tethered to the actual dynamics of a political community, the commonality-aim confronts some distinctive complications. Firstly, there might be a mechanistic hurdle in terms of how the commonality-aim adapts to constituency or perspectival change. Call this the **diachronic instability** problem, which might be put as follows. In the absence of political oppression, polities are subject to perspectival flux. Practically, it seems complicated to track if and when convergence at temporal moment 1 still holds or does not at temporal moment 2 and so on. And, even where feasible, there would still be considerable vacillation or entrenched publicly unjustified political-exercise at various times. Admittedly, this problem is less likely once a high level of plurality subsists as in contemporary liberal states. Hence, it is often unmentioned in the literature. Yet, extending the comparison to moderately diverse polities, as done with the Curricular-Creationism scenario, enlivens the problem given the greater scope for compositional changes.

Another problem for the commonality-aim is that its determination as to which perspectives are relevantly-(dis)qualified cannot be independently determined by some principle like the public-reason-requirement, but must instead be relativised to the given composition of a polity, moderately idealised. Since each polity is taken as is, variously constituted polities will converge on whatever they do – possibly, even illiberal outcomes. Call this the **illiberal-possibilities** problem. This problem may be further particularised in various ways such as whether anything at all will be publicly-justifiable, whether what is justified may be illiberal,

and, relatedly, that there is no mechanism guaranteeing liberalism or safeguarding from illiberal political-exercise (Vallier & Muldoon, 2021, 226).

One form of retort here is to insist that ways of individuating political-exercise and idealising the subsisting actual perspectives can tilt virtually any polity into at least a classical liberal or libertarian direction. Chad van Schoelandt, for instance, suggests that idealisation can illuminate the reasoning flaws of extremist perspectives whereby the extremist would see the inconsistency of morally condemning the very same individual to whom they deny moral standing (2015, p. 1035). Even if so, this will only work in cases where there is some perspective within the public in which these evaluative standards of consistency and moral standing can be anchored. As van Schoelandt himself concedes, there remains a risk of exceeding a defensibly moderate level of idealisation (Idem.). Moreover, acculturation or false consciousness can erode any forms of principled dissent or belief-value sets that could be drawn on in idealisation to discount convergence on illiberal outcomes.

An alternative response is to simply bite the bullet that there is no guarantee against illiberal political-exercise, but maintain that this inauspicious feature is balanced by the technical merit of an account of legitimacy that can seriously engage with and authentically represent the beliefs and values of those subject to political exercise (cf. Vallier and Muldoon, 2021, 227-228). Surely, that is of worth compared to artificially superimposing pre-formed extraneous ideals. Arguably, what is commendable about the commonality-aim is precisely that. Even in allowing imposition of political-exercise upon those who would *actually* dissent, it is an imposition plausibly congruent with their belief-value sets. If there is really no principled dissent to illiberal political-exercise then perhaps such an illiberal polity is entitled to legitimately converge on its illiberal effects.

This biting-the-bullet reply proves forceful and even contains a potent critique of the ideality-aim concerning deeper questions about legitimacy. Whatever the drawbacks of having illiberal or otherwise problematic belief-value sets represented within a moderately-idealised public, authentic diversity is properly respected so that reconciliation for all engaged perspectives can occur. Conversely, having merely conceivable but non-subsisting perspectives represented, as the ideality-aim envisions, would seem to take liberalism as some ideal standard and impose it irrespective of congruence with actually subsisting belief-value sets in an objectionably sectarian or authoritarian manner. This problematically disregards the relatively real, authentic,

legitimacy attainable within an actual polity by convergence for the sake of non-subsisting MOPs of a hypothetical one.

Compounded by the spectre of self-defeat, the charge of its conception of justificatory liberalism being sectarian and disrespectful of actual diversity, all this sets a deep challenge for the ideality-aim. What is the point of justificatory liberalism if it becomes authoritarian and sectarian whilst seemingly over-inflating the reconciling function beyond a meaningful application?

8.3.3 Ideality & Legitimacy

The answer starts by recalling why the abstract-sense of public justification was seen as more fundamental than the process-sense. Unlike the process-sense, the abstract-sense was stable (including against the above-discussed diachronic instability problem) because it depends not on contingencies as to which reasons are offered and to whom but on the structural relation between political-exercise and justificatory reasons. By seeking via the public-reason-requirement to attain public justifiability to all conceivable (relevantly-qualified) perspectives, the ideality-aim aspires to the abstract-sense in its fullest. The reconciliation function is effectively turned towards relations between reasons interacting with one another, including as to judgments on factual circumstances.

All this is significant because upon rejecting the purely voluntaristic standard and turning to idealisation to overcome anarchy or arbitrary political-exercise merely by majoritarian procedures or rule of the powerful, both models of justificatory liberalism inevitably take on a controversial normative stance. It remains controversial no matter what shape it takes, including between the models. And, importantly, once entered upon, controversy is controversy irrespective of degrees. Attempts of convergence with its commonality-aim to more closely approximate actual unanimity therefore have no bearing on the initial controversial stance towards idealisation. Actually, relativising the ideal according to various polities further deepens the controversy by exposing the indeterminacy of value. That is, it results in a controversial asymmetry towards subsisting perspectives over conceivable yet absent ones as well as an asymmetry towards coercion in the status quo – privileging the default of political inaction over political-exercise (Lister, 2010, 168-169; 2011, 360).

Along with moderate idealisation itself, these asymmetries point to the incoherence of the commonality-aim vis-à-vis the reconciliation function of PJP. On the one hand, it seeks to assert a normative standard upon *actual* political processes and outcomes because these might

involve normative flaws or oppression without reconciling towards political-exercise. Yet, on the other, it recoils from extending that normative standard to address arbitrary asymmetries and the diachronically unstable and compositionally-contingent nature of public justifiability. That which, in the first instance, justifies a move towards moderate idealisation over the polity seems to require a broader idealisation to address the asymmetries and to attain a non-arbitrary standard of public-justifiability based on the totality of reasons not merely subsisting, represented ones.

Public justification is, after all, not directed to sundry disagreements nor even a singular disagreement on some political-exercise. Rather, as a principle of legitimacy, public justification grapples with the fact of (reasonable) disagreement that defines political existence – that is, existence in a community with others with potential for mutual benefits in free and fair cooperation.

Politics, it is said, arises when unanimity fails. It is disagreement in the absence of truth or empirical techniques for ascertaining it (D'Agostino, 1996, 23). As such, how to divide common resources can be "clearly a political question in a sense in which the question of how the seeds might be sown (usually) is not" (Idem.). In that regard, public justification must, from the outset, be concerned with all conceivable *qualified* perspectives not just those present. Only that reflects the normative political aim of fair cooperation despite disagreement. This is essentially the commitment to reciprocity or PJP itself and explains why perspectives which cannot be reconciled thereto cannot be offered a public justification and thereby excluded as *unreasonable*. In its completeness as a response to political questions, public justification cannot be satisfied with labouring the reconciling function without maximising its yield. That yield is the maximal range of perspectives and stability over time as supported by the ideality-aim.

Remarkably, for the very reason of its *apparent* authoritarianism, the ideality-aim can reach a deeper level of coherence by supplementing the reconciling function and reciprocity with the maximal range of possible perspectives short of internal contradiction. To explain, though its public-reason-requirement is sectarian in one sense its uniqueness in being able to generate the largest set of conceivable mutually compatible perspectives is also what endows it with a coherent justification for that controversial liberally sectarian requirement. This largest set offers the maximal reconciliation and maximal reciprocity as internally consistent. The commonality-aim, it is true, boasts a greater capacity to accommodate diverse perspectives

(Vallier & Muldoon, 2021, 217-218, 222-224), but the contingent convergence upon some law does not transfer to all polities or circumstances because the reasons might alter.

Conversely, though it may include less perspectives by taking only those that hold the same maximally inclusive set of shareable reasons the ideality-aim ensures a universalised legitimacy shareable by all relevantly-qualified perspectives reciprocally. Perspectives that converge on Curricular-Creationism for sectarian reasons only extend reciprocity to *contingently* converging perspectives, but not those that diverge even if the reasons for divergence are *reasonably* accessible and or shareable. Conversely, perspectives that support Curricular-Creationism as best-education do not limit reciprocity to conclusions reached. Provided the other perspectives address them on the same shareable or accessible reasons (as maximally inclusive a set as possible), there is reciprocity beyond contingent unanimities on conclusions. For a yet more familiar liberal example take the case of slavery.[191] Whereas the abolition of slavery upon reasons appealing to dignity and equality extends reciprocity to virtually all perspectives willing to cooperate on equal terms, convergent reasons to abolish slavery could in principle be entirely devoid of such content and instead be contingently aligned due to various economic considerations, for instance. Again, the reciprocity is narrow and circumstantial failing to generalise to a higher-order level of reflection. It fails, for example, to address perspectives that might not converge because of their conclusive economic reasons to the contrary but yet could converge if they were restricted to only balancing on the moral considerations or other reasons fitting the public-reason-requirement. By contrast, on the ideality-aim, turning to public reasons would mean engaging in what Rawls called "wide reflective equilibrium" (1993/2005, 384 n 16) regarding the principles on which slavery is supported and finding them to be not shared at the proper level of rational reflection and generalisation.

On the ideality-aim then, only perspectives that cannot be reconciled with the maximal reciprocal set of equal inclusive participation of others are excluded as disqualified (albeit still addressed with public reasons in the justification of political-exercise). Applied to the earlier controversy over the specification of PJP and test for public justification, the grounds for distinguishing between the kinds of standard liberal tests and a test like Dean's T_4 is that its idealisation practically narrows the participation of non-theistic perspectives that could be integrated without inconsistency and without inequality to the theistic ones. Again, this is not

[191] See Rawls (1993/2005, 484). Also, Macedo (1997).

to deny that controversy or suggest that consensus and its ideality-aim somehow overcomes it. Dean may well advance a charge of *toute quoque* against the liberal test and its idealisation. That is part of the problem of controversy about legitimacy, but that is a somewhat separate matter to the comparative advantage of consensus and ideality over convergence and commonality.

Thus, apart from the charges encountered about authoritarian liberal sectarianism imposed over the authentic will of the actual (moderately-idealised) polity, it is sometimes added that the convergence commonality-aim allows for a "*justice pluralism*" whereas consensus and its ideality-aim only allow for pluralism about the good (Vallier & Muldoon, 2021, 217). Justice in other words is made to take the form of some token within a reasonable liberal family of conceptions. It is placed beyond the realm of reasonable disagreement and instead provides the framework within which to settle disagreements about the good or values. Convergence with the commonality-aim on the other hand opens up justice alongside the good to reasonable disagreements such that there might be publicly justifiable conceptions of justice that are not within the liberal family.

I will say more about the relation between the good, justice and legitimacy in the next chapter. The basic response to that charge, however, is that the plurality permitted with regard to justice, like the advantages claimed with respect to reflecting the authentic political will of the polity, and, most importantly, the prospect of inclusivism discussed in the previous chapter, all come at a hefty price when it comes to coherence and legitimacy. The asymmetries, diachronic instability, contingency, and, critically, the arbitrary level of specification and idealisation makes a controversial stance on legitimacy. Whatever the rational justification for that stance may be, it cannot easily cohere with the reconciliation function given the more than minimal but less than maximal level of inclusiveness of all conceivable perspectives.

The most crucial disagreement is not about justice but about what can *legitimately* resolve disagreements, including about justice – that is, about political legitimacy. Meeting the challenge of political disagreement, Nagel reflects, requires "philosophical liberalism" to seek a "higher-order impartiality" (1987, 215-216) – viz. justificatory liberalism. Well, when the disagreement concerns justificatory liberalism and legitimacy itself, as the controversy over specification, test and PJP itself revealed, there is apparently no further principle or level of higher-order impartiality left with infinite regress or circularity nearby. As Fred D'Agostino writes:

> <…> if one [conception of legitimacy] implies that a regime is legitimate for a community whereas the other implies that the regime is not legitimate <…> then we have no way of settling the question of the regime's legitimacy for the community until we discover or invent a way of answering the prior question, "Which competing conceptions it the better (preferably, best) conception of public justification? (1996, 8).

Since whatever rational justifications we give for any principles of legitimacy will be themselves controversial in this way, at least ensuring that there is maximal internal coherence becomes critical for plausibly insisting on a particular conception such as justificatory liberalism. Whilst I have postponed to the next chapter the answer about what rational justification might best resist controversy over legitimacy, I have here argued that the consensus model with its ideality-aim holds a comparative advantage over the commonality aim of convergence when it comes to its fit with the functional reconciling aim of PJP negatively reinforced by reciprocity. Insofar as any specific rational justification for PJP will have some reference to these functions, that advantage proves a significant boost for defending PJP or its possible tests against controversy, especially against unflattering comparisons to sectarian tests like Dean's. This is so in spite of the mentioned cost and allegations, including consensus's exclusivism and insufficient tracking of pluralism about justice or varying compositions in a political community.

8.4 Concluding Remarks

In closing, it is worth recapping the progress made thus far. Having in the previous chapter determined the alignment between the question of exclusivism or inclusivism concerning Establishment (including matters about legitimate legal rationales etc.) and that of the choice of model between consensus and convergence, this chapter turned to determining that choice.

Comparing the models through the innovative lens of moderate pluralism revealed structural differences in their animating aims (commonality and ideality). While both aims seemed broadly fulfilling of PJP's reconciling function, analysing why this function might be necessary for legitimacy revealed the importance of normative considerations over actual unanimity. In light of that, the ideality-aim proved the more internally coherent in extending the reconciling function to the maximal range of conceivable *qualified* perspectives or totality of free-standing reasons. Conversely, the commonality-aim (amongst its other problems) seemed ad hoc or internally incoherent in sacrificing actual perspectives to moderately idealised ones whilst

simultaneously recoiling from full-fledged normativity of the maximal reconciling function espoused by the ideality-aim.

Given the significance of legitimacy and PJP in relation to political disagreement and various first-order conflicts along with the deep controversy over the specification and conception of legitimacy, maintaining internal coherence with the function of PJP is therefore crucial for whatever rational justification might ultimately be relied upon to defend from controversy.

The details of the rational justification that seems most promising and uniquely related to PJP and the ideality-aim will be discussed in the next chapter, addressing disagreements over legitimacy. This will provide an important element in the defence of the legitimacy solution to be offered with regard to the Puzzles concerning Free Exercise. With regard to Establishment, however, the case for the consensus model already offers a resolution in favour of exclusivism. Subject to the full defence of consensus justificatory liberalism in the next chapter, the conclusion here means that the principles of liberal political legitimacy impose limits to religious and other cultural, non-public, rationales in political-exercise. Such rationales can therefore only feature in political-exercise to the extent that they can form public reasons as conceived on the consensus model. Though there will necessarily be complications as to setting the jurisdictional boundary between these categories of salience and determining their scope of inclusions, these complications will too require a political settlement through public reasons as will be shown.

Chapter 9: Modal Legitimacy

This Part has thus far focused on the relevance of legitimacy as a lateral solution to the Puzzles concerning Establishment or how liberal state neutrality is to be configured in relations between the public and private, including where and how that boundary itself is drawn. The debate on this between exclusivism and inclusivism was, within justificatory liberalism, traced to how one understands public justification (Chapter 7). Whilst convergence displayed potential for inclusivism and responding to the Coherence-Problem by shifting the possibilities of legitimacy beyond minimal alignment with the narrow-approach, this had complications for internal coherence. Exclusivism about Establishment was for this reason confirmed as the relatively more justifiable position based on consensus-PJP and its ideality-aim (Chapter 8).

This, however, leaves the lateral solution looking suddenly implausible. Firstly, though perhaps the more internally coherent model, consensus justificatory liberalism has not been secured against the objections to it and to PJP as a necessary condition of legitimacy. Accordingly, its exclusivism as the legitimacy or political solution to Establishment remains also in doubt. Secondly, unlike what was just summarised of the convergence or inclusivist promise, exclusivism itself lacks such promise in relation to the Puzzles as applied to Free Exercise. Unless one opts for the kind of radical idealisations which prompted the introspection about justificatory liberalism and its aims in the previous chapter, public reasons will run out precisely where the Deep-Disagreements between the approaches start to arise. Exclusivist Establishment therefore would appear to simply reinforce the dynamic of the Coherence-Problem, slanting towards the narrow approach as the minimal common ground shared with the broad approach. In effect, legitimacy, it may be recalled, becomes either in dispute with exemptions being irrelevant or established, exemptions being incoherent.

Despite the apparent absurdity of pursuing a legitimacy solution – especially one based on exclusivist consensus justificatory liberalism – this chapter will argue for precisely this possibility. Advancing this lateral solution depends on overcoming the above complications. To overcome the first requires both a further explanation of how justificatory liberalism resolves political disagreements legitimately via PJP and completing the justification of consensus-PJP itself. The latter will be furnished with a special rational justification that complements the ideality-aim as foreshadowed in the previous chapter. This is taken up in section 9.1.

Surmounting the second, meanwhile, requires a further refinement of liberal legitimacy by extending it to the largely under-specified domain of application and enforcement or what I have been anticipating as *modal legitimacy*. This follows in 9.2. Though it does not equate to the broad approach nor even allow accommodations and exemptions per se – let alone in all cases – modal legitimacy, it will be seen, provides a key innovative breakthrough to the Coherence-Problem. Specifically, modal legitimacy furnishes the crucial middle ground between the presumed legitimacy and uniformity or illegitimacy and differentiation. Key to this will be establishing through illustrative scenarios that the legitimacy of political-exercise such as a law does not automatically transfer to legitimacy in certain individual contexts of application and enforcement as typically assumed (9.2.1). How modal legitimacy can supplement the under-theorised liberal legitimacy's under-theorised answer to application and enforcement will be illustrated via three Axes (9.2.2) and then developed towards the lateral solution to the Puzzles (9.2.3).

Together with the first move centred on Establishment, modal legitimacy for Free Exercise completes the lateral solution to the Puzzles by offering a way to circumvent the Deep-Disagreements about justice via legitimacy. All this, of course, is not without challenge as the closing response to objections will confirm in 9.3.

There is, however, also a yet far more basic and overarching challenge to both moves or the very logic of the lateral solution. This is the problematic relation between justice and legitimacy which affects not just the core presupposition of the lateral solution – that the two are severable – but also that legitimacy is somehow more urgent and fundamental. Since the lateral solution to the Puzzles via exclusivist Establishment of the justification of consensus-PJP and modal legitimacy depend on it, I begin with establishing these presuppositions through examining the nature and fundamentality of legitimacy in relation to justice (9.1.1 and 9.1.2).

9.1 Legitimacy, Justice, and its Forms

The discussion of the lateral solution so far, along with the Coherence-Problem where the legitimacy of the law is presumed whilst Deep-Disagreements regarding the requirements of justice persists between the narrow- and broad-approaches to accommodations and exemptions, assumes a fairly uncritical distinction between justice and legitimacy. Yet, the relationship

between justice and legitimacy is complex and contested and there is even a noted tendency of conflating the two (Peter, 2023).[192]

9.1.1 Legitimacy and Justice

Schematically, we can express the conflation as what Quong calls the '**basic view**' or that "the exercise of state power is only legitimate when it is just" (2011, 131). The basic view can be contrasted with two other prominent ways of conceiving the relationship. One is a sociological or descriptive conception whereupon justice is irrelevant because "legitimacy is equivalent to '*Legitimitätsglaube*' (a belief in legitimacy)" (Beetham, 1991, 8, italics added), popularised by Weber (1921/1978, 37, 213).[193] Another is Rawls's more nuanced view outlined in his 'Reply to Habermas' whereupon legitimacy operates at a lower threshold of justice and extends beyond it into procedural concerns such that an unjust political-exercise may within some "indeterminate range" still be a legitimate (1995, 175-176). Legitimacy, on this '**nuanced view'**, as we might contrastingly call it, is not only about being "'sufficiently just'", it also operates within an institutional context with procedural dimensions including a pathway dependency or *pedigree* (Langvatn, 2016, 134). These latter features and the descriptive conception can be set aside, however, to concentrate on the connection with and distinction from justice.

Already then, the prior discussion of the Coherence-Problem implicitly alludes to something like the nuanced view and its fit with justificatory liberalism. Legitimate laws are those which are publicly justifiable and (thereby) minimally just, leaving room for disagreement about the further requirements of justice. This confirms how on the mainstream liberal view, something can be legitimate without being just, but not be just albeit illegitimate (Peter, 2023; Wendt, 2019, 43). Insofar as being fully just entails being minimally just or legitimate, this proposition seems sound. Yet, it limited to only what concerns the substance or content of political-exercise, and this, as shall emerge, does no exhaust the relevant domain of legitimacy. More immediately, this proposition – or, rather, the nuanced view – is largely uninformative unless we can more clearly identify how it is that the minimal threshold of justice is ascertained with reference to justice in full? So, for example, if PJP is that minimal threshold, as justificatory liberals propose,

[192] These conflating tendencies being the "political moralism" target of political realists: see Williams (2005); Horton (2012).
[193] Weber's account need not be entirely devoid of normative content, however, as a more nuanced reading suggests (see Greene, 2017).

in what ways might something satisfy PJP but be unjust? Answering these questions requires a yet closer analysis of legitimacy.

9.1.2 Legitimacy

The label for the basic view is actually somewhat of a misnomer since its suppositions are far from basic. Besides the already noted contestability of its conflation of legitimacy and justice, the association of legitimacy with the exercise of state power – or, for that matter, my yet broader association with political-exercise[194] – is far from obvious. There is a sense in which justice with regard to the political is unproblematically continuous with the good. Classically, Aristotle differentiates political rule from other forms (e.g. household management, mastery) by its aim towards the "highest" good or living well or nobly, which requires justice[195] not unlike its less relativised form in Plato's 'ideal constitution' for the polity and soul.[196] Even where justice was isolated as legitimacy or a distinctively political concern, as in ancient political or ideological discourse (e.g. divine kingship), it remained entwined with natural or ethical goods, often with divine ordination.[197] The more problematised concern with legitimacy or a justice of political-exercise seems more prominently associated with modern political theory from Hobbes onwards. Directly referencing Aristotle's characterisation of man as *politikon zōon*, Hobbes challenges the entire ancient paradigm of the state as a natural or otherwise unproblematic occurrence (1651/1994, 106-109).

This singling out of political-exercise as a distinctly problematic concern of justice within the basic view already belongs to a certain paradigm of political philosophy being, as Robert Paul Wolff puts it, "strictly-speaking, the philosophy of the state" (1998, 3). Or, in Robert Nozick's yet more emphatic summation: "[t]he fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all. Why not have anarchy?" (1974, 4).

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[194] Defined in section 7.2.
[195] See *Politics* (c. 350BCE/1998) Books I-III esp. 1252a-125b, 1277b, 1278b-1279b).
[196] See *Republic* (c. 375BCE/1968) esp. 587b ff.
[197] In the earliest-discovered historical records like the *Sumerian Kings List* (c. 2100 BCE), successive overthrows of kings is followed by a natural disaster (the Flood) before kingship again (re)descends from heaven (see 'Sumero-Babylonian king lists and date lists' (trans George, 2011, 199-209). Likewise, ancient Confucian Classics like the (书经 / Shūjing) conceive of legitimacy in ethical terms through the doctrine of 'Heavenly Mandate' (天命 / *Tiānmìng*) (see c. 300BCE/1865, esp. Part III Book IV, Part V, Book I.) or civic and natural harmony whether construed in theological (Eno, 1990, 4) or moral perfectionist terms (Chan, 2014, 27-31).

Within such formulations are two interrelated presuppositions: (i) the salience of the state; (ii) its justificatory deficit. What, in other words, is it about the state (as opposed to other entities) that requires justification or concerns with legitimacy? States are, strictly speaking, not natural as ancient accounts tended to suppose. They require human agency for their establishment and persistence, piecemeal or remote as that may be. So, if justification follows agency then states are at least possible targets of justification in the way one could be for planting a tree but not the tree itself for sprouting. Still, being a possible target does not render one an appropriate target. Justification, after all, is a "defensive concept", responsive to some normative concern (Simmons, 2001, 124). This is perhaps why a justification for suicide seems appropriate unlike one for the continued existence of a person.

In virtue of what then might states require justification? There are various features that might be named: the coercive, hierarchical or inegalitarian nature of states (Ibid., 126) to which we might add involuntary or monopolising. Yet even granting these as necessary, it is not clear that a justificatory case arises. It is hard to see an absolute standpoint from which the said features are necessarily impermissible whereas a comparative standpoint such as anarchy requires its own specification wherein it is not clear that there is uniqueness or advantage of one over the other as a matter of generality.

In light of this, the salience presupposition (i) comes to the fore and in reflecting on what (if anything) singles out the state for fundamental concern we find it is not its statehood per se. On the prevalent (Weberian) definition, the state is "the form of human community that (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory" (Weber, 1919/2004, 33). Of these, it is the 'monopoly' criterion that proves crucial. To see this, consider a powerful gang of bandits gaining effective control over a community and eventually developing routine administrative regularity and institutional forms. Has this become a state?

The answer depends precisely on the monopoly criterion, namely whether or not there is a higher (supreme) entity that can interfere with the effective control of the bandits. Nothing rides on the banditry or illicitness it implies in relation to the qualification of monopoly as being over *legitimate* physical violence nor that the violence be "physical". Were the bandits to gain community recognition and acceptance such that their directives are generally obeyed independent of physical force or threats thereof, it would still not suffice. Indeed, even entities conventionally known as "states" – e.g. subordinate units in a federation or a national state –

would likewise, absent monopoly, not meet the technical definition I am stressing. What this requires is something like relational supremacy over other entities, linking the Weberian definition to what might be referred to as *sovereignty* and the *sovereign* state (cf. Wolff, 1998, 4; Copp, 1999, 5-6). This monopoly or supremacy over other (subordinate) entities whereby one can, in principle, override the power exercised by them (but not vice versa) makes the state distinctive as sovereign (Buchannan, 2002, 690).

Sovereignty is, of course, a highly complex notion not least because the dynamic and relational nature of power makes demarcations of sovereignty precarious and imprecise. For present purposes though, this need not be of great concern. What matters is that, relative to some domain, an entity's sovereignty can be said to *principledly* exist rather than actually but contingently so – namely, where another entity could interfere at will but merely chooses to refrain. Consequently, even if the sophisticated bandits are, as a matter of fact, left without interference, as a micro state of sorts, so long as this remains at the supreme state's discretion the bandits' sovereignty can be denied from the principled perspective.

This perspectival variance similarly helps to understand the simultaneously sovereign and non-sovereign status of certain entities within a sovereign state such as, classically, religious institutions or self-sufficient corporations. Excluding instances where the state practically (including for political reasons) lacks capacity to do so, such non-state entities do not have principled sovereignty for the reasons mentioned despite their actual sovereignty in relation to some discretionary domain(s) – for example, ecclesiastical governance or spiritual matters.

It also explains why the territoriality criterion is of no normative significance and non-state entities can be sovereign in the principled sense. Roaming bandits or a geographically scattered universal community with a central leadership structure could be immune from external interference and sovereign in its relevant internal domain not based on territory.[198]

In sum, on the question of state salience ('why the state?) the answer seems to be: only if it is sovereign and exercising monopolised power in some domain. The salience then actually belongs to monopolised power. Power as a capacity to influence the will of others (Weber, 1978, 53) is an all-pervasive phenomenon in agential interactions, but monopolised power is salient in its potential to shape and determine all other power-interactions. It is this supremacy that characterises and distinguishes ***political*** **power** from other instances and makes it

[198] Nor is this non-state sovereignty at all unusual with many actual notable non-sedentary historical empires: Cimmerians, Scythians, Huns, and (at least initially) the monumental Golden Horde, for instance.

normatively salient within its applicable domain, territorial or otherwise. As Allen Buchanan puts it, "supremacy" or the "monopoly feature" (by which interference of rival power is eliminated) is what distinguishes "political power from mere coercion" (2002, 690). Properly speaking then, it is political communities or polities that are salient on account of exercising *political* power with the state just the emblematic type. Legitimacy then is fundamentally about how (on what basis and/or in what form) political power *ought* (permissibly or ideally) to be configured and exercised.

Yet, this still leaves the second presupposition unclear. Why is political power any more problematic or in need of justification compared to any other form? To see what makes political power a distinctive concern it must be remembered that normative concerns are responsive to facticity.[199] What an individual ought to do in any situation depends in part on what is feasible for them to do based on their agential capacities or power(s) and the balance of moral and/or prudential reasons. Whether there is an objective standard of evaluation or not, the individual agent can, at best, merely rely only on their own understanding of it.[200] This includes the relativity of one's power in relation to others. Suppose I have the only gun giving me a (relative) monopoly of power over others. Suddenly, I could coerce them to act as I wish. Ought I to do so and take their valuables? Or perhaps redistribute the valuables according to everyone's needs? Ought I to coerce some to be nicer to others? It may even be that I ought to do nothing at all and let everyone be, but that would still be a normatively salient act insofar as I could, because of my sovereign power, have instead done other things. Where someone else could outgun me or overturn my power monopoly the normative situations shifts yet again because a new relative sovereign or political power emerges to replace mine. With that I lose the earlier distinctive normative salience because now my power(s) are not determinative in shaping the subordinate configurations of power and effects in the relevant domain of the social world. As commonly observed it is this which renders political power efficacious in resolving social Prisoners' Dilemmas or collective coordination and assurance problems as prerequisites for securing social goods (Rawls, 1971, 6, 267-270; Nozick, 1974, 125 ff; Raz, 1986, 56; Hampton, 1997, 71-85; Simmons, 2001, 136).

[199] Classically, David Hume observes this about the circumstances or "inconveniences" of justice (1739/2014, 3.2.2/ 311 ff., esp. 317) whereby the fungibility and scarcity of resources, for instance, engenders conventions of property. Equally, if we were immortal and had tougher constitutions, physical violence might not occupy moral concern (cf. Hart, 1958, 623).

[200] To be sure, this does not exclude understanding developed from the understanding/testimony of others.

Again, none of this is to deny that in reality political power is far less secure in its monopoly on coercive force. Even well-established states find themselves vying for their monopoly against large corporations or trade unions, and crime syndicates (Green, 1988, 82). Relatively speaking, however, political power finds normative salience whenever it effectively emerges. This also goes to blunt the possible objection that this picture inaccurately presents the existence of political power as an indisputable necessity in denial of anarchic possibilities. Much like the incongruity just noted between the ideal-type and actual political power, the ideal-type of anarchy is yet less congruent with any manifestation. While it is not my intention to adjudicate on contingency and necessity in history and human nature, the Hobbesian fantasy of a state of nature entirely devoid of political power seems not just dissonant with the anthropological evidence,[201] but also inaccurate on the relational nature of political power outlined. While anarchy can certainly correspond to a condition without a stable, centralised state, it is never a world without political power as such given that individuals form groups like families, clans, bands, alliances and so forth. Even if such collectives are microcosmic and non-institutionalised (i.e. power is exercised personally over others), they are nevertheless polities provided a more or less stable constituency under a relatively supreme bearer of (political) power, whether it be a familial matriarch/patriarch, a chief or an assembly of elders or even the entire community.

Crucially, because of its inevitability in relative terms, these distinctive normative considerations or the fundamental question of legitimacy becomes inescapable. Just like non-intervention is a normatively salient choice in the sole gun example, so too with political power every exercise or non-exercise matters because it inevitably affects subordinate relations of power and their background coercive effects. For example, protecting private property requires coercion of those who disregard it whilst also (to some degree) allowing the economically advantaged a coercive relation over the indigent. Conversely, abolishing private property might reduce the coercion associated with protecting it but might increase the coercion associated with dispossessing holders. This is why the fundamental question is so fundamental. Political power has the potential to affect the various dynamics of background coercion, power and other aspects of the social world in a determinative way compared to all subordinate power(s) within the relevant domain. Justification then is appropriate of political power not just in the general

[201] As Francis Fukuyama expounds, the individualistic rational agent would be an anomaly within the primordially sociable socio-biological profile of homo sapiens (and greater primates more generally) who have always existed communally in loose kinship-based social groupings or 'bands' (2011, 30-55).

sense in which agency attracts justification-demands but in its normatively salient sense on account of the supremacy or finality of political power in its domain.

All this reveals how though conceptually legitimacy can be distinguished from justice insofar as it exclusively concerns the justification of political power rather than, say, desert or distributive shares in material (e.g. wealth and natural resources) or intangible goods (e.g. opportunities, reputation, dignity, honour etc.), there remains a critical interaction. In the first instance, legitimacy could still be characterised as a kind of subset of justice, namely a justice of means. Much like individual conduct is justified by moral permissibility or ethical ideals, political power, given its aforementioned uniqueness in control or determination of the social world, becomes justified by political morality or justice. The question of how ought political power be configured or exercised thus becomes formally answerable as: in the way required by justice (whatever that may be). This, however, seems to align with the basic view. After all, if political power can affect so much of the social world, should its legitimacy not be only about just means but also realising just ends?

The key to the nuanced view then and to seeing how, for example, political-exercise might satisfy PJP but be unjust is taking the just means as substantive constraints on the pursuit of just ends. Put differently, the distinction between means and ends is not neat since the means can themselves serve as kinds of ends of justice that must be satisfied for legitimacy independently of the further ends of justice. Take the following example. Exercising political power to punish violent offenders might be a just exercise (as opposed to that of punishing the complainant, say) and not unjust in outcome (assuming the offenders morally deserve the relevant punishment) but still not qualify as legitimate if the political-exercise unjustly destroyed someone's property to achieve this. That would illegitimate the political-exercise even though there was a just outcome concerning the offenders and even if the unjust outcome as to the destruction of property were to be subsequently remedied into a just one. Legitimate exercise is therefore sensitive to the constraints of justice on the means of exercise independently of the justice of the means in general and the justice of the ends served.

The constraints of legitimacy thus allow for legitimate political-exercise even where it is unjust or failing to prevent an injustice. It also means that something being required by justice does not necessarily mean it can be legitimately pursued. This will emerge as a crucial component of why modal legitimacy provides a lateral solution to the Deep-Disagreements about justice whatever their correct resolution might be. For now though, it at least reveals how PJP as a

condition of legitimacy does not necessarily guarantee that the exercise of political-power are just all things considered, only that they are not unjust in the minimal sense.

9.1.3 A problem of forms

At this point, however, a complication arises. How is the threshold of minimal justice or legitimacy on the nuanced view to be determined? It is worth taking a step back to consider the levels of disagreement involved here. Recall that in the first instance, value pluralism means a disagreement about the good, including morality and religion in response to which liberalism arises as an attempt to quarantine the disagreements about the good with mutual protections within a common "moral constitution" or framework of justice (Rawls, 2001, 1-2; Gaus, 2015, 114-121). That, however, quickly turns into a disagreement about justice. Not only are there many possible conceptions of justice, both liberal and otherwise, but, to recap, it is not always clear where the boundary between justice and the good or public and private is to be drawn.

Here, justificatory liberalism makes its chief contribution of a political solution or legitimacy by looking towards a higher-order unanimity or normative common ground upon which the disagreements can be resolved. Though, as seen, in the absence of any such actual common ground this is an idealised one based on *reasonableness*. For consensus-PJP that entails a disagreement involving public reasons such that each opposing position is, in principle, *reasonably* justifiable to the other.

To illustrate, compare a disagreement about religion or morality (e.g. the criminalisation of euthanasia or of depictions of a deity) with some other disagreement about, for instance, education or environmental policy (e.g. standardised tests or mode of power generation). Since in the first category – call it **Moral-Disagreement** (cf. Nagel, 1987, 231-234) – each side can seemingly only appeal to private or esoteric justifications, the rationale for using political power to impose one or another position would not discharge public justifiability and thereby be illegitimately exercised. This implies that the proper state response here is deregulatory – leaving the matter to individual choice (Idem.).

The second category – call it **Other-Disagreement** – might also involve some private or esoteric justifications such as about ecological morality, but crucially there are public justifications available too – based on, say, economic and scientific arguments in favour of a particular policy. The availability of one or more sound public justifications renders the disagreement *reasonable* and allows legitimate exercise in imposing a particular policy by law even in the face of disagreement. Even if the state might be able to allow individual choice

here, it could legitimately prescribe a course of action by law. Thus, the liberal-democratic tendency to impose publicly justifiable rationales based on some procedural solution like majority support in such reasonable disagreements will be a paradigm case of legitimate exercise to which I will refer as **Legit-Majoritarianism**.[202]

Public justification therefore helps with disagreement about justice by identifying the *reasonable* range of conceptions upon which all *reasonable* persons can agree whereby whichever happens to be procedurally adopted by, say, Legit-Majoritarianism, it is a *reasonably* acceptable one. This extends to various other political-exercise within that framework. So long as the disagreement is *reasonable* whatever political-exercise is ultimately enacted is thus publicly-justifiable and legitimate. Where the disagreement is not *reasonable* in that it pertains exclusively to morality, the good – or even justice beyond the aforementioned range – no Legit-Majoritarian resolution can legitimate a political-exercise since it is not publicly-justifiable.

All this, however, brings us to a yet deeper disagreement discussed in the previous chapter: that about legitimacy itself. Disputes arise over the specification of PJP, notably between consensus and convergence, as well as the various levels of idealisation and tests, all the way to PJP itself. Why restrict legitimacy to public justifiability? Why to public reasons with the ideality-aim and its confinement to effectively liberal conceptions of justice as minimal thresholds of legitimacy? Why not the more contextually sensitive commonality aim or actual consent or truth etc?

This will naturally affect how legitimacy is understood in relation to justice. A useful illustration here might be Nozick's famous scenario about Wilt Chamberlain (1974, 158-161). Supposing that Chamberlain's acquisition of wealth is just the question that arises is whether justice might nevertheless require redistribution to (disadvantaged) others? Many liberal-egalitarians will no doubt think it does, but that does not mean that the political-exercise of redistribution will therefore be legitimate. It may, for example, be lacking convergent reasons

[202] Though, in principle, it may be that an indicative political-exercise is ascertainable on the balance of public reasons, I am jumping to a procedural resolution given that in most cases public reason is incomplete for political decision-making. More precisely, the incompleteness might take the form of *inconclusiveness* whereby there is no definitive indication on the balance of public reasons or *indeterminacy* whereby there is no clear set of public reasons identifiable pertaining to the issue in question. Schwartzman (2004) offers a fuller discussion of this. For an appeal to procedural resolution see Williams (2000); for arguments for incompleteness, Reidy (2000).

or a Legit-Majoritarian resolution. This, once more, illustrates how pursuing justice might not be something the state can legitimately do.[203]

As foreshadowed, apart from the relatively greater internal coherence explained in the previous chapter, consensus and the ideality aim offer a special rational self-justification (including for PJP) that is fundamentally *practical* or political. The first step here is to note that the though the ideality-aim seeks to go beyond the commonality-aim (concerned with contingently subsisting or represented perspectives) to all (*reasonable*) perspectives that are *conceivable* upon reflection and use of reason, this need not be non-relative or atemporal. That the use of reason is from within our contemporary, imminent frame does not make the ideality-aim ad hoc or arbitrary. Though the standpoint is relativised and contingent, it is also historically progressive and rationally moderated.

Rawls's seminal reflections are especially informative here in their acknowledgement of the evolutionary shifts of public political culture. For Rawls, public political culture comprises of "the political institutions or a constitutional regime and the public traditions of their interpretation (including those of the judiciary) as well as historic texts and documents that are common knowledge" (1993/2005, 13-14). Thus, for example, whereas the value of autonomy exists as a comprehensive moral value in ethical doctrines like Kantian autarchy and Millian individuality, it also occurs as a political value within the institutional framework of citizenship and legal personhood, for instance (Ibid., xlii-xliii). Unlike the moral values, the political value does not rely on controversial comprehensive moral and philosophical views but is embedded in the actual public political culture of liberal-democratic states.

More broadly still, the public political culture contains many other key settlements of moral disagreement or political values that allow for conceptions of political justice to emerge. Regarding this emergence or progressive[204] historical shifts, Rawls cites religious toleration and slavery as examples (1993/2005, 8). The crucial part however comes directly after this when Rawls adds that these "settled convictions" serve as "provisional fixed points" from which "public culture as the shared fund of implicitly basic ideas and principles" emerges (Idem.).

[203] Of course, this is not Nozick's position. For him, though it may be good to redistribute, such political-exercise would be illegitimate because justice does not require redistribution and it would be unjust if involuntarily effected.
[204] No value judgement is intended here about the "progress". The connotation is more about the cumulative character and directionality of the shift.

The settled conviction about the injustice of slavery, for instance, establishes that there is an *idealised* unanimity of *qualified* perspectives on this point (some *actual* points of view may still consider slavery just).

But it also does much more than that. It serves for the normative calibration of public reason or, in the Rawlsian terms quoted above, the provisional fixed point from which further "due reflection" or "reflective equilibrium" proceeds (Idem.). Indeed, a convergence on the abolition of slavery may not contain within it any convergent reason with moral content about dignity or equality (the convergent reasons might all be purely economic considerations, for instance). Conversely, to determine the same question by public reasons would engage in a reflective equilibrium regarding the principles on which slavery is supported and finding them to be not shared at the proper level of rational reflection and generalisation. It is partly by this process that non-subsisting but conceivable perspectives could be taken into account in public justification by public reasons on the ideality-aim unlike with the commonality-aim.

Now, if within the actual contemporary public political culture the dialectical deadlock between proponents and detractors of PJP persists then, reflecting on the very same shared principles within which the debate occurs, a practical resolution must be sought. Though no indisputably compelling normative case exists for PJP, construing it as but another rational justification does not lead to a practical resolution either.

Rather, the fact of ongoing theoretical dialogue on the matter, on due reflection, indicates the recognition of the value of cooperation *already implicit as a shared public ideal.* If such a fact actually exists it discloses through reflective equilibrium the imminence of public justification as a potentially shared or mutually accessible reason amongst *qualified* perspectives (even on the looser end of the scale).

Consequently, if public justification is already in some sense imminent within public political culture, interpreting it with the ideality-aim reinforces its coherence by reference to the most inclusive set of perspectives (subsisting and conceivable) seeking cooperation within the actual, historically imminent public political culture. To appropriate Joshua Cohen's remark, the point here is that "[i]n a Hegelian *Doppelsatz*, we need to accommodate the ideal because the real manifests the ideal" (2009, 59). Naturally, there are complications about the precise relation between the real and the ideal – actual and normative – but the settlement of these mattes lies in precisely the kind of prevalent political understandings as approximated (however crudely)

by appeals to "reasonableness". And for the reasons above and in the previous chapter, it is the consensus ideality-aim that provides the most internally coherent inclusive version of that.

Though far more could be discussed here, the outlines of this practical defence for consensus-PJP complete the account of how it can navigate political disagreements including about justice – and even the boundaries between justice and legitimacy – to offer a coherently exclusivist solution to the Establishment concerns of the Puzzles. This and evincing how the legitimacy of political-exercise might be limited even when required by justice in turn also opens the path to the lateral solution to the Puzzles applied to Free Exercise. To achieve this, however, we must go beyond PJP and liberal legitimacy and consider the under-theorised dimension of modal legitimacy as will be explained below.

9.2 Modal Legitimacy as Lateral Solution[205]

Even with the possibility of legitimacy constraints limiting the pursuit of justice, if the legitimacy of the law is the starting point of the Coherence-Problem and consensus-PJP blocks non-public reasons by which legitimacy might extend to the broad-approach, how can legitimacy offer any solution? The answer begins from seeing how liberal legitimacy is not exhausted by PJP as a necessary condition. Though PJP is a *necessary* condition it need not thereby be taken as a *sufficient* condition of legitimacy. While political-exercise failing to fulfil PJP will be illegitimate, the fulfilment of PJP is only a *pro tanto* or presumptive indication of legitimacy. This will be illustrated below motivating the move to modal legitimacy in 9.2.2.

9.2.1 Legitimacy at its (further) limits

As discussed above, once the disagreements about justice become narrowed to *reasonable* disagreements within a political conception with substantive limitations (including with respect to Moral-Disagreements), Legit-Majoritarianism allows for legitimate procedural resolution of Other-Disagreements. What, however, does legitimacy of such political-exercise entail?

In the first instance, it entails that the minority or losing parties cannot *reasonably* reject the resolution even if they actually disagree with it, no matter how vehemently. Legitimacy already ensures that minimal justice has not been transgressed despite the resulting injustice as one may perceive it. This is why civil disobedience, at least on the Rawlsian view, differs from "militant" opposition in that civil disobedience recognises legitimacy and accepts secondary

[205] This section utilises and expands upon arguments and examples previously developed in Leontiev (2020).

legal sanctions for the violation of the primary law (Rawls, 1971, 366-367). And also from "conscientious refusal (or evasion)" where typically it is not the justice of the law that is in question, but one's allegiance to it given one's contrary convictions (Ibid., 368-371). Or, less typically, it is the justice of the law but one's response does not take the form of a public address seeking amendment or repeal of the unjust law as in civil disobedience (Idem).

As the relationally sovereign or supreme power, political power which is legitimate is by definition morally permissible coercion – at least in the structural determination of the social world. Broadly then, legitimacy seems to entail the permissible pursuit of the rationale, including the general state interest in collective coordination of the political community (**Collective-Coordination**) and the protection of the legitimate rights or interests of others (**LRIO**).

All this seems generally straightforward in as much as the publicly-justifiable rationale, Collective-Coordination, and LRIO are all part of the kinds of substantive constraints on the use of political power such that even proponents of exemptions will typically concede that exemptions are not warranted where their grant would conflict with at least the latter two interests. The problem, however, is that these principles operate at a high level of generality with considerable scope for variety in specification as the below illustrations disclose.

Borrowed Property

Consider Plato's classic conundrum in *The Republic* when Socrates challenges Cephelus on the justice of returning a borrowed weapon to a friend gone mad (375BCE/1968, 331c / 7). Whereas Socrates posits that justice requires refusing return, in striking contrast, Hume's famous conception of justice as an artificial virtue insists on return as a matter of right (1739/2014, 3.2.1.7-11 / 308-309). While there may be room to debate the *reasonableness* of Socrates' position here with respect to LRIO, let us simply assume that a Legit-Majoritarian resolution endorsed Hume's conception requiring return as the relevant principle for political-exercise. Beyond the already mentioned implication that legitimacy would mean there is no *reasonable* basis for complaint from Socrates, it is not clear what follows if Socrates were to insist on keeping the weapon.

The publicly-justifiable rationale of property rights and the particular LRIO here suggest that political-exercise to address ownership rights would be legitimate. From there, it might be assumed that Socrates can be coerced to return the borrowed property with perhaps only some restrictions on reasonably proportionate means. This, however, is somewhat too quick because

it does not specify the precise connection between the *reasonable* acceptability of the political-exercise and the direct coercive applications in various forms. An insightful observation on this is made by Arthur Ripstein in a related albeit not identical context, which is worth quoting in full:

> almost no one is prepared to accept that, as a general matter, people may be forced to do what they ought to do, just because something important is at stake. Yet much political philosophy seems to move in precisely this pattern: some significant moral requirement is identified, and shown to be particularly important, and from that it is concluded that the requirement in question may be enforced. People ought, for example, to respond to the needs of strangers, and so the tax system is justified in exacting resources from them, by force if necessary, and in order to get them to do as they should (2004, 5).

Ripstein's Kant-inspired response is to argue that LRIO already entails coercion. This seems to merge considerations of legitimacy into those of justice not unlike the basic view. Besides the reasons already outlined for moving beyond this view, it carries no advantage regarding the above generality concern. Although coercion is unavoidable in some structural sense, what form does legitimacy warrant here? Shall Socrates be forced to comply such as by having representatives of the state physically wrest the weapon from him or coercing him with threats of violence to deliver the weapon to the owner? Or shall it rather be withdrawing any protection of his possession should the owner or someone on their behalf come for the weapon? Or perhaps freezing or seizing some benefit or asset of his until return is effected or transferring the seized assets as compensation to the owner?

These questions illuminate the important under-specification in how liberal legitimacy (and other accounts) is typically cast. To be fair, the very separation of legitimacy from justice more generally is a progressive step and perhaps PJP itself cautions against theoretical (pre)determinations of political questions. Nevertheless, coercion remains largely bundled as one monolithic current of political-exercise.

Conceptually, of course, liberals are aware of the possible distinctions like that between structural and direct coercion or "primary" and "secondary" (Audi, 2000, 87-88) but the practical application has not gone far beyond their subjection to PJP. Audi, for example, suggests that primary coercion needs more justification because it requires performance whereas secondary coercion is derivative (e.g. expenditure to which one objects from already collected tax contributions or licensing requirements provided one wants to drive legally)

(Idem.). But right as the impulse towards gradation here is, the distinction still pertains to political-exercise in general rather than in particular to application and/or enforcement.

From another direction, some have sought to isolate enforcement as distinct from the legitimacy of primary political-exercise itself. Robert Hughes, for example, has sought to cast doubt that the entitlement to legislate carries an entitlement to coerce even in non-ideal societies (2013, esp. 199 ff.). Coercion, Hughes argues, is not the only way of solving assurance problems so as to ensure rules can be morally binding whereas the justification for enforcement as a response to unjustified law-breaking is complicated by the potential risk of harming the innocent (Ibid., 201-202, 203-204). Important as these considerations are, their focus is instrumental or consequential in nature, speculating on the effects of enforcement. Apart from their likely empirical complications such considerations do not reach into any inherent normative distinctions about the mode of application and enforcement itself. Put differently, risk of unjustified harms to the innocent speaks to the justification of enforcement as a general practice but not its justifications in particular cases.

It stands that much like with the substantive constraints on Legit-Majoritarianism, certain gaps with regard to the legitimacy of application and enforcement require some theoretical specification. As Leslie Green, observes, the question of "techniques" or "modalities" for achieving justice "retains partial autonomy" from the first-order question about the ends of justice and so it is "puzzling that those who have spent the most time on the theory of justice have had little to say about the various modalities through which it might be achieved" (1988, 6).

To continue with the demonstration, consider, further, the scenario:

Nuclear-Plant:

Suppose Legit-Majoritarianism results in a law for the generation of nuclear power and construction of such a plant (the **Plant**). What does the legitimacy of such a law entail? Though there is arguably no LRIO in play, the rationale and Collective-Coordination presumably allows exercise of political power to implement construction and to reasonably prevent interference therewith such as destruction or vandalism. This will certainly restrict the dissenting parties, compelling them to live in a world with the Plant. Yet, does legitimacy extend here to extracting from these dissenters a relevant tax contribution to fund the Plant? If they morally object to such a measure does the disagreement turn into the Moral-Disagreement

type where Legit-Majoritarianism does not apply? Or does the law's rationale and Collective-Coordination dimension incorporate the taxation contribution as part and parcel of the law?

Apart from the logistical complexities of actually dividing consolidated public revenue according to various expenditures the liberal-egalitarian reasons for precluding the differential approach on moral or (broadly) 'cultural' grounds have already been presented. In essence, the answer is the latter: the tax contribution is part and parcel of the publicly-justifiable law and thereby also reasonably acceptable despite actual opposition.

Such an answer, however, seems dubious. On closer scrutiny, it may be contended that the operation of the PJP-satisfying law is, in principle, separable from the tax contribution. It may, for example, be that the taxation is a separate PJP-satisfying general law but the expenditure on the Plant is not specifically included in either. Alternatively, it may be that the Plant is not the kind of law that compels dissenters to participate in a way supportive of tax liability. To see this, we can compare this case to the below.

IP-Regime

Legit-majoritarianism establishes an intellectual property (IP) regime covering all forms of expression or "works" (e.g. literary, musical, architectural, image, software, etc.) and where creators of works automatically get legally-enforceable IP rights. Again, some dissenters object to contributing taxes to the administration of this regime.

Unlike in *Nuclear-Plant*, the objectors to taxation in *IP-Regime* face a distinct hurdle: an inseparable part of the IP-law is that they are compelled (albeit passively) to be IP-rights holders. [206] Consequently, the exemption would mean a disbalance between their noncontribution and their rights-entitlement which in turn (unlike with the *Nuclear-Plant* tax objector) makes the legitimacy of compelling the tax obligation more plausible.

Now it might be challenged that the Plant too holds benefits for all making the disbalance point likewise applicable. While the challenge is plausible it ultimately involves empirical findings and this is why *IP-Regime* still differs in being an *a priori* legally-set disbalance.

What though if the dissenters were to opt out of the IP regime to neutralise the disbalance? This option arguably fails not only for the reasons about normative entitlement to exemptions to general laws, but also that there would be a Collective-Coordination issue with the IP-regime

[206] Assuming, of course, they create at least one "work" triggering the right. This seems unavoidable since virtually any communication in material form would qualify.

being something requiring universal coverage for its efficacy. A "works" economy would likely be compromised if there were uncertainties about holders and coverage.

The lesson of the comparison is the importance of *inseparability* of the compelled passive participation/compliance/involvement (used interchangeably) to the law that exists in *IP-Regime*, but not in *Nuclear-Plant*. One further illustration may assist here. Compare the following similar but critically different scenarios.

A. *Darwinism-Classes:*

A Legit-Majoritarian law requires the inclusion of Darwinian evolutionary theory in the public education science curriculum.

B. *Darwinism-Classes-Mod:*

Same as A., but the law explicitly takes additional step of requiring students at public institutions to attend the classes.

In A., the dissenter must accept the state-of-affairs, but unlike in B., they are not prima facie compelled by the law to participate further. Though the distinctions in the forms of compliance here are not without their difficulties,[207] they are nevertheless useful in clarifying the taxation objection in *Nuclear-Plant*, and like cases. That is, if something like *Darwinism-Classes* does not, without more, require *Darwinism-Classes-Mod*, why should *Nuclear-Plant* (without more) compel tax obligations?

At this point, it may be thought that all this is really moot or vacuous since whatever under-specificity there might be, the cure is a PJP-satisfying law – for example, a separate tax levy specifically for the Plant or for state repossession of unreturned property – that would legitimate the contested application or enforcement without the need to wonder about these nuances.

This solution is, in principle, possible, but it is inadequate in several respects. Apart from its questionable feasibility (given the exponential increase of legislative work), it arguably underestimates the conceptual limitations on how specific any regulation can be in relation to every possible set of circumstances and contingencies. More importantly, if the various nuances are identifiable they would arguably enter the balance of public reasons anyway even

[207] For instance, the absence of legal requirement does not mean there are no further indirect socio-political consequences. It is a complicated question when such consequences effectively become equivalent to a legal requirement.

if ultimately subject to Legit-Majoritarian resolution. Accordingly, theorising them offers greater guidance as to how they interact with political-exercise. Lastly and critically, these concerns reveal the insufficiency of PJP as a necessary condition of legitimacy for all gradations of coercion. Whilst structural effects are inherent and unavoidable, direct coercion is more complex. As the above discussion conveys, it is one thing to, say, recognise property rights by permitting free exchange of goods or to fund the Plant from public revenue, but quite another to physically compel someone to return property or perform manual labour on the Plant. Not all application is certain and not all enforcement is alike. It is this that the general application of PJP to political-exercise fundamentally neglects.

Again, none of this is to impugn PJP or the necessity of it to legitimacy as outlined on the consensus model and ideality-aim. It is only to note that it operates within a general domain of legitimacy that is integral but does not exhaust legitimacy as a whole. In what follows, I will sketch what I call the domain of **modal legitimacy**. This will evince how the legitimacy of a law might not, of itself, prove determinate as to all its specific instances of application thereby indicating the sought-after possibility of a legitimate law not in all instances being legitimate in application or enforcement against an objector.

In relation to the Puzzles, this means that independently of considering the possibility of exemptions to the legitimate law in question, there may yet be space for limiting the legitimacy of the law itself in its specific *application* to the circumstances of the objector. To reveal this, I will draw on the discussed taxation example without utilising the Collective-Coordination aspect and instead underscore its other distinguishing features that can answer the objectors. Through this, I will simultaneously be able to roughly mark out the possible kinds of limitation to the *application* of legitimate laws against certain corresponding kinds of objection.

9.2.2 Modal Legitimacy

Let us then set aside Collective-Coordination or how the taxation is combined with or individuated from the primary law. Taxation might still be distinguished from cases where enforcement against an objector might transgress PJP or liberal political legitimacy in terms of something like the following three "Axes" pertaining to the modes of operation of political-exercise with respect to individuals.

1. Positive/Negative

This applies to the nature of the performance required. By *positive*, I am trying to capture laws which mandate the performance of certain acts or adhere to certain conduct: compulsory school

attendance or conscripted military service, for example. Even an obligation to cease and desist from some activity being performed might qualify as positive insofar as it requires the subject to actively do/stop something. Conversely, *negative* obligations are those which can be complied with without performing any act. A law extending a parliamentary term or prescribing categories of damages different tribunals can award imposes no performative requirements on any citizen *qua* citizen.

Concerning taxation in *Nuclear-Plant*, the law would be acting on property rather than the person, meaning that the obligation involved is entirely negative: no positive acts/cessations are required. It might be suggested, though, that this fails to recognise that taxpayers do have positive obligations in effecting the tax payment to the state. True, but these relate to the *administration* of the tax rather than the tax obligation itself. The two are conceptually distinct and it is entirely possible that the owed tax value can simply be deducted from gross income (property) without any obligation on the citizen (person).

2. Personal/Impersonal

Even if they carry no positive obligation, some laws will be *personal* in nature. For example, a legal prohibition on abortion or censored literature can be complied with by doing nothing but it nevertheless broaches (significantly) personal matters pertaining to bodily integrity and reproductive rights or academic freedom, respectively. In contrast, taxation or even a positive obligation to stop at a red traffic light or park parallel to curb is arguably impersonal in not triggering any such distinctively individual interest.

One could counter here that the extraction of tax as material support for some morally objectionable purpose seems personal. Yet, this challenge overlooks the fact that whatever underpins the objection to the tax contribution such as the *Nuclear-Plant* will remain in effect with or without one's contribution unless there is a majority reversal to the original law. By contrast, in the abortions and censorship examples being permitted individual access or not makes a significant difference to the concerns of each specifically affected individual.

3. (Non)-Intimacy

Most distinctively, this Axis of intimacy refers to the degree of directness and onerousness of the obligation. However, 'onerousness' here is not about difficulty of compliance. Rather, it refers to something like the specificity of the compliance required. Laws requiring homeowners to enclose swimming pools to a particular technical standard or dog owners to remove their pet's waste from public spaces might be examples of the specificity of the requirement rather

than its burdensomeness. By contrast, a law requiring very expensive or difficult to obtain materials for the pool fence might be onerous in the burdensome way.

Another way to convey the nature of this Axis is in terms of its micro-intrusiveness. Consider the following comparison about vehicle safety regulations. Typically, laws require vehicles to be fitted with airbags and seatbelts and additionally require wearing/strapping-in seatbelts when in locomotion.

Interestingly, while both the first-mentioned and second-mentioned restrict the totality of possibilities of driving (e.g. without an airbag or not strapped by a seatbelt), they do so in remarkably different ways. The first law removes the choice from the driver *practically* – at the production line by the manufacturer's compliance – whereas the second law retains the choice but makes not wearing illegal within that choice.

Why should that be significant? To see, we might consider the following challenge. Imagine a technology that could be fitted into every vehicle which would automatically strap drivers in with a seatbelt at the relevant time. In this way analogous to the airbag case the choice is practically eliminated and there is no positive obligation on the driver. In the absence of this technology, should it really matter that the law simply directs the driver to effect this result themselves?

Intimacy and the two previous Axes suggest that indeed it *does matter* and precisely in the way the contrast is set up. The fact that the law cannot achieve the practical elimination of choice at the macrocosmic level turns it to address and direct the individual specifically, as it were. The individual retains a choice but only one option is lawful. Here, one can notice the first Axis in that the obligation is *positive* – actually strapping oneself in – which contrasts with the *negative* obligation in the airbag case where the driver is not compelled to do anything to comply. So long as they do not actively remove the airbag, they remain in compliance every time. Coming to *intimacy*, the law seems to direct in a specific manner here. There is a prescription as to how, when and for how long one should use the seatbelt – and, in this example, the feature of having to do all this to oneself at the imperative of the law. The difference to the hypothetical automated seatbelt case according to the *positive/negative* Axis combined with the (*non)intimacy* Axis is that these microcosmic elements carry something objectionable – perhaps offensively infantilising or otherwise intrusive in the personal address and level of politico-legal interference with the individual as to their mode of self-conduct. Finally, where

in addition to this there is a further objection to compliance on account of something personal or individual to the relevant subject then the *personal* Axis would be triggered as well.

An important clarification must be made here. Intuitions will likely differ as to whether the requirement of self-strapping is really all that objectionable compared to the automatic seatbelt mechanism. Some might instinctively feel that there is something more insidious or controlling about the automatic case since the individual effectively has no practical choice at all unlike that of ignoring the legal requirement. Those opposed to seatbelts may even feel it far worse to have the automatic mechanism that extinguishes even the possibility of recalcitrance as opposed to the *intimate* requirement as sketched above. I have no qualms with such observations but they are beside the point here. The illustration is not concerned with all possible comparative dimensions but only the *intimacy* of the interference with the individual's mode of self-conduct. That the automatic mechanism would be more sinister, manipulative, freedom-reducing, or in any other way worse overall does not detract from the greater *intimacy* of the non-automatic interference. And all else being equal, greater *intimacy* is problematic over lesser.

Compare, for instance, two versions of a requirement to take an oath the purpose of which is to express a binding promise to fulfil some acts or duties. One in which the oath-taker can decide on the precise expression of the oath from some options or in consultative drafting and one in which a mandatory text is prescribed with very specific wording. The mandatory text might not be arbitrary and there may be good reasons for having a uniform text for each swearing. Yet, if the substantive requirements can be conveyed with less compulsion on individual speech and expressive choices the *intimacy* Axis indicates in favour or the first version.

The Axes reveal how not every compelled active compliance is relevantly alike. As contrasted earlier, taxation obligations are *negative* (acting on property, not mandating acts/omissions), impersonal (not broaching matters of personal significance) and not intimate (not especially specific or intrusive as to mode of compliance) whereas the above seatbelt case triggers at least the first and third Axes. This reveals that a response to the objection to taxation can be given without invoking LRIO or Collective-Coordination but rather looking at how taxation differs on the Axes from other kinds of objection such as seatbelts and, by extension, the typical kinds of exemption cases commonly cited as shall be seen below.

9.2.3 A lateral solution?

The foregoing discussion of modal legitimacy and its Axes is but an initial sketch – far from complete or exhaustive of what might constitute the dimension as a whole. Nevertheless, if the foregoing is correct, then modal legitimacy opens a way for a lateral solution to the Puzzles concerning Free Exercise. Specifically, as the Axes reveal, PJP does not exhaust every dimension of legitimacy and omits a crucial middle ground between the public reasons legitimating the law and the private or non-public considerations that would be excluded from publicly-justifying cultural-exemptions.

While public reasons can legitimate a certain law or political-exercise, this operates at the general or universal level of rationale and content of the law, but not at the particular level of every detailed form of application which the law might take. Ordinarily, the content can set the relevant parameters on such form. Laws compelling something comprising Moral-Disagreement such as abortion, for example, will be illegitimated by PJP, but when it comes to Other-Disagreement, there may be publicly-justifiable laws which indirectly trigger the above Axes upon application. So, although the Axes are superfluous to the public-justifiability of the law, they are nevertheless relevant as non-private and free-standing objections to the law.

The Axes therefore occupy an intermediate place between public and private or rather a dimension of mode that intersects between the two. When there is no interference with the LRIO nor a universal coverage requirement of Collective-Coordination, there is arguably space for a further limit to PJP in terms of application and enforcement against individual objection formulated in terms of the above Axes or similar grounds. Crucially, the objection is not specific to any private or cultural ground but a limit to the exercise of legitimate political power universally (albeit manifested in a relevant instance). As the seatbelt example illustrates, it is not the exercise of political power that is limited nor any constraint on its rationale or content, but only its mode as a formal requirement that transcends the requirements imposed by PJP.

When it comes to the Axes, the presumption is that the legitimacy criteria of PJP has already been fulfilled. Indeed, the general concerns with LRIO/Collective Coordination already ensure that at the point of an Axes-based objection to enforcement against an individual, the law has already exhausted all its possible public functions. The success of limiting the application of the law on the Axes will not stop the law (content-wise) from being legitimate, protecting LRIO and/or fulfilling Collective-Coordination. It will only ensure that political-exercise is not used to enforce legitimate laws when the legitimacy of the mode of enforcement is questionable.

Let us then consider the kinds of exemption claims previously encountered like the prohibition on blades and the exemption claim for Khalsa Sikhs to carry *kirpans* despite prohibition on blades in public or riding motorcycles without helmets. Assuming the law is legitimate and exemptions are complexly in Deep-Disagreement, what can the further Axes-based limits achieve here? Like in the seatbelt example, enforcement against the objector with a relevant comportment to the Axes transforms legitimacy in relation to that objector. Hence, for the Sikh enforcement might prove *positive, personal and intimate* in the bodily requirement (wearing the helmet, carrying the *kirpan*) and the spiritual one (removing the turban or *kirpan*). Similar analyses might be given for the controversies around the veil or headscarf and other embodied practices. The law here is directing the individuals in their embodied practices not at a structural-social level as evinced in the vehicle installation of airbags or hypothetical self-strapping seatbelt technology examples, but at the microcosmic level of specific address and elimination of a choice by designating it illegal. Notably too, there is no requirement of historical injustice or other non-ideal conditions that might motivate a pragmatic exemption like those offered by Brian Barry in relation to construction helmets for Ramgarhia Sikhs. Modal legitimacy is instead principled and forward-looking, being grounded in the formal analysis of the mode of interaction between law and individual in particular contexts of application and enforcement independent of the presence or absence of non-ideal background considerations per se.

Beyond just embodied practices, we can find further examples in other of the acute exemption claims discussed. Recall for instance disputes over education policy or membership in private associations and free expression in relation to anti-discrimination laws. Here again the considerations of the legitimacy of the law at the general level are left to be decided by the relevant account of liberal legitimacy as discussed above and in Chapters 7 and 8 but not to the exclusion of modal legitimacy where the Axes are triggered. Accordingly, a law including the teaching of Creationism or Darwinian Evolution in the public school curriculum will not necessarily be legitimate in application and enforcement concerning attendance of these classes to the extent that attendance requires physical or online presence that restricts one's movements compels a level of mental presence. These factors arguably complicate the modal legitimacy of extending the law about the educational requirements towards compelling objectors to attend. Similar considerations will apply to applying and enforcing membership requirements on associations and expressive practices of individuals to which I will return further below.

To include another key example discussed earlier, consider also the peyote and other access to substances cases which might trigger considerations of modal legitimacy insofar as the *positive* Axis involves the act of ceasing to possess or consume and the *personal* in affecting one's consumption and holdings, and *intimate* in that unlike regulations directed at supply, the law against possession and consumption is micro-intrusive upon the individual's specific bodily freedoms in keeping or ingesting some substance. Again, were the law operating at a more macrocosmic level such as in regulating importation or cultivation of the substance to eliminate its availability as a practical circumstance, the Axes might not be triggered since there is no positive obligation to do or to cease any act of a personal, intimate nature. Yet, by addressing the individual religious/conscientious users specifically to address their conduct of personal significance in an intimate manner of their possession to consume, considerations of modal legitimacy are triggered.

I hasten to add that none of the above analyses are intended to be absolute or contrary to LRIO and Collective-Coordination. The Axes are not static but dynamic with reference to actual contextual political realities. The LRIO might, for instance, arise if it becomes increasingly difficult to contain the distribution of the illicit narcotic outside the groups relying on the Axes. Similarly, the Collective-Coordination might be relevant in a conscription scenario if there becomes a deficiency in the numbers required for national defence and so on. These assessments and balancing of the indication and other factors could be left to judicial processes to determine. Nevertheless, there remains conceptual possibility of further limitations to legitimacy operating in a space unconflicted with established liberal legitimacy principles and the content of the law.

Another important qualification is that since it is not artificially reverse-engineered to fit with every indication of the broad-approach and serves its own functions with respect to liberal legitimacy, modal legitimacy does not guarantee the broad approach in full, nor intend it. For example, whereas the broad approach would agitate for an exemption in the case of Humane Slaughter Regulations, the Axes will not necessarily be of assistance. Since the law operates at the level of production of consumable meat products limiting *kosher* or *halal* supply it does not seem to trigger the *positive* or *intimacy* Axes even *personal*. At best, they could offer a remedy where the *shechita* or *dhabīḥah* occurs in private production such as on the objector's own non-commercial, animal farm.

This reflects that modal legitimacy is primarily of use in the most acute cases of application and enforcement where the narrow-approach exemptions are not available and the broad-approach is not guaranteed due to Deep-Disagreements entrenched by the Coherence-Problem. It also means that the general considerations about legitimacy remain important in ways previously alluded to in the discussion of the Coherence-Problem. To reiterate, there may be no legitimacy on the balance of public reasons for a requirement for Sunday closure as opposed to an unspecified one-day closure after six consecutive days rule. Likewise, where civic opportunities are threatened, there may be legitimacy requirements for amending a rule on admissions linked to dress-codes as in the discussed case of *Mandla* and so on. Thus, bracketing convergence, the defence of consensus-PJP itself stands as an important first layer of how exclusivism and its internal coherence with justificatory liberalism can nevertheless offer ways to sidestep Deep-Disagreements over justice.

Naturally, there will still be cases that cannot be solved on the balance of public reasons such that Legit-Majoritarianism will result in political-exercise that may find actual objectors seeking exemptions with respect to which the Axes too may be limited as remedy. In a pluralistic society characterised by reasonable disagreements and competing needs of LRIOs and the need for Collective-Coordination, the Axes too must navigate these challenges. It is important to clarify, however, that this does not collapse into the kinds of balancing approaches encountered in Chapter 6 – for example, Patten's FOSD balancing. Unlike those approaches, the Axes do not represent a competing principle of justice but the limits of exercising political power to enforce certain publicly justifiable ends upon individuals where there is no interference with LRIO of others or Collective-Coordination. Also, since the Axes do not stem from private interests, but rather from universal formal concerns, they intersect the public/private divide offering space in which individual freedom is maximised without detriment to publicly-justifiable ends.

This can be confirmed by considering one of the more difficult cases like the controversy involving Folau with which we initially began. Many of the dilemmas can be resolved by the publicly-justifiable common ground between the narrow and broad approaches. For example, the faith-based discrimination complaint seems to require recognition whatever the implication of the anti-discrimination concerning the post. Likewise for freedom of expression subject to how the scope of expression is defined vis-à-vis prohibited hate speech (itself requiring political resolution through public reason and procedural mechanisms). The exclusivism of consensus-PJP, however, would limit Establishment and reliance on religious reasons or other

comprehensive truths in constructing the relevant meanings – these remain open to interpretation. Supposing then that discriminatory meanings arise and certain vulnerable identities have LRIOs against the post, how are these to be addressed and how might the Axes apply here?

Since, as a legitimacy solution, the Axes concern political-exercise, there is no direct interaction between the victims of the discriminatory post and potentially discriminatory dismissal of Folau. Neither the victims nor Folau exercise political power. The political-exercise then principally arises in applying and enforcing the discrimination laws. In that regard, the *negative* (non-dismissal) *impersonal* (relating to a corporate entity) and *non-intimate* nature of not enforcing a contract, the Axes seem to allow enforcement against Rugby Australia in blocking its coercive acts against Folau. Meanwhile, the Axes seem to limit the application and enforcement of the anti-discrimination sanctions upon Folau given the *positive*, *personal* nature of the expression (and its persistence) and the *intimate* nature of any sanction that would require Folau to delete the post, publicly recant, or otherwise limit any future like expressive conduct.

Importantly too, were Folau instead a public official discriminating against specific individuals his situation would be more in line with Rugby Australia's (above) and since the discrimination addresses specific individuals the Axes in their favour would likely arise as action taken by the state.[208] Again, there could be far more nuances to consider at each stage and variation but already the critical difference to the standard balancing approaches and justice-oriented solutions can be, at least in outline, gleaned. The solution may involve balancing and accounting for LRIOs (or, othertimes, Collective-Coordination) but the balancing operates on another dimension.

Modal legitimacy then raises the prospect of extending the considerations of liberal legitimacy to application and enforcement and therefore escapes the predicament of the Coherence-Problem and the Deep-Disagreements on justice. This makes the solution lateral, as it were, in that whatever the requirements of justice might be, there are nevertheless limitations to what the state may do given the constraints of legitimacy. Questions about the requirements of justice then stand independent of the lateral solution and valuable in their own right. Justice, as

[208] This would resemble the public official discrimination cases like *Ladele* and *Miller-Davis*. The discrimination being politically coercive compared with cases involving merely private individuals (e.g. *Elane-Photography* or *Ashers-Baking*.

discussed, need not necessarily and always be pursued by political-exercise. Indeed, legitimacy may mean that it cannot be.

9.3 Objections and Replies

Before concluding, it is necessary to consider and respond to two critical concerns about the lateral solution just outlined. The first pertains to the account of legitimacy given and that the extension into modal legitimacy is only coherent because the original account is incomplete or empty. The second challenges the distinctiveness and usefulness of the lateral solution over the standard justice-oriented approach particularly because the Deep-Disagreement might extend to matters of legitimacy. I take these up in turn.

9.3.1 Incomplete and empty legitimacy

On the account given, legitimacy was linked to political power, namely the justification of its configurations and exercise. More technically, this can be described as 'justification-right(s)' (Ladenson, 1980, 137) or the moral equivalent of liberties/liberty-rights or privileges within the Hohfeldian anatomy of (legal) rights (Hohfeld, 1917).[209] Along with claim(s)/claim-right(s), power(s), and immunities, justification-rights are kinds of "**advantages**" of a right to each of which there is a correlative "**disadvantage**", namely: duties, liabilities, disabilities, and non-right/claim. Thus, holding a privilege/liberty/justification-right over, say, one's bodily movements, entails others having no-right(s) to obligate one in that domain: here, moving or not moving one's body in any particular way. Likewise, having a claim-right entails another has a duty to the holder to do or not do something: if you promise to drive me to work, I might obtain a claim-right to being driven and you a duty to drive me and so forth.

The account I presented exclusively addressed justification-right(s) and might accordingly be labelled a **justificatory account**. This places it within a certain tradition identified with a lens on political legitimacy as opposed to another tradition identified with a lens on political *authority* (Peter, 2023).[210] The first aspect of the complaint can therefore be articulated as saying that a complete account of political legitimacy must involve other of the Hohfeldian incidents than merely a liberty- or justification-right(s). This is a grand debate over what some have called the 'strong legitimacy' (Zhu, 2017, 450) or 'inseparability' thesis (Durning, 2003,

[209] Indeed, all three terms can be used interchangeably provided they refer to the *moral* analogue.
[210] See also: Buchanan (2002); Estlund (2008, 41-42); Munoz-Dardé (2009); Roughan (2013, 24-26).

375). Roughly summarised, it is about whether justification falls short of legitimacy because "[j]ustified coercion in pursuit of justice is not sufficient for a right to rule. Nor is a right to coerce persons to comply with laws that one has made" (Christiano, 1999, 170). It is neither possible nor necessary to consider it here, however. For what a full account of legitimacy requires is a distinct concern from what, if any, implications political authority might have for modal legitimacy. To consider this question, we need to get a sense of what authority might mean. Whilst there are numerous possible conceptions, the Razian one has become something of the standard so I will proceed on this basis.

Raz sharply notes the above distinction:

> It seems plain that the justified use of coercive power is one thing and authority is another. I do not exercise authority over people afflicted with dangerous diseases if I knock them out and lock them up to protect the public, even though I am, in the assumed circumstances, justified in doing so. I have no more authority over them than I have over mad dogs (1986, 25).

As he sees it, political-exercise is fundamentally normative claiming "to impose *duties* and to *confer rights* <…> find offenders and violators *guilty* or *liable* for wrongdoing." (1986, 26, emphasis added). Normally comprised of directives such as commands, orders, laws, decrees – which are essentially speech-acts (Applbaum, 2010, 235) – political-exercise involves more than coercive force per se.

Invoking authority in political-exercise means that laws and other incidents claim normative power. In essence, by directing 'that X' it follows that X *ought* to happen (Raz, 1979/2011, 11-12). Moreover, it *ought* to be followed *for* the reason that it was directed by an authority and without regard to the merits or demerits of performing X all things considered. This is what is referred to as the '**content-independence**' feature of authority (Green, 1988, 36-41) or in Razian terms its *pre-emptive* nature based on *protected reasons* for action (Raz, 1979/2011, 18; 1986, 43-48).

From this, it might be advanced that political authority can determine the issues of application and enforcement without the need for modal legitimacy. By delegating the political authority of the Legit-Majoritarian political-exercise various officials can be authorised to make the various necessary further determinations as to application and enforcement.

The argument quickly runs into an obstacle, however. If legitimacy derives from public-justifiability then even if the delegation is publicly-justifiable it is not clear that the exercise of authority thereafter will retain legitimacy in its discretions. Public justifiability, of course, is

not what makes an authority legitimate on the Razian view or **service-conception** of legitimate authority. This holds that authority is legitimate where a

> subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) [**dependent reason(s)**] if he intends [or tires] to be guided by the authority's directives than if he does not [**normal justification thesis or 'NJT'**] <…> that the matters regarding which [the normal justification thesis] is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority [**independence condition or 'IC'**] (Raz, 2006, 1014, my additions in bold).

In this case, authority has an independent basis from PJP which is problematic since this would imply a split between legitimate exercises of political power and legitimate exercises of authority or directives as to what *ought* to be done. In other words, legitimate political *authority* might establish what I ought to do based on what I am obliged to obey but not the practical question of what ought to happen where I fail to do as I ought. As such, authority lacks an answer for when exercises of political power are justified – i.e. political *legitimacy*.

One way out might be to attempt a reconciliation of the two such that legitimate authority is that which is delegated in accordance with PJP and is only legitimate where its directives reflect what would be publicly-justifiable anyway and this is what ought to be done, politically. Yet, talking this way leads right back to modal legitimacy insofar as exercising legitimate authority would require the very same public reason considerations about applications and enforcements.

An alternative option would be to stick with the service-conception and argue that what ought to be done is simply a matter of a further directive from the legitimate authority. The flaw with this response, however, is that it implicitly assumes that the legitimate authority's claim-right to being obeyed in relation to the question of what ought to be done operates alike in relation to the question about enforcement or what ought to be done about a failure on the first question. This assumption is problematic. Notice that the first and second-order directives concern separate agents: the subject and the official. Subjects are directed to φ and when they do not φ it is an official that is directed to enforce the φ-ing (call this ***E*** for "enforcement"). Thus, the subject does not have a duty to be *E*-ed to φ they simply are *E*-ed when the official complies with their duty to *E*. It is true that the legitimate authority unifies both the φ-ing and the *E*-ing as duties to subject and official respectively. But it seems that though the subject had dependent reason(s) to φ they did not thereby have dependent reason(s) to be forced to φ (via official *E*-ing). The asymmetry in this dynamic discloses how the justification of *E* as a directive to the

official (who is effectively a subject for the purposes of the directive to *E*) indirectly operates as a justification of *E* as an exercise of political-power.

A dilemma now arises. If the justification here retains its prima facie form of that addressed to the official's (agent-specific) dependent reasons it might retain its authoritativeness vis-à-vis the official (to φ and thereby *E*) but this is awkward as indirect justification for E itself since the dependent reasons might be along the lines of "do *E* to collect your pay-cheque" or "to avoid a demotion". On the other hand, one might attempt to broaden the form of justification so that the official's dependent reasons include more general reasons of justice and morality, but this starts to merge into a general justification of political-exercise with the official's dependent reasons largely irrelevant except as a formal conduit perhaps. So, unless one opts for the first horn of the dilemma, one must centrally embrace the justificatory account of political legitimacy such as that presented in this chapter (9.1).

Whilst far more could be debated on these matters than the truncated consideration given here, it suffices to show that authority and normativity are not necessary to the arguments made in this chapter and political-exercise and modal legitimacy are not somehow empty or incomplete by this omission.

9.3.2 Disagreements about legitimacy and replication

This second objection strikes at the very point of the lateral solution by questioning whether anything has really been achieved given the resemblance between the Deep-Disagreement on justice and those about legitimacy. Political legitimacy, as has been evident throughout this Part, is both complex and divisive much like justice was shown to be in Part II. To recall, legitimacy entertains disagreements not just between liberals and non-liberals but also between justificatory liberals and other liberals (comprehensive and perfectionist) and other right-reasons view adherents or even political voluntarists. Moreover, within justificatory liberalism, there are disagreements over PJP between consensus and convergence as well as a plethora of competing specifications and idealisations. And all that is even before we might ask about disagreement on modal legitimacy. If anything then, the lateral solution has merely transferred the Deep-Disagreements to another field and, worse still, even raised the stakes insofar as being illegitimate might be seen as more fatal than being unjust.

These are serious charges but not unanswerable. Indeed, the criticism about disagreements over legitimacy has been gradually answered over the course of Chapter 8 and 9.1. Chapter 8 demonstrated the advantage in coherence of consensus over convergence while in this chapter

a special practical or political justification for consensus-PJP was presented that arguably encompasses all the above disagreements into the historically actualised inevitability of consensus justificatory liberalism. Admittedly, I cannot seriously say that this achieves a conclusive proof that ends all disagreement but it does mark a way to conceive of the disagreements in a way that keeps them on the surface so to speak. They could but do not need to be treated as Deep-Disagreements.

Whatever else one may conclude about that, there is a further response. Pivoting towards legitimacy is an important way of evading the Coherence-Problem. Specifically, it demonstrates that even presuming legitimacy of a law (for argument's sake) does not mean that we are compelled to presume the legitimacy of its modal dimensions: application and enforcement. This key move then shifts the Deep-Disagreement to an entirely different plane with distinct possibilities. Specifically, it enables us to accept that exemptions to legitimate laws are incoherent and yet derive something similar to exemptions in some of the most acute cases of objection to legitimate laws with regard to their application and enforcement.

The resemblance with the Deep-Disagreements about justice are therefore just that, in substance they differ and occur in an importantly different dynamic. In that regard, it is true that the stakes are higher: illegitimacy is plausibly more extreme than injustice. But this actually is part of the point. The higher stakes transform the nature of the disagreement. There is no longer simply the question of the claimant's entitlement to an exemption or a universal extension of that exemption to like cases. Rather, the question becomes one of stability in a constitutional compact between citizens as democratic co-exercisers of political-power which in turn fits with precisely into the political justification advanced for consensus-PJP.

Likewise, it plays into the nature of modal legitimacy as a dimension where a challenge to political-exercise is a discrete relational challenge. It does not make broader claims about the public justifiability of the political-exercise in general and acknowledges that all substantive issues of legitimacy have already been settled at the prior stage. The Axes play off the residual indeterminacies in legitimacy and the higher stakes to generate exemptions-like relief. Being formal rather than substantive it avoids the Coherence-Problem and addresses the Justificatory-Puzzle laterally, as argued.

Lastly, there remains the question of the Axes. Surely, there will be disagreement as to not just what the Axes are but how to interpret them in various instances. It is true that no argument has been offered for why the three enumerated Axes are to be relevant. The reason is, firstly,

that they are not intended to be definitive but a sketch of the kinds of considerations that might be relevant to determining application and enforcement. In principle, there may be more Axes or additional ones perhaps. However, and this is the second part of the reason, the Axes are also analytical – that is, they are simply attempts at dissecting the categories in the modality of the law. As such, there will arguably be limits to the variety and variation of the Axes, in substance at least.

Concerning disagreement on how they are to be implemented or interpreted, this is a task that falls to the political and judicial processes rather than the theoretical. As mentioned, the Axes are dynamic and context sensitive so they rely on case-by-case applications rather than predetermination ex ante. In this sense, the Axes are much like constitutional constraints (whether written or unwritten) on general laws and they naturally complement the separation of powers doctrine, aligning with the judicial. This division corresponds precisely with the PJP determinations of when political power is legitimate to enact laws for publicly justifiable ends and when, on the Axes, it is illegitimate in compelling active compliance. This also preserves the legitimacy of the relevant law to the very point of enforcement with judicial courts as ultimate arbiters of any requisite matters such as the authenticity of the claimant's assertions in relation to the Axes alongside the balancing considerations with LRIO or other public interests.

Ultimately, seen in the context of PJP as a necessary but not thereby sufficient condition of liberal legitimacy, the justification for the Axes and modal legitimacy appears to align with the very same animating rationale behind PJP itself. Consistent with Rawls's description of liberal-democratic political power as that exercised by democratic citizens upon themselves as free and equals (2001, 40, 90), the Axes are addressed towards mutual and reciprocal respect in how legitimate laws are enforced against certain forms of individual objection not specifically grounded in private considerations. Seen thus, modal legitimacy addresses the very same liberal-contractarian concerns about political power and the bases of social cooperation but when it comes to the rationality and reasonableness of the compact with regard to the modes of application and enforcement therein.

Modal legitimacy emerges as a largely overlooked and under-theorised dimension because of the presumption that legitimacy extends straightforwardly from the general to the particular or the dimension of application and enforcement. Accordingly, its role is supportive or supplementary to the justificatory liberal project as a whole in identifying and addressing the

gaps and indeterminacies beyond PJP. Yet, this role proves significant for the lateral solution and in taking seriously the stated democratic shared sovereignty and the inherently coercive nature of law exercised by citizens over one another. Indeed, as Robert Cover powerfully reminds us, the operations of law and its interpretation "takes place in a field of pain and death<…> [a] judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life" (1986, 1601). Whatever else, taking the more acute cases of exemptions more seriously this way is a worthwhile feature of the lateral solution.

Conclusion

The arguments spread across the nine chapters of this study have been long and often complex. Yet, rather than restating these in summary form as done throughout the dissertation, this conclusion will instead briefly reflect on the overall dialectic and the outcomes of the two aims pursued.

We began with an observation about the surfeit of public debate or even deeply divisive, sometimes violent, conflict on the various issues identified with religion and conscience in liberal states. Given this and the deep – sometimes devastating – impacts produced, the central philosophical question arises: what is the proper place or role of religion and conscience in liberal states?

Answering this, however, proves complicated not simply because of semantic or definitional complications relating to religion and conscience, but rather that, however understood, the answer depends further on how one conceives of liberal neutrality in its interaction with judgements of salience and its prescriptions as to justice or fairness. Besides the theoretical paradox of liberal neutrality and its inability to escape salience despite its aversions thereto, there is a further and more exigent practical complication. Exercises of political power like laws become implicated due to their inherently differential impacts in regulating social interactions. Accordingly, apart from normative-theoretical concerns, there are pressing regulatory and jurisprudential matters in trying to develop coherent legal principles with appropriate practical application.

Despite its initial coherence, the standard liberal answer of asserting neutrality whilst mandating fundamental protections and constraints on religion, conscience, and certain analogous categories, proves inadequate – offering no stable theoretical or jurisprudential position. Not only does it not specify how exactly the balance is to be attained, but it also provides little guidance for drawing the boundaries between the various categories and their entitlements both substantively and relationally when there is conflict amongst them. This is particularly manifest in the more complex cases like that discussed in the introduction about Folau or the many forms of indirect or incidental interference with some claimed interests by otherwise neutral general laws.

None of this, of course, is to disvalue the many significant and insightful contributions made across the scholarship, a number of which have been discussed in relevant sections. Indeed, the various probing answers offered to the central question have disclosed its multidimensionality or composition of various more specific questions. From those about religion and the state or constitutional Establishment to those about rights or Free Exercise as well as about salience, neutrality, the requirements of justice and equality as well as its various configurations and measures and more. Yet despite this complex variety of issues, the operating assumption across the vast literature has by and large been that these are simply discrete independent questions or cumulative component parts of the, overarching, central one. The result of this is the incommensurable or incomplete answers often pursued in isolated streams of discipline-specific literature, obscuring important interrelations and disparate assumptions and ultimately potentially promising solutions too. The scholarly debate and public debates become more alike in their seemingly inescapable protractedness.

This dissertation has responded to the foregoing problematic in two critical moves. The first was to take an overarching and interdisciplinary approach to the question, analysing legal and philosophical debates in tandem to distil two discrete puzzles with interrelated but conceptually distinct concerns. In particular, whereas the prevalent tendency across the literature is to begin with some more or less narrowed version of the central question, Part I began with a yet more preliminary critical concern about the very framing of the theoretical-normative inquiry around religion and conscience in the first place. From the outset, this revealed how the inquiry itself is shaped by and remains embedded in liberalism's presuppositions about religion and conscience. Rendering this more explicitly not only clarified the key categories and the structure of the inquiry but highlighted the deep connection to normativity in its legal and "political" forms. As said, and reflected in the legitimacy-oriented lateral solution offered, religion and conscience represent some of the deepest alternative sources of normativity to those of civil society and the state.

Refining the inquiry further along its legal dimensions of Establishment and Free Exercise and the philosophical concerns of liberal neutrality and religious toleration, Part I traced a countervailing duality and a difficult disjuncture concerning how conscience and religion are to matter between themselves and in relation to closely-analogous doctrines and commitments. This was formalised as the Salience-Demarcation-Puzzle. A further analysis of the debates, however, also reconstructed a deeper underlying concern as to normative justification of

salience or rather differentiation itself in relation to liberal state neutrality. This was marked as the Justificatory-Puzzle.

Reviewing the various debates and responses to these matters, including the influential strategy of disaggregating religion as a category of salience, it was argued that a complete solution cannot conflate nor neglect either of the two Puzzles, but that the Justificatory-Puzzle remains more fundamental in its concerns beyond any particular category of salience and practical implications for Free Exercise. Part II therefore focused on the problems of the standard answers to the Justificatory-Puzzle by approaching it as a matter of (distributive) justice. As detailed, these matters sink into intractable or "deep" disagreements culminating in the formal complication elaborated by the 'Coherence-Problem'.

The dissertation's second contribution was thus to advance the possibility of an alternative approach that can avoid these setbacks or circumvent the deep disagreement on justice. This became the lateral solution based on recalibrating the Puzzles from justice to considerations of legitimacy or the normative limits of state political power. Accordingly, Part III turned to liberal political legitimacy as represented within the mainstream paradigm of justificatory liberalism to argue for the lateral solution via exclusivist Establishment alongside modal legitimacy with regard to Free Exercise.

Whilst demonstrating the coherence of consensus justificatory liberalism both internally – relative to convergence – and in relation to external critiques of public justification provided an exclusivist political solution to Establishment, it also led to a key hurdle. It seemingly reinforced the Coherence-Problem in relation to Free Exercise – forestalling the hopes of the lateral solution there. If the law relating to the accommodations or exemptions in question must already be presumed legitimate how can legitimacy possibly be a solution?

The integral innovation was modal legitimacy as the extension of liberal political legitimacy to the domain of application and enforcement. Through this, the lateral solution emerged within the intermediate space provided between a political-exercise being legitimate in relation to consensus-PJP and yet illegitimate in a particular instance modally. By transposing legitimacy to a different plane, as it were, the Coherence-Problem with its presumption of legitimacy is evaded and the possibility of something resembling exemptions emerges despite the ongoing Deep-Disagreements between the narrow- and broad-approaches.

Apart from the refinement of the Puzzles and the more finely-granulated approach to liberal political legitimacy, including important comparisons between consensus and convergence, the

considerable advantage of the lateral solution then is its pragmatic guidance on something substantially like exemptions and accommodations. The lateral solution, to be sure, does not deny the significant independent philosophical value of ascertaining the requirements of justice. However, it also reveals an independent pragmatic solution to the imminent practical concerns left unresolved by the standard approaches to the Puzzles via justice. Whatever the requirements as to justice may be, what the state may legitimately pursue in that regard is an entirely separate matter.

Specifically in relation to the Puzzles, that means that whilst the exclusivism of consensus justificatory liberalism would entail a political solution to the issues of Establishment alongside coverage and basis in the Salience-Demarcation-Puzzle, whatever that solution might be does not affect the constraints on application and enforcement over objections covered by modal legitimacy. In relation to the Justificatory-Puzzle too, although publicly justifiable political-exercise might be tilted towards the narrow approach, modal legitimacy offers a remedy in some acute cases notwithstanding the Deep-Disagreements about justice, which, in any event, are of no bearing to what the state may or may not legitimately pursue.

The chief limitation, of course, is that modal legitimacy does not fit with all accommodations and exemptions that might be sought on the grounds of justice by the broad approach. As discussed, it will only facilitate certain of the more pressing instances of individual objection based on the three Axes outlined. To some extent, the more general contributions of consensus justificatory liberalism to resolving the structural problems in relation to which exemptions and accommodations claims might arise retain an indispensable initial role.

The turn to modal legitimacy, however, offers an important opportunity to probe deeper into the internal logic of liberalism and its normative struggle with disagreement and value pluralism. Specifically, it returns us to the starting point about religion and conscience as phenomenological realities whatever their imminent, historically-culturally mediated conceptual form. Since legitimacy and law are normative concepts that are themselves engaged in a certain appeal to finality and absoluteness then reflexive consistency pulls towards an equal recognition of alternative sources of normativity. Whilst that does not mean deference or accommodation of them, it does suggest a certain reciprocity or stability in coexistence. Modal legitimacy carves a space for that in attending to the material *realities* of political-exercise in relation to *concrete individuals* as bearers of normativity beyond their idealised surrogates for the purposes of public justification in fulfilment of PJP.

All this is, of course, not without its objections and disagreements as the end of Chapter 9 previewed. Indeed, the lateral solution was only demonstrated in possibility and awaits more elaborate analysis and testing in future inquiry and scholarly debate. Its applications and limitations are hence yet to be fully seen. Importantly though, it promises an integral supplement to the justificatory liberal account of political legitimacy with but the necessary condition of PJP. Indeed, modal legitimacy seems precisely integrated into the animating spirit of justificatory liberalism as reflected in its vigilance against political coercion in recognition of the contractualist conception of citizens as freely cooperating, equal co-rulers. There is even something of Locke's original plea for toleration or Light and Evidence over corporeal penalties here too. Whilst legitimate political-exercise might structurally coerce in various ways, there is a special wariness as to direct enforcement against individual objection in certain contexts, as the Axes suggest.

Thus, beyond the possibility of a pragmatic, lateral solution to the Puzzles, modal legitimacy offers fertile prospects for further analyses of legal application and enforcement and the operation of law as a vehicle of liberal legitimacy. Furthermore, given the exclusivism of consensus justificatory liberalism and the complex normative diversity in multicultural and multinational states modal legitimacy could be an important moderating device in such conflict of normative orders as religion and conscience so sharply present.

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