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Accommodating What Needn't Be Special

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Abstract: Liberal debates on religious accommodation have so far focused on the nature of the interest upon which the right to freedom of religion is based. Liberals who oppose religious accommodation argue that there is nothing special about religious belief. Those who defend accommodation on the other hand seek to identify some property (such as conscience or deep commitments) that both religious and non-religious beliefs can share. The article seeks to develop an argument in favor of certain types of religious accommodation that is agnostic about the nature of religious belief and whether it is special in any sense. It argues that it is a mistake to think that the question of religious accommodation, as it arises in law, must necessarily turn on arguments about freedom of religion. The principle of fairness can justify legal duties to accommodate religious (and non-religious) practices, without the need to assess the character of the practice in question or the reasons for engaging in it. The article argues further that the principle of fairness can better explain why human rights courts uphold some claims for religious accommodation as reasonable, and not others.

Keywords: law and religion, right to freedom of religion, religious accommodation, European Convention on Human Rights (ECHR), liberalism

Introduction

How should human rights courts deal with claims of religious accommodation? Such claims have proliferated in the last few decades and in Europe, they have become a thorny political, as well as legal, issue.¹ Most jurisdictions allow some degree of religious accommodation but the normative basis for doing so remains elusive. The academic debate typically focuses on the normative foundations of freedom of religion as a human right: what is the fundamental human interest that freedom of religion protects? And is it important enough to impose positive

¹ See RONAN MCCREA, *RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION* (2d ed. 2014).

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duties on others to accommodate religious practices? This way of framing the debate has encouraged polarization and fueled intellectual wars about whether modern liberal states should tolerate religion.² It assumes that the legal protection of religion turns, at least in part, on the value of religion as a worldview, or belief-system. In doing so, it pushes the legal question into an ideological impasse: atheists cannot accept that religious commitments are special, nor can religious believers accept the opposite. This paper explores a way out of this impasse. The suggestion is this: religious practices are worthy of legal accommodation but the extent to which they are depends neither on the importance of religious belief as a human interest, nor on the value of religion as a worldview. Can we justify accommodating certain religious practices as a matter of law, without taking a stance on the value of religious belief?

Divergence between Legal Rights and Moral Rights

Religious accommodation poses a complex normative question with many layers. It includes, among others, questions about (i) the moral foundations of human rights and (ii) the morality governing legal institutions and state enforcement. The first is a question of interpersonal morality and the conditions under which one person has a right against another, independently of whether that right is legally enforceable. For example, we all have the moral right not be lied to and to have promises made to us kept. These are rights we have regardless of whether they are enforced in law. The second question by contrast is a question of *political* morality and the conditions under which legal institutions should uphold individual claims brought before them.

These two questions are separate. Not all rights of interpersonal morality are, or should be, enforceable by legal institutions. One may have a right under first-order interpersonal morality that is not – and should not be – legally enforceable. Consider for example promises between friends made without consideration, or without the intention to create legal relations. These are not legally enforceable and for good reason. In contrast, one may have an enforceable legal right but that right need not – in the absence of a particular legal practice grounding it – correspond to a right of first-order, interpersonal, morality. For example, in English law the seller has a right to use the buyer's deposit, between exchange of contracts and completion, in order to purchase another property. Nothing in interpersonal morality necessitates that the seller

² See BRIAN LEITER, WHY TOLERATE RELIGION? (2012).

should have that enforceable right, for there would be nothing morally untoward if the law did not give the seller this right. By contrast, the law would be morally flawed if it did not enforce the right not to be tortured or not to be a slave.

This suggests that the set of rights we have *absent* the law, and the set of rights we have *in* law need not be identical. Not all moral rights are legal rights and not all legal rights correspond to moral rights that exist *absent* legal and political institutions. The same logic applies to human rights.³ Aspects of the legal right to freedom of religion may, but need not correspond to aspects of a moral right, i. e. a right that exists outside the context of legal enforcement. Just like there are morally sound reasons to enforce a particular scheme of rules for buying and selling land property, likewise, there might be morally sound reasons to protect certain religious practices as a matter of law. And likewise, it does not have to be the case that there is some pre-institutional, moral right to freedom of religion, just like there is no pre-institutional right to use the buyer's deposit in order to purchase another property.

Moreover, even when the legal rights do reflect a corresponding moral right, there might still be divergence between their content. Consider the law of contract. On a widely accepted view, it is premised on the morality of promises.⁴ However, not all contractual obligations are based on promise and not all promissory obligations are legally enforceable. For instance, the law may impose pre-contractual liabilities on promissory parties, or it may enforce "accidental agreements," i. e., cases where one's actions would lead any reasonable person to believe that one intends to make a valid contract. By contrast, the law will not enforce gratuitous promises between friends and, in many jurisdictions, agreements where there is no consideration. So the content of a contractual obligation does not necessarily correspond to the content of a promissory obligation. Or, put differently, the making of a promise is neither a necessary nor a sufficient condition for the existence of a legally enforceable contract. The concept of a contractual obligation does not fully map on to the concept of a promissory obligation.

The fact that there is no one-to-one correspondence between legal rights and moral rights has relevance to debates about religious accommodation. It means that there is logical space for defending religious accommodation on a basis other than some alleged human right to freedom of *religion*. Aspects of the *legal* right to freedom of religion need not correspond to moral principles to do with

3 For extensive discussion of whether human rights correspond to antecedent moral rights, see ALLEN BUCHANAN, *THE HEART OF HUMAN RIGHTS* chs. 1–4 (2013).

4 See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

religion, just like aspects of the law of contract need not correspond to moral principles of promissory morality. We must in other words accept the following possibility, namely that the fact that a practice is religious is neither a necessary nor a sufficient condition for accommodation. This is the space that I seek to explore in this article. I do not discuss in this paper empirical matters, such as the history of religious accommodation in Europe or the process of legalizing disputes over accommodation under the heading of European human rights. The question I wish to explore is entirely normative.

Human Rights, Liberalism and Religious Accommodation

It is widely held that liberalism has difficulty accounting for freedom of religion as a fundamental right. This is because liberals hold the principle that the state should be neutral towards people's conception of what a good life consists in (the *neutrality principle*). Given that a religious way of life is simply one amongst many such conceptions, liberals cannot justify granting religion any special treatment. The liberal state should respect a religious way of life no more and, no less, than it respects an atheist who devotes his life to non-religious endeavors. Yet, freedom of religion seems to occupy a special status as a fundamental legal right in many jurisdictions; it is mentioned as a distinct legal right in several constitutions and in the major human rights treaties.⁵ This poses a dilemma for liberals: either they have to reject that religious claims should ever be accommodated by the state, and criticize existing practices of

⁵ It should be noted that in the text of the major international human rights treaties, the right to freedom of religion is listed alongside that of freedom of thought, conscience or belief, see International Covenant on Civil and Political Rights, G.A. 2200A (XXI), art. 18, 21 UN GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966); Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), art. 9, Nov. 4, 1950, 213 U.N.T.S. 222, as amended by Protocols Nos 3, 5, and 8 which entered into force on Sept. 21, 1970, Dec. 20, 1971 and Jan. 1, 1990 respectively; and American Convention on Human Rights, art. 12, OAS Treaty Series No. 36; 1144 U.N.T.S. 123; 9 ILM 99 (1969). As a textual matter, it is an open question whether freedom of religion is meant to be an instance of a general human right to hold, change, and manifest beliefs or whether it is meant to be a separate right. By contrast, the First Amendment to the U.S. Constitution makes a separate reference to religion, prohibiting the establishment of religion and the interference with its free exercise. For an argument that the U.S. Constitution singles out religion as special, see Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000–2001).

accommodation, or they have to accept that the same kind of accommodation should be granted for the religious and the non-religious alike.

The first horn of the dilemma is to reject religious exemptions as incompatible with liberal neutrality. This is the view taken by Brian Barry in his influential book.⁶ On this *anti-accommodationist* view, there is divergence between current legal practices and what liberal principles ideally require. The second horn of the dilemma is to endorse accommodation by seeking to find a criterion for accommodating claims that capture the religious and the non-religious alike. This is the view taken by many liberal accommodationists,⁷ and developed in detail by Eisgruber and Sager in their account of freedom of religion under the First Amendment of the US Constitution.⁸ Eisgruber and Sager argue that liberalism's commitment to equality can justify accommodation of what they call "deep commitments"; liberal equality demands that people should not be discriminated against on the basis of their deep spiritual commitments. For Eisgruber and Sager both religious and non-religious commitments can possess features (e. g. depth of commitment, categoricity, comprehensiveness) in virtue of which they deserve accommodation. According to their view, there is convergence between existing law and what liberal principles require. In short, liberals either have to reject religious accommodation, and repudiate existing human rights doctrine that allows it, or accept religious accommodation, by finding some common property between religious and non-religious commitments.

To make the dilemma clearer, consider for example accommodation claims made with respect to religious symbols in the context of employment contracts. Many companies choose to have a strict uniform policy requiring all staff that has contact with their customers to wear a uniform without any personal accessories or other personalized items of clothing. The choice is not arbitrary since it is based on commercial reasons. It helps to build a corporate image of professionalism that is profitable for the company and often has practical benefits, e. g. it makes it easier for customers to identify members of staff. But it may have the effect of disadvantaging religious employees: if the policy is lawful, Muslim employees will not be able to wear a headscarf, Sikhs to wear a turban, Christians to wear a cross, and so on and so forth. The dilemma liberals are said to face here is between the following two options. They can deny that

6 BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001).

7 See JOCELYN MACLURE AND CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* (2011); LEITER, *supra* note 2.

8 CHRISTOPHER EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007).

religious employees have a moral right to have the wearing of religious symbols accommodated by their employer, and defend the right of the employer to determine what employees (including religious believers) may wear at work. Alternatively, they can accept the claim of accommodation but insist that the wearing of certain non-religious symbols (say to do with one's sports team or one's aesthetic views) should *equally* be accommodated, in so far as they also express some "deep," meaning-giving or identity-shaping, commitment. They may therefore end up defending the right of a Manchester United fan to wear his club's scarf at work, or the right of an Iron Maiden fan to wear a lapel pin with a skeleton on it.

I find the above dilemma misleading. It puts the liberals between two equally unattractive positions. The *anti-accommodationists* have to deny that religious employees have *any* claim against their employer with respect to their religious symbols seems too restrictive. At first glance, it seems unfair that religious believers should always have to choose between losing their job and removing their religious symbols. "Get another job" seems too coarse-grained a response to all the different kinds of claims of religious accommodation. It lumps together the case of the employee who wants time off work in order to pray or attend a service and the case of the employee who refuses to offer services to homosexuals. The *accommodationists* on the other hand have the difficult task of finding some common property between religious and non-religious beliefs and practices, in virtue of which they are all worthy of protection. Cécile Laborde rightly points out that the *accommodationist* position faces considerable difficulties.⁹ She identifies a number of objections that are worth discussing in some detail.

First, not all religious symbols/practices/beliefs are – at the same time – deep, categorical, and meaning-giving. Some religions may be predominantly meaning-giving (or identity-shaping) without imposing categorical requirements on its members and vice versa. For example, Greek Orthodox believers go to church on the night of Holy Saturday and have a vigil to celebrate Easter. When they return home they bring back the Holy Light in a candle and use it to draw a cross on the door. Yet, this is seen as a matter of cultural tradition rather than a categorical religious requirement. Moreover, within the same religion, some of its practices/commitments may be deep but not categorical or identity-shaping,

⁹ See Cécile Laborde, *Protecting Freedom of Religion in the Secular Age* (2012, manuscript on file with author) [hereinafter Laborde, *Protecting*]. A shorter version of this paper was published in THE IMMANENT FRAME (Dec. 16, 2012, 13:06 PM), <http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/>. See also Cécile Laborde, *Equal Liberty, Nonestablishment and Religious Freedom*, 20 LEGAL THEORY 52 (2014).

others may be categorical but not deep or meaning-giving and so on and so forth. The concept of a religious practice is, to use Wittgenstein's famous term, a "family resemblance" one. Though we can tell a religious practice when we see one, not all aspects of religious practices will be captured by a single proposed criterion, whatever we take this to be. And the worry for the liberal here is this: on the *accommodationist* view, the scope of the legal right to freedom of religion inevitably shrinks to a small sub-set of religious practices that the single criterion will capture (those resulting, say from sincerely held "deep" commitments) and loses its distinct place as a fundamental right to freedom of *religion*. Freedom of religion becomes freedom of "deep commitments" or something of that sort.

The second objection that the *accommodationists* face is that protecting only those religious beliefs that are in some sense strongly or deeply held may have undesirable practical consequences. For instance, it may result in privileging certain religions over others, such as those with more categorical demands over its members. Or it may encourage more demanding interpretations of religious commitments. This is because religious practitioners will know that the more categorical their practice the more likely it is that it will be accommodated.¹⁰ This in turn might fuel religious fundamentalism with all the risks that it poses to multicultural liberal states.

Third, privileging sincerely held, deep commitments (be it religious or not) may still compromise liberal neutrality; why should the liberal state treat those who take their views about the good life loosely and lightly *less* favorably than those who view them as deep and categorical? The worry here is that the liberal state violates the principle of neutrality, since it takes sides between different conceptions of the good life, valuing more those that are deeply or strongly held.

Fourth, whatever property is *accommodation-meriting* (e. g. depth, meaning-giving, categoricity, comprehensiveness, sincerity) may or may not be present in non-religious commitments. This is an empirical question that the liberal cannot prejudge. It is conceivable that, as it turns out, *only* religious commitments can possess this property.¹¹ In that case, religious commitments will have a unique claim to accommodation, even though the reason for accommodating them will not be the fact that they are religious. The worry here is that liberals might end up accepting that only religious beliefs merit *special* treatment, albeit not in virtue of being religious.

¹⁰ Laborde, *supra* note 9.

¹¹ Though conceivable, it is nevertheless unlikely, given that many non-religious beliefs (e. g., in ecology or global justice) are deep, categorical, and meaning-giving.

The above objections that the liberal *accommodationist* faces are not in my view insurmountable. As I argue shortly, each one of them can be answered from a liberal perspective. The objections do suggest however that there is something misleading about the way the dilemma over accommodation is framed for liberals. The problem in my view lies in the fact that the case for accommodation is made to depend on the nature of the belief or commitment in question. In other words, the dilemma has it that, if liberals do not dismiss out of hand claims for religious accommodation (and few seem to be willing to do that), then the case for accommodation must ultimately be grounded on the nature and character of religious belief (and analogous non-religious beliefs): that it is deeply held, sincere, meaning-giving, or identity-shaping.

There is however a third option and it is the one I want to explore in this paper: liberals can defend religious accommodation without assuming that the ground for accommodation turns on the special character of religious beliefs or commitments. The view I want to explore is the idea that the value of *fairness* requires accommodating certain practices, regardless of whether they are *special* in any way (e. g. deep, strong, meaning-giving etc). This is a separate line of argument from that of subsuming freedom of religion under a general liberal right to autonomy or ethical independence.¹² I call this third position “*Fair Accommodation*.” Liberal *accommodationists* have neglected this possibility, seeking to ground religious accommodation on some morally valuable property of the religious belief. But this is not the only way one can justify the practice of religious accommodation under liberal principles. I will argue that the value of fairness can provide justification for accommodating religious practices, without taking a stance on whether the beliefs (religious or non-religious) that are accommodated are special or valuable in any way. They may well be, but that is beside the point.

What a Liberal Defense of Religious Accommodation is Not

Before I turn to the argument from fairness, I want to address the four objections against liberal *accommodationism* that I mentioned above. The objections are

¹² See, e. g., RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); see also MCCREA, *supra* note 1, at 110 ff.

directed against the view taken by the second horn of the dilemma, namely that accommodation is justified because it tracks some property that religious beliefs happen to possess (e. g. deeply held, meaning-giving etc.). Though this view is different from the argument for fairness, it is helpful to dispel certain misunderstandings regarding what a liberal account of religious accommodation is about.

The first objection against liberal *accommodationism*, understood under the second horn of the dilemma, is that it shrinks the category of freedom of religion to a small set of commitments and practices (those that are deep), leaving out a large part of religious practices. This objection seems to me question-begging, as it assumes that the scope of the right to freedom of religion, as a fundamental constitutional or human right, includes *all* religious practices and then objects that the liberal criterion for accommodation captures only *part* of those practices. The assumption however takes sides on what is in dispute, namely which practices or beliefs should be protected as a matter of constitutional or human rights law. The mere fact that the text of existing constitutions or treaties singles out freedom of *religion* as a separate right can be seen as an accident of history with no normative significance. We cannot infer simply on the basis of the text that all religious practices are *pro tanto* worthy of protection, any more than we can infer from the basis of the text that all speech is *pro tanto* worthy of protection. Libel, defamation, and incitement to violence are not worthy of protection, not even *pro tanto*. We need a normative argument for fixing the scope of any fundamental right. Liberals supply such an argument by saying that the scope of what should be protected, as a matter of law, is to be determined by reference to the category of sincerely held deep commitments. It cannot be objected against the liberal position that there is more to religion than deeply held commitments; this is because the liberal is not offering a theory of what *religion* is. He is offering a theory of the conditions under which human rights law (or constitutional law) should protect religious beliefs or practices when deploying state coercion. Objecting that there is more to religion than what the liberal criterion captures is either *irrelevant* (the liberal is not offering a theory of religion) or question-begging (it assumes without any argument that any test which does not protect *all* religious practices is flawed).

The second objection is also premised on the question-begging assumption that all religious beliefs and practices are *pro tanto* entitled to legal protection. The objection is that, as a result of the liberal criterion for accommodation, some religions (e. g. those who have more categorical requirements) will get preferential treatment compared to others. This in turn – the objection goes – might deprive some religions of the legal benefit of accommodation and/or encourage

religious believers to put forward fundamentalist interpretations of their faith with a view to receive preferential treatment. But why is this an issue? If the liberal criterion for accommodation is correct, it does not matter one bit that it leaves many religious practices unprotected. It matters only if there is reason to protect them, which is what needs to be shown. Moreover, saying that religious accommodation encourages believers to endorse extreme interpretations of their faith is like saying that recognizing the defense of insanity in criminal law encourages people to be insane, or rewards insanity. If there is good moral reason to recognize the defense of insanity in criminal law, then – other things being equal¹³ – it is irrelevant how many insane defendants there are and whether some defendants will try to deceive the authorities by pretending to be insane. Likewise, if there is good moral reason to accommodate deeply held beliefs, it is irrelevant how many people hold such beliefs and whether some will try to deceive human rights courts by pretending to hold them.

The third objection is premised on a misunderstanding of liberal neutrality. Liberal neutrality does not mean *evaluative* neutrality, if there is such a thing. Liberals prize the moral value of individual responsibility for the ethical success of one's life. They do so without presupposing *skepticism* about what an ethically good life consists in. One is responsible for the ethical success of one's life precisely because one can make better or worse choices from an objective ethical standpoint. What liberals object to is the state forcing individuals to make choices, merely on the basis that their life will go ethically better. When the state does so, it offends the responsibility of individuals for the success of their own life, even if the choices forced upon them are valuable from an ethical standpoint. In other words, liberal neutrality prohibits the state from violating what Dworkin calls the right to ethical independence;¹⁴ liberal neutrality does not prevent the state from recognizing and regulating aspects of the good life (e. g. marriage and parenthood), when doing so does not violate the right to ethical independence. So by recognizing and accommodating certain commitments, the state does not necessarily violate liberal neutrality, in so far as the rationale for its coercive intervention (e. g., forcing the employer to accommodate religious employees, forcing parents to care for their children, or forcing promisors to perform) is not *solely* premised on the view that the life of those coerced (e. g. the employer, the parents, or the promisor) will go ethically better.

13 Things will not be equal if say, a sufficiently large number of culpable murderers manage to avoid criminal liability by abusing the insanity defense.

14 RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011). See also DWORKIN, *supra* note 12.

Finally, recall the fourth objection, namely that the liberal position compromises the principle of neutrality if the proposed criterion for accommodation happens to capture only religious practices. It seems to me a mistake to think, as Eisgruber's and Sager's approach suggests, that it should be a condition of a criterion for accommodation that it should, in real life, apply to some non-religious commitment, such as one's health condition, or one's passion for football or music. The condition under the second horn of the liberal dilemma is better understood in a different way: we must be able to point to some feature of religious commitments which warrants accommodation in virtue of some non-religious (i. e. secular), generally recognized, moral principle. What the liberal position is committed to is that the principle can *conceivably* apply to non-religious practices. But whether or not such practices actually exist is neither here nor there. Consider for instance the suggestion that practices of religious believers should be accommodated in virtue of the fact that they had been the victims of persecution in the past, by way of rectifying a historical injustice. Imagine moreover that only religious groups have been historically subjected to such forms of persecution. On this suggestion, only religious groups get to benefit from accommodation even though the rationale for accommodation (rectifying historical injustices) has nothing to do with the nature of religious commitments. It is *contingently* the case that religious beliefs possess this feature and other types of belief do not. Since it is *conceivable* that non-religious beliefs can possess this feature then accommodating it does not amount to privileging religion. Trying to find analogues between religious and non-religious commitments (e. g. cases of conscientious objection) may play an epistemic role, helping to sharpen our intuitions about what that property is. But it does not follow that, absent such non-religious practices, singling out that property is arbitrary; a non-religious case for protecting religious practices is not an oxymoron.

In sum, attempts to justify religious accommodation on the basis that religious commitments possess some special characteristic do not compromise liberal principles. But such attempts do have the burden of explaining what that special characteristic is and why it merits accommodation, and in particular to explain why it imposes duties on others. I am skeptical that liberals can provide a convincing argument in favor of the proposition that the mere holding of deeply held beliefs (be it religious or non-religious) about the good imposes duties on others whereas other beliefs do not. But I am far less skeptical that existing legal practices of religious accommodation, as seen in the case law of major jurisdictions, are morally defensible. So I propose to challenge the view that religious accommodation in law is defensible if, and only if, religious commitments possess (uniquely or together with other, non-religious, commitments) some special characteristic.

Fairness and Religious Accommodation

Let me now go back to what I called a third option, or a way out of the uncomfortable liberal dilemma. Can liberals justify accommodation without taking a stance on what makes religious (and conceivably non-religious) beliefs *special*? Religious accommodation must be reasonable, but what does the abstract notion of reasonableness mean in this context? More specifically, must the reasonableness of accommodation in law depend on the existence and stringency of religious reasons?

I want to begin with another analogy from contract law. Promisors routinely breach their contractual obligations. You call an electrician and he fails to turn up. He made a promise and he broke it, wronging you, the innocent promisee. The law however does not normally force the promisor to perform. It only requires him to pay expectation damages, i. e. the cost of what it takes to put the promisee in the position he would have been, had the promisor not breached.¹⁵ You, the innocent party, should get another electrician to do the job. You only have a legal claim against the wrongdoer for the cost of it. Nor does the law inquire into the reason why the electrician failed to turn up. It could be that he had a very important conflicting commitment (say, to take his kid to the doctor) or it could be that he was just too lazy to turn up. The law does not inquire into the reasons why the electrician breached his contractual obligation, whether he had a serious reason or not. Yet it requires you to accommodate him; you are the one who now needs to find another electrician. You are the one who has to accept that he will not do what he promised to do. He can just pay his way out of it. Moreover, if you decide not to hire another electrician and you suffer major damage as a result, then the promisor will not be responsible for it, because you will have failed to mitigate your losses. The doctrine of mitigation in contract law requires you to accommodate the promisor even further, by burdening you with the task of mitigating the losses that *he*, the wronging party, caused. If you don't mitigate, then the promisor will not be responsible, regardless of whether he had serious reason to breach.

How can contract law impose this burden of accommodation upon the innocent promisee, without inquiring into the nature of the reason why the promisor breached? On the surface this appears morally problematic: why should the innocent promisee accommodate the guilty promisor? The answer

¹⁵ For extensive discussion of expectation damages as a departure from promissory morality and related criticism, see Seanna Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

lies in normative principles to do with fairness.¹⁶ In a market economy, it is normally very easy for the promisor to get a substitute performance, assuming that the performance is not unique in some respect. It normally makes no difference to you *which* electrician fixes your lights. By contrast, it does make a difference to the electrician whether he can pay instead of performing. Given how easy it typically is for the promisee to release the promisor from the obligation to perform and to get a substitute in the market, then it is unfair to force the promisor to perform, given that it may be burdensome for him to do so. Likewise, given that it is very easy for the promisee to mitigate the damage caused by a breach of contract, then it is unfair for him to let the damages accumulate and then seek to hold the promisor responsible for the easily preventable, aggravated loss. So long as the promisee can *easily* get a substitute performance that is roughly equivalent to the promised one, then it is unfair for him not to accommodate the promisor, regardless of the reason why he breached.

We can apply these principles to employment contracts and uniform policies. If you choose to wear jewelry or accessories in contravention of your employer's uniform policy, then you breach your contractual obligation. But shouldn't the employer accommodate you nevertheless? According to the principle of fairness, this depends – among other things – on how *easy* it is for the employer to do so and whether he can find alternative ways to secure roughly the state of affairs he would be in, had you not breached. Let us assume that the purpose of a uniform policy is to enable consumers easily to identify staff and to create a corporate image of professionalism. The employer can equally serve this purpose by allowing employees to wear personal items (jewelry or clothing), so long as the company's uniform is visually dominant. The employer does not care about how he achieves the corporate benefits of a uniform policy. Even though employees are in breach of their contractual obligation (just like the electrician who failed to turn up), the employer nevertheless has a duty to accommodate them, so long as there are alternative ways, easily available to the employer, to achieve the purpose of a given job. What matters is whether the alternative the employee is offering the employer, following the breach, is roughly equivalent in effect to the one required under the contract. Suppose that an employee, for purely aesthetic reasons, decides to wear the company's uniform with personal jewelry or clothing that matches in terms of color and aesthetics. Doing so does not at all impair the corporate benefits of a having uniform policy. It would

¹⁶ Prince Saprai and I explore this in *Mitigation, Contract Law and Fairness*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW ch. 15 (Gregory Klass, George Letsas & Prince Saprai eds., 2016).

therefore be unfair for the employer to dismiss the employee, given how easy it is for him to accept an easily available alternative performance on the part of the employee.

The other relevant aspect according to the principle of fairness is the harm that the employee risks suffering if his practice is not accommodated. Dismissal is a serious harm to the interests of the employee, affecting one's income, ability to meet basic needs, self-esteem, future employability, and many others. It follows that the severity of the sanction imposed on the employee for breaching an employment obligation must be proportionate to the gravity of his breach. The principle of proportionality, seen in the light of fairness, makes relevant what the threatened harm is. It may be fair not to promote an employee who always refuses to work overtime. But it may be unfair to dismiss him for that same reason.

What is distinctive about the argument from fairness is that it is irrelevant *why* the employee breaches his contractual obligation. What makes accommodation reasonable does not depend on the reasons for the breach and their strength. Rather, it turns on the nature of the threatened harm (dismissal) and the extent to which the employer can easily accommodate the alternative that the employee is proposing, given the nature and corporate function of his job. Personal symbols or clothing, worn on top of the company uniform need not impair the corporate goals of a given job. When this is the case, it is equally unfair to dismiss an employee for wearing a cross on top of the company uniform than it is to dismiss him for wearing a military chain, a sports club scarf, or a music band lapel pin. Yet, according to the principle of fairness, the employer is not accommodating the reasons why the employee breaches, any more than by receiving compensation or mitigating your losses, you accommodate the reasons why the electrician failed to turn up. According to fairness, what gets accommodated is the alternative performance of the employee, not his reasons for it.

To be sure, the argument from fairness makes the idea of religious accommodation sound like a misnomer. This is because it relies on basic, first-order principles of fairness that justify why the employer may not dismiss or disadvantage employees who fail to comply with the company uniform policy. And it does so regardless of whether they do so for religious reasons, and regardless of whether the reason why they breach is deeply-held, categorical, meaning-giving, or what have you. It may therefore be objected that this is not really an argument in favor of *religious* accommodation, but a narrow argument in favor of accommodating minor breaches of employment obligations. I think the objection makes a valid point, but I do not see why it is an argument against a fairness-based explanation of religious accommodation. There is no reason

fairness-based principles should be excluded from qualifying the content of human or constitutional rights, including the right to freedom of religion. No area of law is immune from interacting with other areas of law and no area of law is founded entirely on one single principle. Nor is it necessary that the normative principles justifying accommodation must solely be founded on the right to freedom of religion. As I argued earlier, it is question-begging to assume that the legal right to freedom of religion is identical to some moral right to freedom of religion.

Now, what is easy for the employer to accept as an alternative performance depends on two factors: first, on the nature of the job and, second, on the effect of accommodation on the overall interests of the employer. I do not think there can be general rules about either of these two factors. How strict the policy of wearing uniforms needs to be in order to achieve corporate benefits or serve the corporation's goals depends on the nature of the corporation. Wearing jewelry and other accessories over one's uniform does not affect the performance of a flight attendant in the same way as it affects the performance of a doctor or a cook. We need an independent and objective description of what in many jurisdictions is called "genuine occupational requirement."¹⁷ The wearing of a uniform affects differently business goals or profits, depending on whether it is a hospital, a restaurant, an airline, etc. It is unfair if my university fires me because I was one minute late for my lecture, even if I was late for a trivial reason. But it may not be unfair if the university hospital fires a surgeon because he was one minute late for a surgery where (knowingly) even a few seconds can make a difference to whether the patient lives or dies.¹⁸

Moreover, whether the employer can accommodate employees in a different way, by reassigning them to another post in which they do not have to wear a uniform, depends on the cost that doing so involves on the part of the employer (in general, not just in one particular case), including potential costs that other employees may have to shoulder.¹⁹ If the cost is significant, then it is not easy for the employer to accommodate and hence he is not required to do so under the principle of fairness. It may be easy to reassign one employee from a post in which he has to wear a uniform to a post in which he does not. But it is not easy

¹⁷ See the Canadian Supreme Court judgment, *Bhinder v. CN*, [1985] 2 S.C.R. 561 (Can.).

¹⁸ In this respect, the issues that freedom of religion raises in the context of employment are analogous to those raised by privacy. Lifestyle choices that have no impact on the employee's ability to perform his job are an impermissible basis for dismissal. See the discussion in Virginia Mantouvalou, *Private Life and Unfair Dismissal: Private Acts in Public Spaces*, 71 MODERN L. REV. 912 (2008).

¹⁹ I am grateful to Oisín Suttle for drawing my attention to the relevance of the interests of other employees that may be affected.

to do so when *many* or *most* employees have refused or are likely to refuse to wear a uniform. Fairness requires the employer to accommodate employees only if it is easy to do so *systemically*, not just on an individual case.

It may be objected that the principle I propose is one-sided in that whilst it takes into account the reasons the employer has to impose a uniform policy (commercial reasons), it refuses to take into account the employee's reasons to be exempt (religious reasons).²⁰ Such a departure from the principle of reciprocity, the objection continues, can only be justified by judging the discounted reasons to be *bad* reasons, which is what my account is seeking to avoid. The objection does well to highlight the importance of the principle of reciprocity: principles of accommodation cannot ignore the employee's reasons and focus exclusively on the employer's reasons. Yet it seems to me that, contrary to the objection, the principle of fairness I propose is far from one-sided. The employee has good reasons to want to keep his job and these reasons are taken into account by the principle of fairness in balancing the gravity of the breach against the seriousness of dismissal as a sanction. The principle is sensitive to commercial reasons on the side of the employer but it is also sensitive to reasons of well-being on the part of the employee. What the principle ignores is not the employee's reasons in general, but only his *motivating*²¹ reasons for breaching an employment obligation, i. e., his religious commitments. It stays agnostic as to whether the employee's motivating reasons are real normative reasons, i. e., whether they justify his refusal to comply with the occupation requirement. And it does so because there is no need to inquire into the normative merits of the employee's motivating reasons. Even if they lack any normative merits, fairness still requires that the employer try to accommodate the employee before dismissing her. So it is not the case that we can only ignore religious reasons if we judge them to be unmeritorious reasons.

A further objection concerns the scope of the principle of fairness. The principle of fairness can justify only a limited number of claims for religious accommodation.²² For example, an employee, who considers it her duty to wear a full religious habit, will have no claim to be accommodated in a business in which wearing a uniform is a genuine occupational requirement. The same applies to the case of an employee who considers it her religious duty to attend service or rest on a given day of the week, during which most business in a

²⁰ I am grateful to Riz Mokal for putting this objection to me and helping me to see its force.

²¹ Motivating reasons are considerations in the light of which an agent acts. Normative (or justifying) reasons are considerations that in fact count in favor of an action, regardless of whether the agent took them into account. See JONATHAN DANCY, PRACTICAL REALITY 5 (2001).

²² I am grateful to Cécile Laborde for raising this objection.

particular sector is essential.²³ The objection helps to distinguish between a weak and a strong thesis. The weak thesis is that the principle of fairness is the best normative explanation of certain cases of religious accommodation under law. The strong thesis is that claims for religious accommodation not captured by the principle of fairness, as I construe it, are necessarily unwarranted. In this paper I only defend the weak thesis. My argument seeks to establish that upholding claims for religious accommodation need not rest on the assumption that religious beliefs are special. Defending the strong thesis would require addressing all the various claims made for religious accommodation and showing that those not captured by the principle of fairness are unwarranted. Having said that, it cannot be an objection even against the strong thesis that it only justifies a limited number of claims for religious accommodation. This is because we should not assume that these other claims for religious accommodation are *pro tanto* warranted. It is precisely this assumption that my argument challenges, an assumption that is encouraged by the textual recognition of a general human right to freedom of religion in law.

To recap, principles of fairness – of the kind already applicable in contract law and employment law – suffice to justify common exemptions from employment requirements, like the strict uniform policy. Accommodation is reasonable if it is fair for the employer to do so given the nature of the business and the cost that this imposes on him.²⁴ Such fairness-based exemptions can benefit anybody, regardless of whether one is religious and regardless of whether one's reason for failing to comply with employment requirements is sincere,²⁵ deeply-held, meaning-giving, or identity-shaping. In this sense, we should be skeptical about the normative input that the law of human rights can have on the law of unfair dismissal. The doctrinal tools and labels that human rights law imports into employment law are different, but the normative issues remain the same. Religious employees will no doubt benefit from the requirements of fairness, and

23 Similar claims invoking ECHR, art. 9, have recently failed in court. See, e.g., *Mba v. London Borough of Merton* [2013] EWCA (Civ) 1562 (Eng.).

24 U.S. courts use the expression “undue hardship on the employer.” See the judgment of the U.S. Supreme Court in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

25 Several courts take sincerity or good faith to be a necessary condition for the reasonableness of accommodation. See the judgment of the Canadian Supreme Court in *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.) and the UK House of Lords in *R (Williamson) v. Secretary of State for Education and Employment* [2005] 2 AC (HL) 246. By contrast, on the fairness-based view advanced in this paper, sincerity is not a requirement, since the reason why the employee seeks accommodation is deemed to be irrelevant. That is not to say of course that good faith, as a general principle, is not legally relevant within the employment relation.

they may have really good and sincerely held deep reasons not to comply with various employment requirements. But it is a mistake to infer from the fact that the law expects the employer to accommodate religious commitments that the rationale for accommodation is that there is something special about religious and other deeply-held beliefs which grounds the human right to freedom of religion. Lawyers may be inclined to think this because the freedom of religion and belief are recognized as distinct rights in constitutions and treaties and are used in litigation as an argument in favor of accommodation. But the fact that freedom of religion can be so used is a contingency to do with the doctrinal categories recognized in each jurisdiction. It does not entail that the normative argument for accommodation must be founded on the right to freedom of religion. What matters ultimately is what, if any, is the best normative justification for accommodating religious practices.

Eweida and Ladele v. United Kingdom

In January 2013, the European Court of Human Rights decided four cases to do with accommodation of religious beliefs in the workplace.²⁶ In two of these cases (*Eweida* and *Chaplin*), the applicants were Christian employees who, under their employer's policy on uniforms, were not allowed to wear a cross at work. In the other two cases (*Ladele* and *McFarlane*), the applicants were employees, who had been disciplined or dismissed for refusing, on the basis of their Christian beliefs, to offer services to same-sex couples. The Strasbourg Court found no violation of freedom of religion (Article 9 ECHR), except in the case of *Eweida*, the British airways employee who was not allowed to wear a cross on top of her uniform.

The reasoning in the Court's single judgment (all four cases were joined) is relatively short, placing emphasis on the respondent state's margin of appreciation. The Court approached the legal issue as one of balancing the employee's freedom of religion on one hand, and on the other hand, the employer's legitimate aim of promoting business interests (*Eweida*), health and safety (*Chaplin*), and equality (*Ladele* and *McFarlane*). Without going into the details

²⁶ *Eweida and others v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10, 36516/10 (Jan. 15, 2013). For an analysis of the four judgments, see Ronan McCrea, *Religion in the Workplace: Eweida and Others v. United Kingdom*, 77 MOD. L. REV. 277 (2014). See also Nicholas Hatzis, *Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination*, 74 MOD. L. REV. 287 (2011).

of the Court's reasoning – scarce as it was – I want to explore whether the principle of fairness can help to distinguish between *Eweida*, in which the Court did find a violation, from *Ladele*, in which the Court did not.

Ms. Eweida was employed by British Airways as check-in staff. She refused to comply with the company policy on uniforms, on the basis of her Christian beliefs. Ms. Ladele was employed by the London Borough of Islington as a registrar of births, deaths, and marriages. She refused to conduct same-sex civil partnerships on the basis of her Christian beliefs. What, if any, is the difference between two cases?

We should start by observing that the doctrinal way of framing the question is potentially misleading: both *Eweida* and *Ladele* made claims of discrimination against their religious beliefs (Articles 14 and 9 ECHR). The Court accepted that their claims fell within the scope of a protected right under the ECHR, and moved on to examine whether the interference with their rights was proportionate. This makes it look as if both *Eweida* and *Ladele* have a *pro tanto* claim to have their beliefs protected. But from a normative standpoint this is unwarranted. We have to establish, rather than assume, whether one's criterion for what makes accommodation reasonable applies in these two cases. Though there might be epistemic value in the Court's construing the matter in this way, it should not blind us as to the need to provide a normative justification of what falls within the scope of a fundamental moral right *properly* understood.²⁷

If we apply accommodationist criteria under the second horn of the dilemma (e. g. depth of commitment, sincerity, meaning-giving) we might be unable to distinguish between *Eweida* and *Ladele*. Both may have refused to comply with occupational requirements on the basis of categorical, sincere, and deeply held Christian convictions. But this is not the case under the principle of fairness, as presented in the previous section. Under the principle of fairness, the question is whether the employer could have easily accommodated the alternative proposed by *Eweida* and *Ladele*, given the nature of their employment. I have already argued that this is normally true in cases like *Eweida*'s. And one might think that the Borough of Islington could also easily accommodate *Ladele* by not expecting her to conduct same-sex partnerships. But this would be to take too narrow a definition of what is easy for the Borough of Islington to do.

To begin with, the nature of *Ladele*'s occupation is given objectively: It is a public sector job whose aim to officiate in *all* civil partnerships, regardless of the

²⁷ On the nature of human rights review as a diagnostic test, see George Letsas, *The Scope and Balancing of Rights: Diagnostic or Constitutive?* in SHAPING RIGHTS: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 38 (Eva Brems & Janneke Gerards eds., 2013).

characteristics of the couple. Registrars perform a public role and they have duties, in virtue of occupying the role, to treat everyone with equal respect and concern. It is an essential part of what the job is about, a “genuine occupational requirement.” In performing public roles,²⁸ employees cannot act in ways that offend the egalitarian duty to treat everyone with dignity, even if strictly speaking they perform the tasks that they were assigned. For example, Ladele would directly be offending her job duties if she were to officiate in a same-sex partnership wearing a T-shirt inscribed “Homosexuals will burn in hell.” Though Islington Council has an express “dignity for all” policy, its employees would still be bound to treat people in the borough with equal respect and concern even if it did not.

But let us assume that the applicant would not behave in ways that offend the egalitarian duties of a civil servant and was merely asking to be exempt from officiating in same-sex partnerships. It is still not the case that the Borough of Islington could easily reassign her to another job, perhaps less visible. Providing services to homosexuals and same-sex partners is a substantial part of what registrars do and not merely an expressive requirement for a job in the civil service. A request for reassignment would amount to a request to be re-hired to a different job, whose description would exclude a substantial part of a registrar’s duties, but whose salary would remain as costly for the employer as before. Recall that under the principle of fairness the employer has a duty to accommodate only when the alternative the employee offers is roughly equivalent vis-à-vis the nature of the occupation, it is easily available, and it imposes little or no additional costs on him. Accommodating Ladele was far from easy and hence not reasonable under the principle of fairness.²⁹

The principle of fairness helps to distinguish between *Ladele*, and *Eweida* and does so without assuming that Ladele had a *pro tanto* claim to be accommodated that was defeated by stronger considerations. The difference between having a right that is defeated, and having no right, is not terminological. In the former case, there is something to regret morally speaking and a reason to seek to prevent circumstances in which the right gets defeated. In the case of Ladele, we should not say that we should regret the loss of her religious freedom, because no right of hers was violated. To be sure, the Court presented her case as falling within the scope of the right to freedom of religion (Article 9

²⁸ I speak of performing a public role as opposed to occupying a public (state) office, because various private jobs perform public roles and vice versa.

²⁹ A further issue is whether the number of Christians employees who refuse to offer services to same-sex couples, is so high that reassigning all of them will inevitably have a cost on the employer (i. e., the taxpayers), even if it has no or minimal cost in the case of one employee.

ECHR), but this should be seen as no more than a doctrinal construction with a heuristic value. In the case of Eweida by contrast, a right was violated but that right was not a right to have one's religion accommodated; rather it was her right to be treated fairly by her employer.

It is also important to note that on the explanation from fairness advanced in this paper, the stringency of the religious belief or practice in question is irrelevant. This is confirmed by the outcome in the two cases. Arguably the duty not to officiate in same-sex partnerships is more stringent than the duty to wear a cross, whether we view it from the objective perspective of religious doctrine or from the subjective perspective of the religious believer. Yet, it was Eweida's claim that prevailed, not Ladele's. If the right test for religious accommodation were to track some balancing between the importance of religious belief on one hand and business interests on the other, then the differential outcome in these two cases would be hard to justify.

Conclusion

The history of religious persecution largely explains the presence of freedom of religion as a separate right in constitutional documents and international treaties. For its most part, human rights law on freedom of religion has played, and still plays, an important role in combating religious persecution. But the accommodation question is a different story. It is a question loaded with assumptions about the nature, character, and political role of religion in Western liberal democracies. Liberals have equivocated between denying the very possibility of religious accommodation altogether and seeking to explain what makes religious and other deeply-held beliefs special. I have argued that the former approach is under-inclusive and the latter is over-inclusive. There is a third way: Religion (just like any other conception of the good life) does not have to be special in order to be accommodated. Accommodation, as a legal position, is not accommodation of the *reasons* why someone refuses to comply with a general requirement. The principle of fairness can justify cases in which courts uphold the exemption claims of religious believers, regardless of why they do so.

The current judicial climate in Europe may appear to be inviting to claims of religious accommodation and to encourage the legalization of disputes over the proper role of religion in liberal democracies. But this appearance will subside if it becomes clear that the normative conditions for what makes accommodation reasonable are minimalist and have nothing to do with the nature and stringency of religious commitments. Principles of fairness that already apply in

contract and employment law, without much controversy, suffice to justify the cases of religious practices that liberals want the law to accommodate. The accommodation question is, in the end, not that difficult for liberals. It becomes difficult if we are drawn into a theoretical framework in which we have to ask what is special about religious commitments (and other, non-religious, commitments). Liberals should not of course dismiss this question as unimportant. But it is a question that needs to be asked at a personal level, not at the institutional level of deciding what enforceable rights people have under human rights law. Religious practices, like so many other conceptions of the good life, may well be valuable in a special way, but, as a matter of fairness, they are worthy of some accommodation even if they are not.

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