IS THERE A RIGHT TO RELIGIOUS EXEMPTIONS?

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This article enquires whether religious claimants are ever entitled as a matter of right to exemptions from laws of general application. The author considers various responses to the objection that religious exemptions are unfair and shows that arguments purporting to demonstrate that religion is distinctive in a way that marks it as meriting special constitutional solicitude in the form of exemptions fail. This essay then surveys and assesses the plausibility of four prominent kinds of argument in support of recognising a right to religious exemptions, with reference to arguments offered by the Constitutional Court in putative justification of this right. The four kinds of arguments are as follows: arguments grounded on respect for conscience (understood as perceived moral duties); arguments relating to equality of opportunity; egalitarian arguments; and arguments grounded on respect for conscience (understood as the faculty with which individuals search for ultimate meaning).

I INTRODUCTION

Critical commentaries appearing in South African law journals that have engaged with the adjudication of claims for religious exemptions by South African courts — some of them excellent — have tended to focus, with justification, on the force of the reasons offered by the courts in question in support of the granting or refusal to grant religious exemptions in particular cases.[1] Almost nothing has been written about an issue conceptually prior to assessment of South African courts' decisions concerning religious accommodations: whether there is a right to religious exemptions. This may not seem like an outstanding issue, since the Constitutional Court has recognised a right to religious exemptions in certain circumstances.[2] But the Constitu-

[1] For useful discussions of the way in which the right to freedom of religion has been applied in South Africa, see Lourens du Plessis 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: memorial constitutionalism in action' (2008) 8 *African Human Rights LJ* 376; Irma Kroese 'God's kingdom in the law's republic: religious freedom in South African constitutional jurisprudence' (2003) 19 *SAJHR* 469; Johan van der Vyver 'The contours of religious liberty in South Africa' (2007) 21 *Emory International LR* 77; Paul Farlam 'Freedom of religion, conscience, thought and belief' in Stuart Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2006) ch 41 and Denise Meyerson 'Religion and the South African Constitution' in P Radan, D Meyerson & R Croucher (eds) *Law and Religion* (2005) ch 5.

[2] While the Canadian Supreme Court and the South African Constitutional Court have recognised and continue to recognise a right to religious exemptions, the position relating to claims for religious exemptions in the United States under the First Amendment is different. In certain — very few — cases, the Supreme Court invalidated state laws that burdened religious exercise unless such laws were narrowly tailored to compelling state interests (see, for example, *Sherbert v Verner* 374 US 398 (1963) and *Wisconsin v Yoder* 406 US 205 (1972)). In 1990, however, the US Supreme Court changed course, holding that there is no constitutional right to religious

tional Court's recognition of a right to religious exemptions is one thing; its correctness in doing so a different matter entirely. The question whether religious claimants are ever entitled to exemptions is important because, if the court is wrong about this, its recent decision granting a Hindu pupil an exemption from a school uniform regulation to permit her to wear a nose stud is perforce mistaken.[3]

In this essay I shall distinguish between and assess the plausibility of certain prominent arguments in support of, and objections to, recognising a right to religious exemptions, including arguments offered by the Constitutional Court in putative justification of this right. By religious exemptions I mean exemptions from facially neutral laws of general application (that is to say, laws that do not intentionally target religious believers for adverse treatment) granted on the grounds that such laws impose a burden on certain religious believers that is not brought to bear on other citizens. This burden arises because the laws in question require (sometimes as a condition of their receiving a benefit or availing themselves of some opportunity) that religious believers act in a way that is inconsistent with their religious beliefs or refrain from engaging in practices motivated by such beliefs. Examples of claims for exemptions include the claim by a group of Evangelical Christians to be exempted from legislation proscribing corporal punishment in schools on the grounds that their religious beliefs require that corporal punishment be inflicted on pupils in the private schools run in accordance with their faith;[4] the claim by a religious pupil to be exempted from school uniform regulations that forbid the wearing of clothing and adornments with religious import;[5] and the claim by religious believers for an exemption from drug laws on the grounds that their rituals of worship incorporate the use of banned drugs.[6]

Believers claiming exemptions assert, in essence, that they should be excused from compliance with a particular law or regulation because it makes acting consistently with their religious commitments impossible[7] or because

exemptions from laws of general applicability (*Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 (1990)).

[3] *MEC for Education, Kwazulu-Natal & others v Pillay* 2008 (1) SA 474 (CC).

[4] See, for example, *Christian Education South Africa v Minister of Justice* 2000 (4) SA 757 (CC) and *R (Williamson) v Secretary of State for Education and Employment* [2005] AC 246 (HL).

[5] See, for example, *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100; *Pillay* supra note 3. See also *Multani v Commission Scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256, which involved a Sikh pupil's demand that he be permitted to wear a kirpan (a metal dagger) which Sikh men believe themselves to be obligated religiously to wear at all times.

[6] See, for example, *Smith* supra note 2 and *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC).

[7] See, for example, *City of Boerne v Flores* 521 US 207 (1997). A Catholic church wished to expand its facilities to accommodate its growing congregation. It claimed an exemption from local zoning laws restricting its ability to construct an addition. Acting in violation of the law was impossible since 'the reconstruction could not be

it coerces them into acting inconsistently with their religious beliefs by placing a heavy cost on their acting harmoniously with such beliefs: either criminalisation and punishment (as, for example, in the case of claims for exemptions by Rastafarians whose rituals of worship incorporate the consumption of drugs proscribed by law) or the denial of some benefit or opportunity such as an employment or educational opportunity (as with the claims of religious pupils to be exempted from workplace dress codes or school uniform regulations). Their claim is that the law requires them to break faith with their identity-defining religious beliefs and convictions in a way that is unfairly burdensome. Claimants often, though not invariably, assert that they have a duty to a higher authority that takes precedence over their duty to act as the law directs.

A right to religious exemptions is a right to be free of burdens that make religious conduct either impossible or too costly to perform. It entitles believers in certain circumstances to an exemption when the law unintentionally imposes a serious burden on them. The protection that it affords is prima facie rather than absolute. But it does require a sufficiently strong state interest in order to justify placing serious burdens on religious conduct. The existence of such a right has been hotly disputed. Although many people would agree with the South African Constitutional Court that 'the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law',[8] several constitutional scholars and philosophers deny that religious believers are entitled to exemptions as a matter of right.[9]

It might be imagined that the existence of a fundamental right to freedom of religion resolves the debate about whether a right to religious exemptions exists in favour of recognising such a right. The matter is not so simple, however, since people disagree about how the right to freedom of religion should be interpreted. In John Locke's *A Letter Concerning Toleration*, in which the right to freedom of religion and conscience as a restriction on state power receives one of its most influential formulations, the state is required to refrain from making laws concerning religious worship, which falls outside its legitimate concern. The right to religious freedom is on this rendering a right to non-persecution only. For Locke, it is not grounds for an exemption that a legitimate, generally applicable law requires conduct inconsistent with

done without the help of architects and contractors, whom the city could prevent from doing the work merely by withholding the necessary permits' (Andrew Koppelman 'How shall I praise thee? Brian Leiter on respect for religion' (2010) 47 *San Diego LR* 961 at 966).

[8] *Christian Education* supra note 4 para 35.

[9] See, for example, William Marshall 'The case against constitutionally compelled free exercise exemption' (1990) 40 *Case Western LR* 357; Frederick Mark Gedicks 'An unfirm foundation: The regrettable indefensibility of religious exemptions' (1998) 20 *University of Arkansas at Little Rock LJ* 555; and Brian Barry *Culture and Equality: An Egalitarian Critique of Multiculturalism* (2001).

the conscience of a religious believer. If, for reasons of conscience, he cannot obey the law he must 'undergo the punishment, which is not unlawful for him to bear; for the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, *nor deserve a dispensation*'.[10]

My intention in this article is not to put forward a new theory of religious exemptions, but instead to survey existing theories with a view to determining whether any of them provides a persuasive justification for recognising a right to religious exemptions. I shall begin by considering an objection to the granting of religious exemptions — that they are unfair. I shall assess responses to this objection, intended to show that special constitutional solicitude towards religion is not unfair since religion is somehow special or unique. I shall argue that these responses fail and that there is no reason to privilege religious commitments over secular moral commitments. I shall then assess the plausibility of (various versions of) four kinds of argument advanced in support of there being a right to religious exemptions: arguments grounded on respect for conscience (understood as perceived moral duties); arguments relating to equality of opportunity; egalitarian arguments; and arguments grounded on respect for conscience (understood as the faculty with which individuals search for ultimate meaning).

II THE UNFAIRNESS OF SINGLING OUT RELIGION

The main objection to the granting of religious exemptions is that they are unfair; that is, they represent a form of wrongful discrimination. On this objection, since religious exemptions immunise religions against legitimate and important regulatory concerns in a way that amounts to privileging religious commitments and interests over other deep and genuine commitments and interests, they are unfair. They are unfair because they violate the principle of state neutrality defended by liberals such as John Rawls and Ronald Dworkin.[11]

Rawls observes that in modern democratic societies there is a diversity of comprehensive doctrines relating to matters such as religion, philosophy and the nature of the good life. Fairness requires that the state be neutral towards different conceptions of the good life. The principle of state neutrality requires not that laws must be neutral in *effect* — necessarily, many state laws will have a differential impact on religious people and on people of different faiths — but rather neutral in *aim*: the 'state is not do anything intended to

[10] John Locke 'A letter concerning toleration' in Ian Shapiro (ed) *Two Treatises of Government* and *A Letter Concerning Toleration* (2003 [1689]) 211 and 243 (my emphasis).

[11] See Denise Meyerson 'Why religion belongs in the private sphere, not the public square' in Peter Cane, Carolyn Evans & Zoe Robinson (eds) *Law and Religion in Theoretical and Historical Context* (2008) 44 at 54.

favour or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it'.[12]

In the 'tolerant secular society' that Ronald Dworkin supports, although the state must 'be permissive about religion; it must not make the peaceful practice of even a fundamentalist religion illegal', it should nevertheless be 'collectively neutral', neither favouring atheism over religion, nor exhibiting partiality towards any religion over another.[13] Dworkin distinguishes between *personally judgmental* justifications for restricting people's freedom, which appeal to or presuppose 'a theory about what kinds of lives are intrinsically good or bad for the people who lead those lives' (e g an anti-sodomy law that cites the immorality or baseness of the practice) and *impersonally judgmental* justifications 'that appeal to the intrinsic value of some impersonal object or state of affairs rather than to the intrinsic value of certain kinds of lives' (e g a zoning law).[14] He thinks that 'people have responsibility for their own ethical values, that is, their own convictions about why their life has intrinsic importance and what kind of life would best realise that value for them'.[15] Religious convictions fall within the category of ethical values. Nevertheless, individuals' personal responsibility for their ethical values '*does not give them an immunity* from laws . . . that can be justified on sound distributive or sound impersonally judgmental grounds'.[16]

Furthermore, on some understandings of the ideal of the rule of law, it 'commits us to the principle that the law should be the same for everyone: one law for all and no exceptions'.[17] A single set of laws generally applicable to all is intended to ensure that everyone receives equal treatment irrespective of race, religion, sexual orientation and so on. From the standpoint of some supporters of the rule of law, it might appear that 'an enormous range of cultural differences can be accommodated within a common framework of liberal laws' and that exemptions are unfair and invidious instances of 'having different rules for different people in the same society'.[18]

On the one hand, then, religious exemptions seem unfair, since by treating religious concerns preferentially as compared to non-religious convictions and concerns, the granting of religious exemptions is non-neutral. On the other hand, religious exemptions have been granted by courts in the United States, Canada and South Africa consistently with widely-held intuitions in

[12] John Rawls *Political Liberalism* (1996) 193.

[13] Ronald Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (2006) 58.

[14] Ibid at 70–1.

[15] Ibid at 71.

[16] Ibid at 71 and 73 (my emphasis).

[17] Jeremy Waldron 'One law for all? The logic of cultural accommodation' (2002) 59 *Washington and Lee LR* 3 at 3.

[18] Barry op cit note 9 at 39.

favour of granting such exemptions. This generates a puzzle:[19] if religious exemptions are justified, a plausible answer must be provided to the question why it is not unfair to grant religious believers special accommodations with respect to otherwise generally applicable laws.

In a case which involved a claim by a group of Evangelical Christians for an exemption to legislation prohibiting corporal punishment in schools on the grounds that the imposition of corporal punishment is central to their religion, the Constitutional Court responded to the concern about the unfairness of religious exemptions as follows:

> 'It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to the sincerely held religious views of a community and make an exception from a general law to accommodate them, *would not be unfair to anyone else who did not hold those views* . . . the essence of equality lies not in treating everyone the same way, but in treating everyone with equal concern and respect.'[20]

But how is the granting of exemptions in favour of religious believers consistent with treating with equal concern and respect others who continue to be subject the law? The court offers no explanation as to why it is not unfair to single out religion for special constitutional solicitude in the form of exemptions. It does not explain why it would not be unfair to exempt Christian believers from the proscription on corporal punishment, while other parents and teachers who believe for moral reasons that pupils ought to suffer corporal punishment would continue to be subject to the legal proscription. What it offers instead is a list of ways in which religion is important: religious organisations 'play a large part in public life'; they 'command ethical behaviour from their members';[21] and religion informs believers' 'sense of themselves, their community and their universe'.[22] In what follows, I shall assess the court's reasons for singling out religion — its contribution to the public good, its contribution to morality and its status as a source of personal and social identity — as well as other arguments that have been advanced to establish the specialness of religion.

It is sometimes argued that religion is special 'by virtue of the contributions believers make to the public good,' in part because it inculcates in citizens the

[19] See Andrew Koppelman 'Conscience, volitional necessity, and religious exemptions' (2009) 15 *Legal Theory* 215 at 217–8, and Christopher Eisgruber & Lawrence Sager *Religious Freedom and the Constitution* (2007) 78–120.

[20] *Christian Education* supra note 4 para 42 (my emphasis). In the event, Sachs J correctly refused to grant an exemption in favour of the association of Evangelical Christians on the grounds that the right to dignity, coupled with the right not to be subject to cruel and unusual, inhuman or degrading punishment, places a duty on the state to prohibit corporal punishment in schools — a duty that extends even to Christian private schools.

[21] Ibid para 33.

[22] Ibid para 36.

morality on which democratic society depends.[23] Although much philanthropy is religious in nature, much is provided by non-religious organisations. As far as the public good is concerned, religion is in fact a mixed blessing. Religiously-motivated charity work may at times be 'connected with teaching hatred, sustaining illiteracy of the recipients of support, and making assistance conditional on support for political activities, not always of a constructive sort'.[24] It is hard to determine whether religion is on balance more valuable than harmful to the public good: 'we find the devoutly religious among those who were at the forefront of the domestic resistance to Nazi oppression in the 1930s, and the injustice of apartheid in South Africa from the 1960s onward and in America in the 1950s and 1960s. We also, of course, find the devoutly religious among those who bomb abortion clinics and fly airplanes into buildings'.[25]

Although religion instills morality, so do schools, civic organisations and the boy scouts: 'religion may now be one among several methods of inculcating civic virtue, rather than a necessary method'.[26] Many religious groups promote a morality that is inconsistent with the ethos of democratic society: they discriminate on the basis of gender, race and sexual orientation in a way that cannot be counted as publicly valuable. Whatever value, from the perspective of morality, religion may possess may well be 'offset by its negative results, such as the maintenance and fostering of prejudices, authoritarianism, discrimination against women etc', which provide a reason to refuse to extend special protection to religious practices.[27]

American scholar of law and religion John Witte Jr claims that 'religion is a unique form of individual and personal identity'.[28] But religion is not distinctive in this respect: philosophical and secular moral beliefs play a role similar to religious beliefs in constituting a person's identity.[29] Witte argues further that 'religion is . . . a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions and other forms and forums of faith'.[30] But many aspects of secular life have institu-

[23] Amy Gutmann *Identity in Democracy* (2003) 162. Practices considered socially valuable are often thought to warrant exemptions from generally applicable laws. Because society often values the work of charitable organisations, they are in many liberal democracies exempt from the general rules pertaining to taxation.

[24] Ibid at 164.

[25] Brian Leiter 'Why tolerate religion?' (2008) 25 *Constitutional Commentary* 1 at 16. To determine whether religion's contribution to the public good is predominantly positive or negative would require 'much more empirical evidence' (Brian Leiter 'Foundations of religious liberty: Toleration or respect?' (2010) 47 *San Diego LR* 935 at 956).

[26] Mark Tushnet 'The emerging principle of accommodation of religion (dubitante)' (1988) 76 *Georgetown LJ* 1691 at 1696.

[27] Gidon Sapir & Daniel Statman 'Why freedom of religion does not include freedom from religion' (2005) 24 *Law and Philosophy* 467 at 470–2.

[28] John Witte Jr *Religion and the American Constitutional Experiment* (2005) 250.

[29] Marshall op cit note 9 at 380–2.

[30] Witte op cit note 28 at 250.

tional structures attached to them that are enormously important to people: 'Politics, class, ethnicity, cultural traditions and so on all seem to play the same kind of role, in some instances, much more powerfully than religion does'.[31]

Those who argue that religion is special sometimes claim that religious believers hold their beliefs with a special intensity. But intensity of commitment does not distinguish religion. This subjective account of religion's specialness is under-inclusive: the desire of the religious to engage in religious practices may not be particularly intense. It is also over-inclusive: those opposed to a particular law on non-religious grounds may hold their beliefs with equal passion and intensity. Nevertheless, '[n]obody wants to give [an] exemption to someone who is intensely attached to his car, however sincere the attachment may be'.[32]

It is also sometimes argued that the law ought to defer to a believer's fear of extra-temporal consequences; that the burden of obeying a law is greater for a person who believes that complying with the law in question will result in his suffering eternal damnation than for non-believers who do not fear such punishment because they do not believe in life after death. This argument is implausible, however. The threat of eternal punishment is neither characteristic of all religions, nor of all religious obligations. Moreover, 'we cannot generalise confidently about whether [religious believers who believe in some kind of after-life] suffer more torment from violating their consciences than do nonbelievers who contravene their deepest convictions in the only life they expect to live'.[33]

Michael McConnell argues that religion is special on the grounds that '[i]f the scope of religious liberty is defined by religious duty . . . and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable'.[34] McConnell claims that religion has a unique claim to accommodation since it involves a 'duty to a higher authority' in a way that secular moral commitments do not.[35]

There are three reasons why McConnell's contentions in support of singling out religion should not engage our sympathy. First, many religions are not theistic and so cannot generate the unique source of moral authority that McConnell claims for religion. Many religious believers do not perceive a duty to a higher authority. Secondly, the claim by certain religious believers

[31] Leiter (2008) op cit note 25 at 14.

[32] Martha Nussbaum *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (2008) 167.

[33] Kent Greenawalt *Religion and the Constitution: Free Exercise and Fairness* (2006) 131.

[34] Michael McConnell 'The origins and historical understanding of free exercise of religion' (1990) 103 *Harvard LR* 1409 at 1453.

[35] Michael McConnell 'The problem of singling out religion' (2000) 50 *DePaul LR* 1 at 30.

that they are under a duty to a higher authority that takes precedence over the duty to obey the law is based on contested theological propositions the truth of which, if we concur with Locke's judgment that the government should not be the arbiter of theologically contentious claims, the state is not in a position to affirm.[36] From a standpoint external to the religion of which the member is claiming an exemption, there is no reason to think that a religious believer is commanded by a metaphysical power. All that must be assented to from an external perspective is that religious believers may *believe* themselves to be under an obligation to an authority higher than the law. Thirdly, the fact that religious believers experience religious obligations as taking precedence over secular obligations does not distinguish this belief in the right way, for *secular* moral convictions may equally be considered by those on whom they exert an influence as non-optional duties; there is no 'reason to assume that as a matter of real-world phenomenology, religious convictions exercise a more powerful grip upon the individual psyche than do deeply felt secular convictions'.[37] Secular commitments may be so compelling that an individual would die rather than betray them.[38]

That religious and non-religious moral beliefs may have a similar influence on individuals is acknowledged in two draft exemption decisions, in which the US Supreme Court effectively eroded the distinction between religious and non-religious claims to exemptions. *United States v Seeger*[39] involved a claim for exemption from the Selective Service Act, which exempted from the draft anyone 'who, by reason of religious training or belief, is conscientiously opposed to participation in war in any form'. The Act defined religious training and belief as 'an individual's belief in a supreme being, involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or merely a personal moral code'.[40] Seeger claimed a conscientious objector exemption from the military draft on the grounds of a secular moral objection to fighting in a war. The US Supreme Court, to which the case was appealed, avoided declaring the legislation unconstitutional by construing the term 'supreme being' broadly, so that the test was 'whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption'.[41] The court decided that Seeger was entitled to an exemption 'in the light of his beliefs and the unquestioned sincerity with which he held them'.[42]

Welsh v United States,[43] a subsequent US Supreme Court decision, likewise concerned a claim for exemption from the draft law on the grounds

[36] See Locke op cit note 10 at 230 and 241.
[37] Eisgruber & Sager op cit note 19 at 103.
[38] Ibid at 104.
[39] 380 US 163 (1965).
[40] *United States v Seeger* 326 F 2d 846 at 847, quoting 50 USCA §456 (j) (rev 1948).
[41] *Seeger* supra note 39 at 165–6.
[42] Ibid at 187.
[43] *Welsh v United States* 398 US 333 (1970).

of secular conscientious objection. The court ruled that the claimant's beliefs were 'religious', since to qualify as such it was necessary that his 'opposition to war stem from . . . moral, ethical or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions'.[44] The plurality held that the draft law 'exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war'.[45]

The essential issue to which these cases give rise is that raised by Dworkin: whether it is acceptable to exclude from the ambit of an exemption 'those whose morality is not based on religion'.[46] His answer is that 'the invasion of personality in forcing men to kill when they believe killing immoral is just as great when these beliefs are based on secular grounds. . . . A government that is secular on principle cannot prefer a religious to a non-religious morality as such'.[47] The tolerant secular society that Dworkin advocates

> 'does not attach any special value to religion as a phenomenon. It knows that many of its members do attach great importance to their freedom to choose their own religious commitments and life, and it is of course anxious to respect that conviction. But it also knows that other members attach comparable importance to making other choices about how to live . . . that reflect their own different convictions about what lives would be good for them. . . . [To give] special protection to religious people or practices would be regarded in such a society as discrimination in their favour because it would leave other people open to constraints on their freedom in the exercise of choices that, for them, reflect the values of the same ethical character and function of religious values of religious people'.[48]

Finally, some US commentators argue that religion is special because the framers of the US Constitution 'rejected wording that spoke in general of "rights of conscience" and chose wording that singled out religion for free exercise protection'.[49] A tempting response to this is to say that what is

[44] Ibid at 340.

[45] Ibid at 343–4.

[46] Dworkin *Taking Rights Seriously* (1978) 200.

[47] Ibid at 201.

[48] Dworkin op cit note 13 at 61. Martha Nussbaum argues that religion is special, but only because she adopts the expanded definition of religion accepted by the US Supreme Court in *Seeger* supra note 39 and *Welsh* supra note 43, the conscientious objection cases. Nussbaum op cit note 32 at 172–3 approves of the Supreme Court's accommodation of 'non-religious searchers' by 'stretching the account of religion' and is likewise in favour of accommodating the non-religious under the rubric of religion. But from the perspective of analytical clarity, including the avowedly non-religious and anti-religious within the definition of religion is obfuscatory, unless everyone, including atheists, is in some sense religious. As Kent Greenawalt 'The significance of conscience' (2010) 47 *San Diego LR* 901 at 911 points out, however, 'atheism and agnosticism are not religions' but rather 'convictions about religion'.

[49] Nussbaum op cit note 32 at 164. See also Laurence Tribe *American Constitutional Law* (1988) 1189. The text of the First Amendment reads: 'Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof.'

needed is for it to be shown that singling out religion for special treatment is not unfair. The text of the US Constitution does not provide a *reason* for singling out religion. In any case, this textual argument for the uniqueness of religion lacks all force in the South African context. To the extent that the text of the South African Constitution has any bearing on the question of whether religion is special, it is that religion is not special. Section 15(1) of the Constitution provides: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.' This provision protects both religious and non-religious conscience.

The above analysis reveals that arguments purporting to show that religion is distinctive in a way that marks it as meriting special constitutional solicitude in the form of exemptions are vulnerable to overwhelming objections. These arguments fail to identify anything distinctive about religion that warrants special constitutional treatment. No adequate response has been presented to the objection that religious exemptions are unfair. As eminent 'law and religion' scholar Frederick Mark Gedicks, himself a believer, acknowledges, these arguments offer no 'plausible explanation of why religious believers — and *only* believers — are constitutionally entitled to be excused from complying with otherwise legitimate laws'.[50] To exempt religious believers only really does seem, contrary to Sachs J's views in *Christian Education*, unfair to similarly situated others whose conscientious commitments likewise conflict with the law in question.[51]

III THE SPECIALNESS OF CONSCIENCE

The failure of arguments intended to establish the specialness of religion — intended, that is, to show the fairness of giving religious convictions preferential treatment relative to secular moral commitments — has prompted certain constitutional theorists and political philosophers to offer justifications for exemptions based on *the specialness of conscience*, where conscience is broadened beyond the scope of religious convictions to include secular moral commitments.[52] The claim here is that people have a right to an exemption when necessary to permit them to act in conformity with their

[50] Gedicks op cit note 9 at 574 (emphasis in original).

[51] In *Wisconsin v Yoder* 406 US 205 (1972), Burger J exempted the Amish but no other group of conscientious objectors from mandatory schooling laws. The court declared that 'purely secular considerations' would not warrant an exemption: 'Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses' (ibid at 216). The court's position is mistaken in the same way that Sachs J is mistaken in *Christian Education*, as Amy Guttman, in *Identity in Democracy* (2003) 183, criticising *Yoder*, rightly notes: 'Exemptions from law for only religious convictions discriminate against secular conscientious believers.'

[52] See, for example, Michael Sandel *Democracy's Discontent: America in Search of a Public Philosophy* (1996) 65–71; William Galston *The Practice of Liberal Pluralism* (2005)

perceived *religious or non-religious* moral duties. Arguments for a conscience-based right to exemptions have special salience for countries like South Africa and Canada, whose constitutions explicitly protect freedom of conscience, as the US Constitution does not.[53]

William Galston, for example, argues in favour of a principle of *expressive liberty*, 'the normatively privileged and institutionally defended ability of individuals and groups to lead lives as they see fit . . . in accordance with their own understanding of what gives meaning and worth to human existence'. This principle supports the claim that conscience 'enjoys a rebuttable presumption in the face of public law'.[54] He argues that there are liberal grounds for exempting members of religious groups 'from many (not all) laws that have the effect of restricting religious free exercise' and that 'absent compelling reasons to the contrary, principled liberals must defer to individuals' own sense of what gives life meaning and purpose'.[55] 'Conscience is special' because it is central to 'personal integrity'.[56] He does not limit the claims of conscience, understood as deep convictions, to claims of religious conscience, since secular individuals 'come to embrace ensembles of belief and action' that share two central features of religious experience: they understand the requirements of these beliefs and actions as central to their identity, and they experience these requirements as authoritative commands. Conscience-based claims for accommodation are presumptive only and can be defeated by a sufficiently strong state interest: 'Deep convictions may be mistaken in ways that the state may rightly resist through the force of law' and the social or civic consequences of the individual's conscience-based conduct 'may expose it to justified regulation or even prohibition'.[57]

45–71; Gutmann op cit note 23 at 45–71 and Paul Bou-Habib 'A theory of religious accommodation' (2006) 23 *Journal of Applied Philosophy* 109.

[53] The US Constitution provides protection only for religious claims to conscience, not for conscience broadened to include secular claims for conscience. There has nevertheless been some support for the recognition of a right to freedom of conscience in the US. Michael Perry 'From religious freedom to moral freedom' (2010) 47 *San Diego LR* 993 has argued in support of a 'right to moral freedom' (ibid at 996), 'a broadening out of the right to religious freedom' that he characterises as 'the right to live one's life in harmony with one's moral convictions and commitments' (ibid at 996), where moral convictions and commitments are understood to include secular moral as well as religious commitments. This right is a right to be free of the burden placed by a law on the exercise of conscience. It is not absolute: a burden would not count as a violation of the right if the law in question is 'necessary to serve a legitimate government interest' (ibid at 1008).

[54] Galston op cit note 52 at 67–8.

[55] Ibid at 177.

[56] Ibid at 179. This chimes with K Anthony Appiah's claim (see *The Ethics of Identity* (2005) 99) that we can distinguish 'between [those] who, with Luther, declare *Ich kann nicht anders*, and the Mr Bartlebys who simply "prefer not to" ' on the grounds that religious commitments are 'likely to represent deeply constitutive aspects of people's identity'.

[57] Ibid at 68.

Another influential argument in favour of recognising a right to conscience-based exemptions asserts that the will to be moral is valuable in itself and that respect for the will to be moral is part of respect for persons. Amy Gutmann's argument for conscience-based exemptions is grounded on the intrinsic value and specialness of conscience, 'the distinctively human effort to conceive and to live an ethical life which democracy presupposes when it is committed to the ideal of reciprocal respect for persons'.[58] Conscience, Gutmann holds, is a 'feature of ethical personhood' which has 'become synonymous with ethical identity',[59] 'the effort to live according to a sense of goodness and justice'.[60] As Andrew Koppelman approvingly comments in response to Gutmann, '[a] well-functioning human being is disposed to heed her conscience, and this disposition is damaged whenever she succumbs to pressure to violate her conscience'.[61]

The 'respect for conscience' argument has at least two disadvantages. The first relates to practical difficulties. Since it extends the right to exemptions to include non-religious as well as religious claims, adjudicating claims becomes more difficult, since adjudicative bodies will face greater epistemic difficulties in assessing which are genuine claims of conscience and which are not, without reference to texts, doctrines and group rituals characteristic of religion.[62] Further, there is likely to be a greater number of claims for

[58] Gutmann op cit note 23 at 176 states that although exemptions should not be granted automatically, since this would undermine the ability of duly constituted majorities to make law, 'because conscience represents ultimate ethical commitments, a democratic government that fails to consider exempting conscientious objectors from some laws . . . fails to take the ethical identities of persons as seriously as it can without sacrificing the democratic pursuit of public purposes'. Consistently with democratic justice, conscience should be deferred to 'when it is compatible with upholding law's legitimate public purpose' (ibid at 177).

[59] Ibid at 168.

[60] Ibid at 171. Several arguments offered in justification of conscience-based exemptions make reference, as Gutmann's does, to the importance of moral beliefs to the identity of individuals and argue that respect for persons requires that the state grant exemptions in recognition of the identity-defining nature of moral beliefs. Sandel op cite note 52 at 67 argues that for religious believers 'the observance of religious duties is a constitutive end, essential to their good and indispensible to their identity'. Appiah op cit note 56 at 99 argues that failure to accommodate conscientious objection can coerce people into 'betray[ing] their legitimate sense of who they are', since people's conscientious commitments and practices are 'likely to represent deeply constitutive aspects of people's identity' (ibid). Martha Nussbaum *Women and Human Development* (2000) 180 argues that because religion is 'so important to many people, such a major source of identity', there is a strong argument from respect for persons for recognising religious capability: 'When we tell people that they cannot define the ultimate meaning of life in their own way . . . we do not show full respect for them as persons'. Galston op cit note 52 at 67 argues that those with moral beliefs understand the requirements of their beliefs and actions as 'central rather than peripheral to their identity'.

[61] Koppelman op cit note 19 at 240.

[62] See Leiter (2010) op cit note 25 at 958 and Nussbaum op cit note 32 at 170.

exemptions than if exemptions were restricted to religious believers, and this larger number will impose a greater burden on society.[63]

A second difficulty is that the 'respect for conscience' argument is under-inclusive, because it excludes certain forms of religious conduct that are not experienced as matters of duty, but which many think should be accommodated. Most in favour of religious accommodations think that the claim by members of the Native American Church to be permitted to use peyote as part of their sacramental practice should have been granted by the US Supreme Court in *Employment Division v Smith*.[64] But neither of the claimants in *Smith* felt duty-bound to use peyote. Smith was motivated primarily by his interest in exploring his Native American racial identity.[65] In *Prince*, which involved a claim by a Rastafarian for an exemption from drug laws to allow him to use cannabis as part of his sacramental practices, the majority of the South African Constitutional Court deemed the use of cannabis 'not obligatory',[66] yet it did not refuse to grant an exemption for this reason. The Canadian Supreme Court, the British House of Lords and the South African Constitutional Court have all affirmed that there may be a right to an exemption even in cases in which the claim relates to a non-obligatory practice.[67]

One way to include claims relating to non-obligatory practices under the rubric of conscience-based exemptions is to argue that such claims for exemptions are justified on the grounds that 'religious conduct that aims at achieving communion with a divine will or ultimate reality' has a claim for accommodation because it enables religious believers to '*discover what [their] duties in fact are*'.[68] In the case of the ingestion of peyote as a ritual or sacramental practice of the Native American Indians, 'they perform it to gain insight' about the nature of their duties. Thus, 'performing the ritual will, by informing them of their duties, indirectly enable them to act in accordance with their perceived duties'.[69]

This argument is not wholly compelling, however, since several non-obligatory practices in respect of which there may be a right to an exemption are not practices of worship. In *Pillay*, the Constitutional Court granted a Hindu pupil an exemption to permit her to wear a nose stud prohibited by a

[63] Leiter ibid at 958.

[64] Supra note 4.

[65] Koppelman op cit note 19 at 222. In *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988), another widely criticised decision, Native Americans objected to a proposed logging road that would pass through an ancient worship site central sacred to their tribe, and which, the US Supreme Court conceded would 'virtually destroy' the ability of Native Americans 'to practice their religion' (ibid at 451). The court refused to grant an accommodation because the road had 'no tendency to coerce individuals into acting contrary to their religious beliefs' (ibid at 450).

[66] *Prince* supra note 4 at 103.

[67] See *Syndicat Northcrest v Amselem* (2004) 2 SCR 551 at 67–8, *Williamson* supra note 4 at 53 and *Pillay* supra note 3 at 65 respectively.

[68] Bou-Habib op cit note 52 at 123, emphasis in original.

[69] Ibid.

school uniform regulation even though the practice was only expressive of her religion and not required by it. Although there is some dispute about this, Sikhs wear turbans, and some Muslim women wear headscarves, out of custom rather than obligation. Yet many believe that there should be exemptions sometimes to permit Sikh men to wear turbans and Muslim women to wear headscarves. Even where dress is a matter of convention, it may be 'heavily freighted with symbolic import' to the extent that to abandon it is 'no trivial matter'.[70] The reason why requiring believers to abandon these religious practices is not a trivial matter is that it 'can reasonably be considered as central to the practitioner's identity'[71] and can affect her acceptance within her community.

IV EQUALITY OF OPPORTUNITY

Another kind of argument in support of a right to religious exemptions assimilates claims of religious duty to *physical disability* on the grounds that a person who believes himself to be under a religious obligation will experience no choice in the matter.[72] Religious beliefs are not chosen; most come with upbringing. And when a set of religious beliefs is instilled in an individual, then, in the words of G A Cohen, 'we cannot regard its convinced adherent as choosing to retain it any more than we can regard him as choosing to retain his belief that the world is round'.[73] Religious beliefs, it might be claimed, may be an encumbrance analogous to physical disability: the person who believes himself to be under a religious duty may not have chosen to hold that belief, and cannot choose to cease having that belief, any more than the handicapped person has chosen his affliction and can choose to cease having it. A disability, such as a lack of physical mobility due to injury or disease, supports a strong prima facie claim to accommodation, because it limits the opportunity to engage in activities others are able to engage in:

> '[I]f the law against jaywalking bears harshly on a person because he suffers from a disability that impedes his mobility and makes it difficult for him to cross the street during the permitted time in which the "Walk" sign is flashing, this is a ground for accommodation — say by adding extra seconds to the "Walk"

[70] Barry op cit note 9 at 58–9.

[71] Jonathan Quong 'Cultural exemptions, expensive tastes, and equal opportunities' (2006) 23 *Journal of Applied Philosophy* 53 at 58.

[72] Sonu Bedi 'What is so special about religion? The dilemma of the religious exemption' (2007) 15 *The Journal of Political Philosophy* 235 at 240 argues that 'the only way to justify' religious exemptions is to distinguish religious beliefs and practices from other preferences on the grounds that they are involuntary and unchosen. Sandel op cit note 52 at 70 disputes 'the conception of persons as freely choosing selves, unencumbered by antecedent moral ties' and refers to 'the claims of those for whom religion is not an expression of autonomy but a matter of conviction unrelated to a choice' (ibid at 66–7). In his view, accommodations are justified 'to prevent persons bound by moral duties they cannot renounce from having to violate either those duties or the law' (ibid at 68).

[73] G A Cohen 'On the currency of egalitarian justice' (1989) 99 *Ethics* 906 at 936.

interval or by permitting him to assert a right of way against oncoming traffic by brandishing a cane or using a wheelchair. . . .'[74]

There is likewise a strong prima facie reason to accommodate religious beliefs, it might be argued, because such beliefs limit the opportunity of believers to engage in activities in which others are able to engage.

Is the assimilation of religious beliefs to unchosen handicaps correct? There is disagreement on this issue between certain influential theorists of distributive justice. Cohen recommends that those with 'expensive tastes' — for fine wines and seafood, for example, who need more resources to achieve the same amount of welfare as those with less expensive tastes — should be compensated for this reason, provided that they have them involuntarily (that is, could not have helped having them), in which case their possessor cannot be held responsible for them.[75] Expensive tastes reduce the opportunity to lead a fulfilling life, typically generating an involuntary welfare deficit. Cohen thinks that we can treat religious beliefs analogously to expensive tastes: since the individual did not choose to hold these beliefs, and has them through no fault of his own, he should not be required to bear the costs of these beliefs, but should, as a requirement of justice, be compensated for the resulting burdens.[76]

Barry disagrees. Equality, he argues, is not concerned with equalising welfare, but instead with a fair distribution of 'rights, resources and opportunities'.[77] People are free, within the structure established by that distribution, to pursue their chosen conception of the good and to make choices depending on their preferences and beliefs. It may be that some individuals' conceptions of the good, by demanding more resources or more than their allocated liberty, are more difficult to fulfil than others. 'But this has no significance . . . it is irrelevant to any claims based on justice, since justice is guaranteed by equal opportunities.'[78] Like Dworkin, Barry thinks that individuals should not be compensated for the costs arising from religious and cultural beliefs, which he, like Dworkin, treats as akin to 'expensive tastes'.[79] He thinks, as Dworkin does, that although people do not

[74] Richard Arneson 'Against freedom of conscience' (2010) 47 *San Diego LR* 1015 at 1028.

[75] Cohen describes the position he defends as equality of access to advantage, according to which there should be equality of opportunity for welfare as well as resources, and satisfaction of needs.

[76] See Cohen op cit note 73 and G A Cohen 'Expensive tastes and multiculturalism' in Rajeev Bhargava, Amiya Kumar Bagchi & R Sudarshan (eds) *Multiculturalism, Liberalism and Democracy* (1999) 80–100.

[77] Barry op cit note 9 at 35.

[78] Ibid at 32.

[79] From the standpoint of Dworkin's account of equality of resources, set out in *Sovereign Virtue: The Theory and Practice of Equality* (2000), religious beliefs are not analogous to serious physical and mental disabilities. Dworkin's central distinction is between a person's *personality*, which includes character, convictions and preferences, and his personal *resources*, which include health and strength. He argues that we should aim, as a matter of justice, to erase or mitigate differences in people's personal

choose their beliefs, they can be held responsible for their consequences on the grounds that they identify with them — 'that they own them'.[80] A physical disability should be accommodated as a matter of justice because it 'limits the opportunity to engage in activities that others are able to engage in'.[81] Religious and moral beliefs are by contrast 'not an encumbrance in anything like the way in which a physical disability is an encumbrance', Barry argues, since their effect is not to limit opportunities, but to 'bring about a certain pattern of choices from among the set of opportunities that are similarly placed physically or financially'.[82] He insists that the existence of an opportunity does not depend on the subjective disposition of the individual to take advantage of it. Rather, the existence of an opportunity is 'an objective state of affairs'.[83] Since people should be held responsible for their beliefs, and belief-holders have the same opportunities as everyone else,

resources — 'should aim to improve the position of people who are physically handicapped' for example — 'but should not aim to mitigate or compensate for differences in personality' (ibid at 286) or for burdens attributable to the fact that some people's convictions and tastes are expensive, since someone with expensive tastes does not have fewer resources at his command. Dworkin distinguishes (as do all luck egalitarians) between chance and choice. If something results from choice, it is open to assignments of responsibility; if luck, then not: 'individuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck, but not from those that should be seen as flowing from their choices' (ibid at 287). A just society should therefore compensate an individual with a disability, which is a matter of bad luck. Why then should having expensive tastes and convictions not be considered a matter of bad luck? Dworkin acknowledges that certain kinds of cravings — lust for example — can be considered handicaps, and so be assimilated to resource deficiency *if the agent wishes he did not have them* because they interfere with what he wants to do with his life and give him frustration or pain if they are not satisfied (ibid at 82). Beliefs and convictions, by contrast, are 'interwoven with judgments of endorsement and approval'. They 'define for us what a satisfying or gratifying life would be'. In view of the agent's avowal of his commitments, it is, he thinks, 'bizarre' to call his having them bad luck (ibid at 291). As Dworkin puts it: 'Resources and handicaps . . . enable or limit us in their ability to do what we wish to do. Beliefs [and convictions] . . . — those we do not struggle against or hope to eliminate but rather take satisfaction in — determine what it is we wish to do. We enjoy or labour under the former. But we reason or feel or puzzle our way to the latter, and it is amongst the most basic of our ethical assumptions that responsibility for such judgment is our own.' (Ibid at 293.) An individual's personality may be unchosen, but he should nevertheless be held responsible for it in virtue of the fact that he identifies with the beliefs and tastes of which it is made up (ibid at 294). Compensation is in order only when people disidentify with their beliefs and tastes (in the sense of wishing they did not have them). Dworkin expresses disagreement with Cohen's contention that 'although someone whose religion imposes strenuous burdens on his life would not regard his faith as a handicap or wish to lose it if he could, there is nevertheless no reason why "we", who do not accept his religion, could not treat it as a handicap, and compensate him for its extra costs' (ibid at 295).

[80] Barry op cit note 9 at 36.

[81] Ibid at 36.

[82] Ibid at 37.

[83] Ibid at 37.

Barry argues that religious exemptions are not required as a matter of right or justice, though he thinks that they may be granted in a narrow range of cases out of a utilitarian concern for the alleviation of suffering.[84]

Several responses to Barry are open to supporters of a right to religious exemptions. If we wish to defend the claim that religious beliefs should be accommodated as a matter of justice in the way handicaps are, we may, following Cohen, argue that individuals often do not 'take satisfaction in' their beliefs as Dworkin puts it,[85] or 'freely embrace' them in Barry's formulation:[86] some people holding religious beliefs are too unreflective to form a second-order belief-avowing preference. We could add that while it may be true that most individuals whose religious beliefs hamper their lives would not wish that they did not have these beliefs, most would regret not that they have these beliefs, but that these beliefs happen to be expensive.[87] The relevant bad luck does not lie in having the belief, but only in its being expensive. We could also say, as Cohen does in a recent response to Dworkin, that the reason that Dworkin and Barry give for withholding compensation in respect of expensive tastes — individuals' approving identification with them — is a reason for *offering* rather than refusing compensation 'since it is the agents' very bad luck that a preference with which they strongly identify happens to be expensive, and to expect them to forgo or restrict satisfaction of that preference (because it is expensive) is, therefore, to ask them to accept an alienation from what is deep in them'.[88]

Not all equality of opportunity arguments in favour of religious and cultural exemptions rest on the idea that because religious beliefs are unchosen, they should be treated on a par with serious disability. David Miller asserts that equality of opportunity entails that people 'should have an equal chance to live the kind of life that their culture prescribes',[89] which obligates the state to 'respond in an even-handed way to the various aims and ambitions that people have'.[90] Miller challenges Barry's claim that unlike serious disabilities, religious and moral beliefs do not limit opportunities. Barry insists that the existence of an opportunity does not depend on the subjective disposition of the individual to take advantage of it. Rather, the existence of an opportunity is 'an objective state of affairs'.[91] As Miller argues, however, this is implausible, since an opportunity to do something is not just the physical possibility of doing it, but the possibility of doing it 'without

[84] Ibid at 39.

[85] Dworkin op cit note 79 at 293.

[86] Barry op cit note 9 at 37.

[87] See Cohen op cit note 73 and G A Cohen 'Expensive taste rides again' in Justine Burley (ed) *Dworkin and His Critics* (2004) 3 at 10–13.

[88] Cohen in *Dworkin and His Critics* ibid at 7.

[89] David Miller 'Liberalism, equal opportunities and cultural commitments' in Paul Kelly (ed) *Multiculturalism Reconsidered* (2002) 45 at 48.

[90] Ibid at 54.

[91] Barry op cit note 9 at 37.

incurring excessive costs, or the risk of such costs'.[92] Where the costs of taking advantage of the opportunity (or the risk of such costs) are too high, the opportunity is effectively blocked, as the opportunity of students of modest means to enter higher education may be blocked if their parents would be required to re-mortgage their homes for this purpose.

Miller argues that the costs that should attract our concern in the context of religious beliefs are not those relating to constraints *intrinsically* connected to the belief in question: 'It is no failure of opportunity that Jews cannot eat pork while others can.'[93] The problem arises where the conscientious beliefs intersect with legal or other norms of the wider society, so that the individual faces constraints over and above the constraints intrinsically connected to his commitments. This occurs where, for example, religious individuals feel conscientiously compelled to wear clothing forbidden by the dress code of a school or workplace. The costs of taking advantage of this educational or employment opportunity, which requires conduct inconsistent with the individual's conscientious beliefs, potentially include a violation of 'personal identity'[94] and integrity, as well as exclusion from the relevant religious community. These costs are 'sufficiently great that, by parity of reasoning with the higher education example ... the opportunity is effectively blocked'.[95]

Miller suggests, plausibly, that religious and other conscientious commitments should not be treated 'as though they were on a par with physical disabilities',[96] since those with physical handicaps are prevented from taking advantage of certain opportunities and there is nothing that they can do about it, whereas religious believers are in a position to reflect on and revise beliefs that were part of their upbringing and adopt new beliefs. Nevertheless, since it is 'reasonable to assume that rapid revision of these commitments would be costly'[97] we have 'good reason to think that an equal opportunity state should treat [conscientious] commitments as givens'.[98]

Jonathan Quong argues in an important article that even if religious beliefs are unchosen, justice requires that all individuals be given a reasonable chance to pursue their conception of the good, provided that everyone else has the same chance. He capitalises on Rawls's assertion that 'the state is to ensure for all citizens equal opportunity to advance any [permissible]

[92] Miller op cit note 89 at 51.
[93] Ibid at 50.
[94] Ibid at 56.
[95] Ibid at 52.
[96] Ibid at 54.
[97] Ibid at 55. Terry Eagleton *Reason, Faith and Revolution* (2009) 138–9 remarks that 'more is involved in changing really deep-seated beliefs than just changing your mind. ... Because certain of our commitments are constitutive of who we are, we cannot alter them without what Christianity traditionally calls a conversion, which involves a lot more than just swapping one belief for another'.
[98] Miller ibid.

conception of the good they freely affirm',[99] where fair equality of opportunity refers to 'the conditions that obtain when people with similar abilities and ambitions have the same chances of success'.[100] In Quong's view, granting exemptions will be *permissible* in cases in which a law restricts citizens from pursuing their conception of the good, but exemptions will be a *requirement of justice*, rather than merely permissible, in cases in which the collision between the religious or cultural beliefs in question and the law results in a believer's being prevented from taking up basic civic opportunities like employment and education, since this constitutes a denial of fair equality of opportunity. What is important for Quong is the opportunity to *combine* one's conception of the good with a basic civic opportunity, such as employment or education.[101]

The reason Quong gives for expanding equality of opportunity so that religiously-motivated practices should be considered when deciding whether employment and educational opportunities have been fairly allocated is that, although Rawls does not consider the holding of religious and cultural beliefs as a primary good, having the opportunity to pursue religious and cultural values is nevertheless

> 'generally seen as a fundamental opportunity in life. In the original position, participants would prefer a system of rules that enabled them to combine these opportunities with those of employment and education over a system of rules that required some individuals to make stark choices between religious . . . pursuits and the opportunities of employment and education. In order to realise fair equality of opportunity between citizens, we thus ensure that their *total sets of basic or primary opportunities* are roughly equal'.[102]

Quong's argument has merit from the standpoint of distributive justice, but is problematic in one respect. He argues that exemptions are only permissible, rather than required by justice, when the law burdens individuals with religious or cultural beliefs and that disadvantage does not affect the ability of individuals to avail themselves of the basic opportunities of citizenship: educational and employment opportunities. By contrast, many have the intuition that exemptions may be required as a matter of justice even in cases in which educational and employment opportunities are not affected. Quong's account identifies the clearest cases in which an exemption may be required by justice, but there may be others. For instance, when a law of general application incidentally burdens religious believers by preventing them from engaging in sacramental or liturgical practices, an exemption may be required by justice — depending, of course, on a contextual assessment of the burden placed on the state and the costs to other citizens were such an exemption to be granted.

[99] Rawls op cit note 12 at 192.
[100] Quong op cit note 71 at 58.
[101] Ibid at 64.
[102] Ibid at 66, emphasis in original.

V EGALITARIAN ARGUMENTS FOR EXEMPTIONS

A third argument for exemptions is grounded on the unfairness in the way in which, in modern democracies, some groups are treated relative to others.[103] I want to consider two variants of this egalitarian argument. The first proceeds by noting that in modern democracies legislatures representing majorities make laws that permit the religious practices of the majority. This disadvantages members of minority religious groups, whose religious practices are not similarly accommodated. They suffer a burden not imposed on members of the majority. In terms of this argument, fairness requires that redress be offered to the disadvantaged minorities in the form of reciprocal accommodation.[104] Langa CJ advances this justification for exemptions in *Pillay*, which involved a claim for an exemption by a Hindu pupil to permit her to wear a nose stud prohibited by a school uniform regulation:

> '[T]he [school uniform] code has a disparate impact on certain religions and cultures. The norm embodied in the code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear-studs, which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them.'[105]

A second egalitarian argument is that if the religious practices of members of any religious group, *not necessarily the majority group*, are accommodated by law (in the form of exemptions or otherwise), then fairness demands that in relevantly similar circumstances the religious practices of other groups should be accommodated, in the form of exemptions if appropriate. O'Regan J justifies granting an exemption in *Pillay* on these grounds. She implies, pace Langa CJ, that the school uniform was neutral, but since the school had granted exemptions in relevantly similar cases to permit 'the wearing of "Lakshmi strings" at certain times of the year; and the wearing of hide bracelets to mark respect after a funeral', fairness requires the granting of an exemption to a Hindu pupil to permit her to wear a nose-stud.[106] 'Exemptions had in the past been afforded to others . . . so the justification afforded by the school does not establish the fairness of the refusal in this case.'[107]

As Stuart White observes, however, neither of these two egalitarian arguments (arguments grounded in the unfairness of accommodating some but not others equally deserving) can be accepted as *complete* justifications for

[103] In this section, I draw extensively from Stuart White's excellent essay 'Exemptions as an egalitarian demand', available at *http://www.clb.ac.il/workshops/2011/articles/white.pdf*, accessed on 10 November 2011.

[104] See, for examples of this argument, Michael McConnell 'Free exercise revisionism and the *Smith* decision' (1990) *University of Chicago LR* 1109 at 1130–6; Stephen Carter *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993) 126–8; and Nussbaum op cit note 32 at 116–19 and 164.

[105] *Pillay* supra note 3 at para 44.

[106] Ibid para 170.

[107] Ibid para 164.

exemptions, because it may be that the initial accommodations relative to which those seeking an exemption are being compared may not themselves be justified.[108] If the initial accommodations are unjustified (non-comparatively), then justice may require not that initial accommodations be extended via further accommodations to other religious groups, but that existing accommodations be withdrawn. These egalitarian arguments would support only a 'second-best policy' for exemptions: if there are pragmatic reasons in favour of retaining the existing accommodations, then fairness requires that these accommodations be made reciprocal.[109]

Another weakness of these egalitarian arguments is that if no accommodations have been made as an initial matter, even though such accommodations would be justified non-comparatively, then egalitarian arguments in favour of an exemption would be unsuccessful. But in cases in which religious believers are entitled to an exemption as a non-comparative matter, their entitlement should not depend on whether other similarly situated groups have been accommodated.[110] Accordingly, egalitarian arguments for exemptions are neither sufficient nor necessary to make a case for exemptions in a completely just society. Nevertheless, the failure to accommodate members of a religious group when other, similarly situated religious believers have been accommodated may be unfair and this failure may constitute an injustice.[111] Considerations of fairness may therefore justify the granting of exemptions.

In light of these deficiencies in the two egalitarian arguments, we should notice, for example, that the reason O'Regan J gives in *Pillay* for considering the school's failure to grant an exemption unjustified — that it unfairly denies to an exemption to a pupil in circumstances relevantly similar to pupils previously granted exemptions — renders her justification for an exemption dependent on the school having previously granted exemptions from the school uniform regulations in favour of other pupils. But if these previous exemptions are unjustified (a possibility O'Regan J does not investigate), absent pragmatic reasons in favour of retaining them, they should be withdrawn rather than extended to the claimant in *Pillay*. Furthermore, had the school not previously exempted pupils from the school uniform regulations, the logic of O'Regan J's argument commits her to upholding the school's decision to withhold an exemption in favour of the Hindu pupil in question. But that seems mistaken, for a pupil may have a right to an exemption from a school uniform regulation to allow her to wear an item of clothing or jewelry as a symbol of religious commitment, even if no exemptions have previously been granted. She may be entitled to an exemption on the grounds that individuals should have the opportunity to pursue religious and cultural values, and should be in a position to combine

[108] White op cit note 103 at 8.
[109] Ibid at 8.
[110] Ibid at 9.
[111] Ibid at 10.

this opportunity with educational and employment opportunities. (I considered this justification for a right to exemptions in the previous section.) The point is not that O'Regan J's egalitarian argument does not justify allowing an exemption in *Pillay* — it may well do so — but that it is incomplete.

In an important recent book, *Religious Freedom and the Constitution*, Christopher Eisgruber & Lawrence Sager put forward an egalitarian argument in favour of exemptions. Their argument is grounded on the idea of *equal regard*: the requirement that the state 'show the same concern for the fundamental needs of all its citizens'.[112] Failures of equal regard occur because minority religious groups are vulnerable to, and entitled to protection against, discrimination. The comparably serious interests of minority religious groups may not be as favourably accommodated in law as are mainstream secular or religious interests and as a result they may be subject to undeserved disadvantage.[113] This anti-discrimination principle sometimes justifies special solicitude for religious believers in the form of exemptions.[114] Significantly, Eisgruber & Sager do not think that religion is special relative to secular commitments. They deny that religion merits advantageous treatment; rather, religious believers are entitled to special constitutional solicitude in cases where they have been subjected to undeserved disadvantage.

Eisgruber & Sager identify three kinds of failure of equal regard: cases in which there is an actual inequality in the treatment of different religions; cases in which there is an actual inequality in the treatment of religious interests relative to secular interests such as physical disability and financial hardship; and cases in which the law does not reflect actual unequal treatment between religions, but a religious practice is burdened and it is possible to determine, through counterfactual reasoning, that the law would have accommodated such a practice were a similar burden to be placed on a majority, or more mainstream, religious practice.[115]

The difficulties with the egalitarian justifications of exemptions discussed above apply equally to Eisgruber & Sager's account. Their account cannot be taken to offer a complete justification of religious exemptions because it assumes that initial accommodations of majority religious and secular interests are justified and then demands exemptions for minority religions on the grounds of equality.[116] This leaves open the question whether the state should ever, as a matter of non-comparative justice, accommodate religious groups with respect to generally applicable laws. Furthermore, the case for a religious exemption will in Eisgruber & Sager's account depend on whether the majority have as an initial matter accommodated their religious or secular interests, or whether they would have made an accommodation had the burden in question been placed on a majority religious practice. The

[112] Eisgruber & Sager op cit note 19 at 89.
[113] Ibid at 59.
[114] Ibid at 62.
[115] Ibid at 90–3.
[116] White op cit note 103 at 13.

justification for religious exemptions is held hostage to accommodations made for other groups in relevantly similar circumstances, and what accommodations the majority would make in relevantly similar circumstances.[117] Eisgruber & Sager respond to this objection by saying that 'special needs are ubiquitous and accommodations for them are common. As a result, it is nearly impossible to devise an example of a minority religious practice for which there is no secular or mainstream analogue'.[118] But, as White points out, why should a given religious group's claim for an exemption depend on whether 'some relevantly similar claim to an exemption has already been, or would be, acknowledged'?[119]

In addition, Eisgruber & Sager's assertion that already accommodated secular needs such as physical disability are 'plainly analogous'[120] to religious commitments in a way that ensures that religious interests are accommodated on the same basis as disability, an assertion also made by Langa CJ in *Pillay*,[121] is question-begging. As previously indicated, Dworkin and Brian Barry deny that religious commitments can be assimilated to disabilities. This is not to assert that Dworkin and Barry are correct, for arguments may be advanced to show that religious beliefs should be accommodated in the same way that we compensate those with disabilities. But Eisgruber & Sager offer no such arguments.

VII THE SPECIALNESS OF CONSCIENCE, AGAIN

Each of the preceding three kinds of arguments offered in support of a right to religious exemptions is either incomplete, under-inclusive, or fails to fit exactly with widely-shared intuitions concerning the circumstances in which religious exemptions should be granted. Nevertheless, there is some reason to think that there is a right to exemptions in *some circumstances*. For example, equality of opportunity arguments provide strong reasons to think that a pupil in a school or an employee in a workplace may have a right to an exemption from uniform or dress code regulations to permit her to wear adornment or jewellery freighted with religious import.[122] And the two egalitarian arguments I examined suggest that there may be circumstances in which, because some religious believers have previously been accommodated, fairness requires that redress be offered to other religious believers in the form of reciprocal accommodation.

I am not sure, however, whether any of the theories I have so far considered unequivocally supports the granting of an exemption in a case in

[117] Eisgruber & Sager op cit note 19 at 104–8 refer to this objection as the problem of 'accidental justice'.

[118] Ibid at 107.

[119] White op cit note 103 at 15.

[120] Eisgruber & Sager op cit note 19 at 91.

[121] *Pillay* supra note 3 paras 74–5.

[122] I have argued that justice requires the granting of religious exemptions in these circumstances in Patrick Lenta 'Muslim headscarves in the workplace and in schools' (2007) 124 *SALJ* 296.

which no previous accommodations have been made, the believers in question are not conscientiously committed to engaging in the practice, and equality of opportunity cannot be invoked to justify the right to an exemption. As I have already stated, many people share the intuition that religious believers may have a right to an exemption to permit them to use a banned drug as part of their religious rituals, where the drug is central to the liturgy of the church in question and its consumption does not harm or violate the fundamental rights of others, even if the consumption of the drug is not considered by believers as a conscientious commitment.[123]

I want to consider a final theory of religious exemptions, in many ways attractive, which would accord a right to an exemption in these circumstances. In her recent book, *Liberty of Conscience*, Martha Nussbaum offers a justification for conscience-based exemptions that defines conscience, idiosyncratically, as 'the faculty with which each person searches for the ultimate meaning of life', which is 'of intrinsic worth and value'. Respect for this faculty is owed in virtue of its status as a 'capability' of people.[124] 'From the respect we have for the person's conscience . . . it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except where that search violates the rights of others or comes up against some compelling state interest.'[125] Conscience 'calls for special protection' in the form of exemptions.[126]

[123] I share this intuition. See Patrick Lenta 'Religious liberty and cultural accommodation' (2006) 122 *SALJ* 352.

[124] Nussbaum op cit note 32 at 168–9. Nussbaum op cit note 60 at 79 includes the ability 'to search for ultimate meaning of life in one's own way' as among the central human functional capabilities. Nussbaum's capabilities approach may be summarised briefly as follows: beginning with a list of functions that are of central importance in human life, whatever else the person perceives or chooses, the capabilities approach asks whether individuals are capable of them or not. It is 'a necessary condition of justice for a basic political arrangement [that] it deliver to citizens a certain basic level of capability' (ibid at 71). Nussbaum describes her 'list of capabilities as a long list of opportunities for functioning, such that it is always rational to want them whatever else one wants' (ibid at 88). She includes in her list of capabilities, a list of things people ought to be able to do and be, 'being able to use one's mind in ways protected by . . . freedom of religious exercise. Being able to search for the ultimate meaning of life in one's own way' (ibid at 79).

[125] Nussbaum op cit note 32 at 169. The 'metaphysical impulse', the inclination of some toward a transcendentally grounded orientation in life, may have value by providing an account of the essential nature of reality and how human life fits into it, and in virtue of the consolation such an account may bring through the assuaging of pain and the generation of a positive attitude towards the world. Accounts of the meaning of life may be repositories of ethical values and aspirations. Having a conception of the meaning of life and life's ethical foundation may contribute to the fulfillment of some people. This may provide a reason for thinking that we should respect whatever faculty is required to form such a conception and may provide a reason for thinking that there is a presumption in favour of permitting people to live in accordance with their beliefs about the meaning of life and its ethical foundation.

[126] Ibid at 169.

Nussbaum's 'specialness of conscience' account is markedly different from accounts already considered such as Galston's, since Nussbaum defines conscience not as a matter of people acting consistently with perceived moral duties bearing on their conduct, but as a faculty people possess that enables them to engage with ultimate, metaphysical issues. She does not restrict the right to exemptions to cases in which performing an activity is a matter of duty: 'to recognize a burden only when the conduct in question is absolutely required by religion seems too prohibitive, ruling out cases of religiously central conduct that has not been authoritatively ordained'.[127] Neither is her account vulnerable to the objection that it unfairly treats religious commitments as special relative to non-religious commitments, since she extends the right to exemptions to claims by non-religious searchers after meaning 'who can give a good account of themselves'.[128] In Nussbaum's account, exemptions may be justified in cases where the conduct in question is not required yet is central to the believer's religion or sense of self.

VIII CONCLUSION

That concludes my survey of arguments in favour of recognising a right to exemptions. The extent to which these theories are successful in showing that the granting of religious exemptions is not unfair is likely to be controversial. Even supposing one or more theories successfully show that there is a right to religious exemptions, questions to some extent supplemental to any of the four theories will have to be posed to establish *which* claimants will have a right to exemptions:

1. To what extent does the claimant identify with the belief or set of beliefs that cause her to be burdened and how central are these beliefs to her conception of herself?[129] In general, the more central to a person's identity a set of beliefs, the more she will be burdened when a collision between these beliefs and the law prevents her from acting in accordance with these beliefs. The greater the burden placed on the individual, the stronger the claim for an exemption.
2. To what extent would the burdens imposed on religious believers by the relevant law or regulation be lessened if they 'engaged in reasonable coping behaviour that they ought to undertake'?[130] Could the religious practice that is the subject of the claim reasonably be modified, qualified or restricted?
3. Would granting an exemption impose costs on third parties? This may be a reason to refuse to grant an exemption, or to grant an exemption

[127] Ibid at 138.

[128] Ibid at 172. She endorses the US Supreme Court's decision in *Seeger* supra note 39 and *Welsh* supra note 43.

[129] The sincerity of the claimant's assertion that her opposition to conforming to the relevant legal requirement is the result of a conflict between her beliefs and the relevant law must, of course, be established.

[130] Arneson op cit note 74 at 1027.

more limited in scope than that claimed. We should, as Miller suggests, approach the issue of the costs that would be imposed by accommodating members of a group as a question of how the costs of cultural diversity should be distributed between the citizens that make up society.[131]

4. How strong is the state's interest in having the law or regulation enforced uniformly and without exception? At least some valid laws will be able to achieve their purposes even if they are not uniformly enforced.[132] School uniform regulations are like this, since the purposes that uniforms serve — discipline amongst other things — are unlikely to be frustrated by granting an exemption to a Muslim pupil to permit her to wear a headscarf. However, where granting an exemption would seriously frustrate the purposes the law or regulation in question is intended to further or would violate the rights of others, there may be no room for an exemption. There can be no exemption to a law proscribing murder. There can be no exemption to the rule mandating that motorists drive on the side of the road legally designated.[133]
5. Does the relevant law already accommodate the religious beliefs of the majority, or those of members of a minority group? If so, the granting of an exemption may be justified as a matter of comparative justice.

[131] Miller op cit note 89 at 55–8.

[132] There is a dispute about how common such laws are. According to William P Marshall 'In defense of *Smith* and free exercise revisionism' (1991) 58 *University of Chicago LR* 308 at 312 'the state interest in a challenged regulation will seldom be seriously threatened if only a few persons seek exemption from it'. For Barry op cit note 9 at 62, by contrast, religious exemptions will only be justified under 'a combination of very precise conditions that are rarely satisfied all together. It must be important to have a rule generally prohibiting conduct of a certain kind because, if this is not so, the way in which to accommodate minorities is simply not to have a rule at all. At the same time though, having a rule must not be so important as to preclude allowing exemptions to it. We are left with cases in which uniformity is a value but not a great enough one to override the case for exemptions'.

[133] To grant such an exemption would violate what Jeremy Waldron 'Tolerance and reasonableness' in Catriona McKinnon & Dario Castiglione (eds) *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (2003) 13 terms the criterion of 'compossibility'. That is, everyone should be permitted to travel safely on the road at the same time.