

University College London

Adjudicating the right to freedom of religion or belief in the  
liberal state

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## **Declaration**

I, Eugenio Enrique Velasco Ibarra Arguelles, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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## **Abstract**

In this dissertation, I state the case for the most robust judicial guarantee of the individual right to freedom of religion or belief which is compatible with the principle of equal liberty. In so doing, I endorse a decidedly liberal conception of religious freedom, which accords legal relevance to certain beliefs and practices because of the instrumental value they have for the individuals that hold them and engage in them. This conception stands in stark contrast to those which pick out certain beliefs and practices qua legally relevant based on some intrinsic quality. In a liberal state, then, the scope of the right to freedom of religion or belief is determined by the meaning that individuals assign to certain beliefs and practices. That the beliefs and practices which concern this right must be identified irrespective of any other criteria is required by the liberal commitment to treating individuals as free and equal persons, capable of forming, revising, and pursuing self-authenticating conceptions of the good. The laudable judicial and scholarly attempts to realise this ideal inadvertently fall back on non-liberal conceptions of religion in order to determine whether a belief and/or practice, in the context of a particular litigation, is protected by the right in question. In order to remedy this shortfall it is necessary to eschew what I call the dominant approach which endorses individual exemptions allotted by way of an objective evaluation of beliefs and a test of individual sincerity. Instead, the liberal paradigm is best served when judges are bereft of any information about the particular beliefs of claimants and/or the motivations for their actions. This judicial treatment of the right to freedom of religion or belief best respects its universal character and discloses its potential as a general right to liberty.

## **Impact Statement**

It is difficult to understate the social and political pressure that courts of law must increasingly endure when adjudicating on cases concerning the right to freedom of religion or belief. The judicial interpretation of this right is at the crux of some of the most contentious manifestations of diversity in contemporary liberal democracies. It is, therefore, paramount to ensure that the courts' discharge of this momentous responsibility is supported by a sound theoretical grounding. In exploring the apparent tension that exists between the liberal interpretation of this right defended by the theory, on the one hand, and the practice adopted by judges in most cases, the analysis offered in this dissertation has the potential to impact both the rich academic debate in the area of law and religion, as well as judicial decision-making in cases concerning the right at issue.

Inside academia, this contribution could serve as a catalyst to reconsider some assumptions that have framed the discussion over the complexities surrounding the adjudication of the right to freedom of religion or belief. More specifically, I think the criticisms directed at what I term the dominant approach to the adjudication of this right should impact two assumptions in particular: first, that an exemptions-based remedy is not only compatible but required in litigation in which this right figures, and; secondly, that some types of evaluations of the beliefs and practices of claimants are legitimate. By revealing the hidden tensions that underlie these two common assumptions when operating under a liberal conception of this right, this dissertation seeks to alter the current discursive parameters in order to redirect the numerous academic efforts populating this field of study towards more promising outcomes.

Outside academia, the proposals defended in this dissertation could profoundly affect the way in which courts approach and decide cases concerning the right to freedom of religion or belief. The specific impact in this regard is also twofold: first, by approaching cases without taking notice of the

beliefs and practices that underlie claims, judges will be able to evade accusations of bias, thereby rehabilitating their image as impartial arbiters of dispute which is of fundamental importance for the peaceful resolution of the myriad controversies that constantly make their way to the court of public opinion, and; secondly, by proposing an alternative to the exemption-based logic that figures prominently in the current judicial practice, the adjudication of the right according to my proposal could have far reaching political and legal consequences if judges succeed in engaging the other branches of government in the difficult task of finding novel solutions to unprecedented disputes.

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## Introduction

Throughout the *Warner* trial Judge Ryskamp inhabited this American double consciousness, at once separationist and evangelical, uneasily, I think, not sure how to resolve it. He confidently asserted the entire and complete right of every American to believe as she or he chooses while at the same time thoroughly enjoying arbitrating among competing views.

Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*<sup>1</sup>

The legal recognition of the right to freedom of religion or belief is a staple of a liberal democracy. The importance and relevance of this right is evidenced by its constant presence in discussions concerning the newfound challenges that characterise contemporary societies. The increasing individual and collective recourse to this right means that judges are called upon to play a prominent role in settling the disputes arising from ever more plural and idiosyncratic disputes. Although many academic analyses dedicated to this right have been instrumental in informing and elucidating this judicial engagement, some fundamental aspects of this engagement have unfortunately been overlooked. This project focuses on the apparent tension that exists between the interpretation of this right that many liberal scholars endorse and the relevance that judges accord both to the beliefs that underlie claims and to the motivations of claimants.

This tension is brilliantly captured by Winnifred Fallers Sullivan in the epigraph of this introduction. It appears as if judges are caught between the Scylla of acknowledging the subjective and individual character of the right to freedom of religion or belief and the Charybdis of finding objective means of allotting the benefits of this right in a context of ever-increasing diversity and atomization. In the face of this new environment, the liberal commitment to

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<sup>1</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, Princeton University Press, 2005, 6.

religious freedom has become strained, making it imperative to propose new schemes of cooperation among moral agents who do not share the same ethical or religious convictions. One particularly notable forum where this social diversity and its accompanying struggles are evinced in the form of unpredictable and seemingly cyclical controversies are the courts of law, who as a consequence receive ever-growing attention from the court of public opinion and from all political and social quarters. While the connection between the reliance on claims alleging a violation of the right to freedom of religion or belief as a predominant means of resolving disputes arising from diversity and the participation of the judiciary in this process seems commonsensical, it is not until recently that studies focused on the activity of this particular institution in these types of controversies have begun to appear. This dissertation aims to contribute to this burgeoning enterprise by offering a conceptual analysis of the apparent inconsistency identified by Fallers Sullivan in her aforementioned quote.

## 1. Research question and hypothesis

Is the judicial practice of submitting the beliefs of a claimant to an assortment of tests with the purpose, on the one hand, of identifying beliefs and practices falling within the scope of the right to freedom of religion or belief and, on the other hand, of establishing their motivations, compatible with the interpretation of the right to freedom of religion or belief uniting most liberal scholars and judiciaries? If not, what are the specific considerations that give rise to an incompatibility? Moreover, what alternatives, if any, are there? This project proceeds from the hypothesis that the concurrent commitment to both a practice of submitting the beliefs of claimants to manifold tests and to a liberal conception of this right is affected by a problem of incoherence, since these commitments seem to call for conflicting attitudes of intervention and restraint, respectively. More specifically, for a conflicting exercise of evaluation and non-evaluation of beliefs. However, the problem seems to arise from different

considerations since these evaluative practices test different aspects of a claimant's beliefs. Finally, and contrary to Fallers Sullivan who—as the title of her book suggests— does not see a way to overcome these difficulties, I think it is possible to resolve these issues by proposing a new judicial approach to this right according to the liberal conception but which avoids the pitfalls of the current practice.

## 2. A note on methodology

In order to test this hypothesis, the project will perform a predominantly theoretical analysis which engages with the debates considered in the Anglo-American literature in the area of law and religion produced by both political and legal theorists. Because these debates are deeply influenced by, and consistently refer to, the jurisprudence of the Supreme Court of the United States ('SCOTUS', from now on), the Supreme Court of Canada ('SCC', from now on), and the European Court of Human Rights ('ECtHR, from now on'), it is with the jurisprudence of these courts with which I will engage in order to provide evidence of the judicial practice that I have identified, as well as for the purpose of exemplifying my conceptual arguments. The reciprocal impact that scholarly proposals and judicial opinions have in this area of the law, as will be evidenced by the analysis which will be conducted in this dissertation is remarkable. And the selection of jurisdictions previously identified usually forms the backdrop on which academic efforts in this context are built, with variable emphasis on one or another. In other words, the area of law and religion has developed mostly around the judgments of these apex courts.

Beyond the relevance that these jurisdictions have over the academic debates in this area of the law, they are also among the judicial bodies with the most experience concerning the adjudication of the right to freedom of religion or belief. Furthermore, since the project aims at proposing a theory of adjudication of the right to freedom of religion or belief, not at the performance of a comparative undertaking in any strict sense, it will be argued that its

findings may also be of relevance to other jurisdictions that reflect the features of interest in their case law. However, in order to justify the appropriateness of this theoretical approach, it will be necessary to establish the similarities that exist between the legal material under consideration present in all of the jurisdictions which will be considered —ie the widespread legal recognition of a right to freedom of religion or belief— and which make this type of analysis possible. Further consideration of the jurisprudence concerning the right to the free development of the personality in Germany, Colombia and Mexico, as well as the aspect of the jurisprudence of the right to freedom of religion or belief relating to ‘essential practices’ in India, will also be required for the reasons which are explained in the overview of the project offered below.

The theoretical outlook of the project will consist in submitting both the theoretical arguments and these primary legal sources to an interpretative analysis based on an in-depth examination, both conceptual and normative in character, of the features at issue. This approach will also inform the critical analysis required to test the hypothesis when judging the success of the different standards currently used by the courts and which they think make it possible to accommodate both of the features in their decisions. After performing this test, having confirmed the hypothesis, then a normative analysis of the benefits and downsides of alternative proposals for the future of the adjudication of the right to freedom of religion will be deployed.

On a final note, it is important to mention that during the process of researching and writing this dissertation, in 2017 Cécile Laborde published a landmark contribution to the field entitled *Liberalism’s Religion*.<sup>2</sup> The sophisticated and encyclopedic nature of this book have been deeply influential for the structure and argumentative direction adopted in this dissertation. The importance of this work for the field has, therefore, made it a necessary reference point and the object of many of the issues considered here.

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<sup>2</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017.

### 3. Chapter overview

This dissertation is divided into three parts. The first part will aim to offer a detailed characterisation of each of the two features at issue: namely, the liberal conception of the right to freedom of religion or belief, on the one hand, and the practice of submitting beliefs to several standards—which I will refer to as the dominant approach to the adjudication of this right—, on the other. In Chapter 1, I provide a considered interpretation of the right to freedom of religion or belief, stipulating that a liberal conception is one which endorses to key tenets: first, that in a liberal state that acknowledges the principle of equal liberty, the value of the right to freedom of religion or belief is to be derived from the instrumental value that religious beliefs and practices have for the individual, and; secondly, that whether any particular set of beliefs and practices should be considered religious in this sense should be left to the subjective evaluation of the individual.

I defend this position by examining the masterworks of two giants of the liberal tradition in political and legal thought, John Rawls and Ronald Dworkin. I expound how it is that both of their theories offer strong normative grounds for the principle of equal liberty and then go on to explain how this principle gives rise to the two key tenets mentioned earlier. Both the instrumentality and individuality of religious freedom in the liberal state derive from the state's commitment to refrain from assigning privileges or burdens on the basis of an individual's *Weltanschauung*, meaning that it cannot make any thick objective evaluations regarding an individual's beliefs and practices. This, therefore, commits the state to adopt a hands-off attitude towards the beliefs and practices to which individuals assign ethical or religious meaning.

Moreover, in this same chapter, I consider several possible rationales for the right to religious freedom, giving special consideration to the principle of autonomy which figures prominently in the literature, and explain why I consider it to be more beneficial to settle for the rationale of integrity, by which

I mean the ability of an individual to act in accordance with how she thinks she ought to act, following Laborde.

I conclude my exposition of the liberal conception of the right to freedom of religion or belief by pointing to the jurisprudential recognition of the aforementioned features in the courts' caselaw. The richness of the evidence of the courts' commitment with this conception will be on full display throughout the dissertation, but it is possible to offer a brief sample of this endorsement by quoting some particularly transparent passages. In *United States v Ballard*, for example, the SCOTUS held that:

Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the *verity* of his religious views. The religious views espoused by respondents might seem *incredible*, if not *preposterous*, to most people. But if those doctrines are subject to trial before a jury charged with finding their *truth* or *falsity*, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a *forbidden domain*.<sup>3</sup>

In *Employment Division v Smith*, it went further when stating that:

It is no more appropriate for judges to determine the '*centrality*' of religious beliefs [...] than it would be for them to determine the '*importance*' of ideas [...] in the free speech field. [...] Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the *relative merits* of differing religious claims'. [...] [i]t is not within the judicial ken to question the *centrality* of particular beliefs or practices to a faith, or the *validity* of particular litigants' interpretations of those creeds'. [...] Repeatedly and in many different contexts, we have warned that courts must not presume to determine the *place* of a particular belief in a religion or the *plausibility* of a religious claim.<sup>4</sup>

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<sup>3</sup> *United States v Ballard*, (1944) 322 U.S. 78, 87.

<sup>4</sup> *Employment Division v Smith*, (1990) 494 U.S. 872, 887-88.

In Canada, the SCC for its part made a similar pronouncement, when asserting in its landmark judgement of *Syndicat Northcrest v Amselem* that:

[t]he State is in no position to be, nor should it become, the *arbiter of religious dogma*. [...] [Judges] should avoid judicially interpreting and thus determining, either explicitly or implicitly, the *content* of a subjective understanding of religious requirement, ‘obligation’, precept, ‘commandment’, custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion. [...] a court is not qualified to rule on the *validity* or *veracity* of any given religious practice or belief, or to choose among various interpretations of belief.<sup>5</sup>

The ECtHR, for its part, has also committed itself to a hands-off approach by holding in *Hasan and Chaush v Bulgaria* that: “The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are *legitimate*”.<sup>6</sup>

This liberal conception of the right in question, endorsed both by the academic literature and the judicial practice, coexists alongside another distinctive characteristic of the adjudication of the right to freedom of religion or belief, requiring individuals or groups alleging a violation of this right to justify their claims by expounding the beliefs underlying them. This practice, in other words, calls for the performance of some form of judicial evaluation of a claimant’s beliefs. This judicial assessment of the motivations or thought processes of the applicants is a crucial aspect in the courts’ decision-making which has not received careful critical consideration. I term this practice, the dominant approach to the adjudication of this right, and offer an account of its features in Chapter 2.

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<sup>5</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [50]-[51].

<sup>6</sup> *Hasan and Chaush v Bulgaria*, App. no. 30985/96, 26 October 2000, [78].

Before focusing on the structural features of the dominant approach, I open this chapter by offering a plausible rationale for it. I explain why I think the adoption of this practice finds its conceptual support on the mainstream acceptance of exemptions from otherwise valid rules as the appropriate remedy for a finding of a violation under this right. The individualized nature of this remedy, I suggest, is what incentivizes judges to look more carefully into the beliefs and practices of claimants. Having offered this explanation, I then consider the two features that I believe are constitutive of the dominant approach. The first feature is characterized by an inquiry into the objective merits of a claimant's beliefs and/or practices, while the second feature seeks to flesh out the motivations underlying the claim.

The specific forms that the first feature takes on in the caselaw differs from one jurisdiction to another. In the United States, courts are concerned with determining whether a law or practice substantially burdens a claimant's beliefs or practices; in Canada, claims must not be trivial or insubstantial, and; according to the ECtHR, claims must show some level of seriousness, coherence, importance, and cogency. The second feature, for its part, has a more unified manifestation in the form of a sincerity test which seeks, as its name suggests, to distinguish honest from insincere claims. The second part of this chapter is devoted to examining the manner in which this dominant approach appears in the courts' caselaw by focusing on some paradigmatic judgments.

This analysis brings to an end the first part of the dissertation. Having expounded the liberal conception of the right to freedom of religion or belief that I take to be the fixed starting point of this analysis and, subsequently, fleshed out the characteristics of the dominant approach to its adjudication, in Part II of the dissertation I submit each of the features of the dominant approach to a critical evaluation aimed at determining their compatibility with the liberal conception.

In Chapter 3, I focus on the first feature of the dominant approach. I start by noting that the concern of this project is limited to claims brought before

judges where a claimant alleges a violation of her right. This specification of the scope of my argument is meant to distinguish it from broader concerns regarding the legitimacy of state sponsored judgments of ethical salience in other contexts. In this sense, I explain that, even if one allows for state sponsored judgments of ethical salience in other forums, the particular issue with this first feature of the dominant approach is the difficulty that judges face when trying to justify a finding against a claimant who asserts that some belief or practice is ethically salient for her. I explain the precise nature of this justificatory difficulty by pointing to the reasons internalism that characterizes the liberal conception of the right to freedom of religion or belief.

I then proceed to explain why my objections to this first feature do not apply only, or even especially, to marginal beliefs or practices but, rather, to mainstream claims with equal force. I explain that the literature and the judiciary seem to rely on the notion of proxies in order to extend their protection to some beliefs and practices but not to others. I think this exercise betrays both the instrumental and the individual championing of the right that is characteristic of the liberal conception.

After making my point in theoretical terms, I then move on to consider the instantiations of this first feature of the dominant approach in the jurisprudence of the courts under consideration. I make several observations applicable specifically to each of them in order to establish the particular problems that each objective evaluation reveals.

In Chapter 4, I continue this critical analysis by focusing on the second feature of the dominant approach, namely, the subjection of claimants to a test of sincerity. I make the case that the problem with this feature is that, contrary to what happens in other types of cases where the judicial determination of a person's mental state is common practice, the liberal conception deprives judges from the evidentiary tools necessary to pick out insincere claims. Because the liberal conception assigns to individuals the role of determining what, for them, reaches the requisite level of ethical salience, it is therefore not possible for judges to rely on evidence that contradicts such a claim. The

subjective character of religious freedom according to the liberal conception rules out the use of objective evidence, which in turn renders any test of sincerity futile.

At the conclusion of this second part of the dissertation, I will have demonstrated that the dominant approach to the adjudication of the right to freedom of religion or belief stands in tension with its liberal conception. Part III, then, is devoted to proposing an alternative strategy for the adjudication of this right which is capable of overcoming the justificatory and evidentiary problems attaching to the dominant approach. I divide this proposal in two parts that point to different elements of the right.

In Chapter 5, I focus on the personal element of the right to freedom of religion or belief and defend its universal character. I explain that the dominant approach seems to downplay this aspect of the right by requiring claimants to justify their interests. On the contrary, I explain that the universal character of the right makes this practice questionable and *sui generis* when compared with how other civil and political rights are usually adjudicated. In cases where these other rights are at stake, judges are not concerned with evaluating the merits or motivations of claimants when engaging in a conduct falling under their scope. While many conceptual points of interest arise from this distinctive adjudicatory practice, for the purposes of the project, the main aim of highlighting this peculiar feature will be to demonstrate its contingency. Instead, I will argue that an adjudicative strategy that does not evaluate claimants' beliefs and practices is not only possible but more conceptually sound from a liberal perspective.

Then, in the sixth and final chapter of this dissertation, I explain that the material element of the right to freedom of religion or belief—that is, its scope—that best aligns with the liberal conception of the right in question is one that conceives it in the broadest possible terms as a right to freedom of action. Because the liberal conception leaves the assignment of ethical worth of beliefs and actions up to individuals, it is only by expanding the scope of the right in this manner that the liberal state can make true on its promise of

respecting persons' freedom in this regard. I demonstrate the plausibility of this proposal by pointing to the judicial experience of jurisdictions that recognize the right to the free development of the personality, which has an equivalent scope. I pay particular attention to jurisprudential developments in Germany, Colombia, and Mexico owing to their foundational, substantial, and newfound character, respectively. I conclude this chapter by noting the preference of adopting a reason-blocking conception of this right and consider how this conception relates to the practice of proportionality.

**Part I.** The liberal conception of the right to freedom of religion or belief and the dominant approach to its adjudication

In the first part of this dissertation, I establish the parameters of the research inquiry by, first, setting out the theoretical and jurisprudential understanding of the right to freedom of religion or belief from a liberal perspective and, subsequently, expounding the dominant approach to its adjudication promoted by scholars and carried out by influential courts. The aim of this initial segment is to bring together two of the most significant themes within the area of law and religion: first, and more generally, the appropriate place of religion in the liberal state and, second, and more specifically, the judicial treatment of claims alleging a violation of the right to freedom of religion or belief. These two initial chapters will serve as the backdrop against which: first, I direct the critical evaluation I offer in Part II, where I expose the tension between the liberal conception of the right to freedom of religion or belief and the dominant approach to this right's adjudication, and; secondly, I propose an alternative strategy for the judicial treatment of this right in Part III, which avoids the drawbacks of the dominant approach and is, thereby, consistent with the liberal conception.

## **Chapter 1.** The liberal conception of the right to freedom of religion or belief

In this opening chapter, I offer an account of what I will refer to, throughout this dissertation, as the liberal conception of the right to freedom of religion or belief. In speaking of a liberal conception, I do not mean to imply the existence of a unified, undisputed account of this right within this tradition of thought. Instead, I make use of this label in order to circumscribe a distinct view characterized by the espousal of two proposals regarding the interpretation of the right to freedom of religion or belief. The first of these proposals consists in locating the “*politico-legal*”<sup>7</sup> value of religion not in some inherent quality — sociological, historical, theological, or otherwise— but, rather, on some instrumental benefit —understood, for now, in the broadest possible terms— derived by individuals from the holding of certain beliefs and the engagement in certain actions —or refusals to act— in light of those beliefs. The second distinctive feature of this conception is the central role that it recognizes to the individual regarding the categorization of beliefs and actions —or refusals to act— as those to which that politico-legal relevance —because instrumentally beneficial— attaches. In simple terms, then, the liberal conception, according to my proposed stipulation, is defined by: one, the subjective valuing of religion, and; two, the recognition of the individual’s authority over the beliefs and actions —or refusals to act— that are to be considered religious.

This chapter’s two main sections expound the political justification for this conception and convey its judicial championing. The first section states the theoretical case for the two features I have singled out as distinctive of the liberal conception. There, I set out the theoretical basis and implications of the distribution of “religious” benefits according to the Rawlsian and Dworkinian accounts of the principle of equal liberty. In the subsequent subsections I explain how these accounts justify these features, clarify what exactly it is that

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<sup>7</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 2. Laborde uses this helpful term in order to assert “[t]hat the category of religion is less than adequate as a *politico-legal category*” at *ibid.*

the right is meant to protect and, finally, refer to some common misconceptions concerning this conception. The second section, for its part, recounts the way in which some notable domestic and international courts have understood their role in the adjudication of the right to freedom of religion or belief in line with this theoretical outlook.

## 1. Religion and the liberal state: the principle of equal liberty

A liberal state can be defined, in the broadest of terms, as one which, following Michael Walzer, “bars any attempt at communal provision in the sphere of grace”.<sup>8</sup> The idea that a political community should not distribute benefits nor dispense punishments on the basis of spiritual desert was a fundamental tenet of the philosophical attempts to put an end to the strife occasioned by the early manifestations of religious pluralism in modern Western States.<sup>9</sup> The birth pangs of this ideal, therefore, according to Mark Lilla, can be traced back to a “revolt against political theology in the West [...] directed against a Christian tradition of thought. It began, in the sixteenth and seventeenth centuries, as a local dispute involving a particular faith and a few kingdoms in a small corner of the globe”.<sup>10</sup>

It was, therefore, the desire to bring the wars over religion, which plagued Europe for centuries, to an end that initially led to the adoption of very limited political compromises. Chief among these were the principle of *cuius regio eius religio*, which allowed sovereigns to determine the religious affiliation of their states, first contained in the Peace of Augsburg (1555) and later reproduced

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<sup>8</sup> Michael Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, Basic Books, 1983, 245. Walzer uses this expression as part of his interpretation of the religious clauses of the First Amendment of the Constitution of the United States of America.

<sup>9</sup> In this regard, Cécile Laborde states categorically that: “The notion of religion is central to the historical elaboration of Western Liberalism, from the European wars of religion onward”. Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 1. For a detailed account of the impact that religious concerns had over the historical development of liberal thought in Europe see Larry Siedentop, *Inventing the Individual. The Origins of Western Liberalism*, Penguin Books, 2015.

<sup>10</sup> Mark Lilla, *The Stillborn God: Politics, Religion, and the Modern West*, Vintage Books, 2008, 17.

in the Peace of Westphalia (1648), as well as the recognition of a modest religious freedom within the same state in the Edict of Nantes (1598). The piecemeal and limited character of these first attempts to overcome religious strife, however, did not succeed in eliminating the oppression and persecution suffered by many religious minorities. A particularly dramatic episode of this prolonged struggle appears in Voltaire's *Traité sur la tolérance*, written in 1763, in which he denounces the popular and institutional fanaticism that led to the execution of Jean Calas, a Protestant who was wrongly convicted of his son's murder, supposedly committed in order to prevent him from converting to Catholicism.<sup>11</sup> Voltaire summarised his condemnation of the bigoted judicial authorities that decided the fate of the Calas family as follows: "They didn't have, couldn't have any proof against the family; but the wrong religion counted as proof".<sup>12</sup>

Perhaps the earliest, and still deeply influential, liberal attempt to stifle this partisan brutality was John Locke's *A Letter Concerning Toleration*.<sup>13</sup> In this canonical work of political theory, Locke advocates for the separation of civil interests from concerns regarding the salvation of the soul, very much in line with Christ's famous dictum: "Then repay to Caesar what belongs to Caesar and to God what belongs to God".<sup>14</sup> For Locke, the social discord over religious affairs could not be put to rest save by observing limits between the civil and the religious. In his words: "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to

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<sup>11</sup> Voltaire, *Traité sur la tolérance*, 1763 available at [http://www.bibebook.com/files/ebook/libre/V2/voltaire\\_-\\_traite\\_sur\\_la\\_tolerance.pdf](http://www.bibebook.com/files/ebook/libre/V2/voltaire_-_traite_sur_la_tolerance.pdf) (last accessed in September 2019). Voltaire dedicated this work to the memory of the death of Jean Calas and offers his account of this case in the first chapter. According to Voltaire, the evidence clearly suggested that the deceased had, in fact, committed suicide.

<sup>12</sup> *ibid.* The translation is mine.

<sup>13</sup> John Locke, *A Letter Concerning Toleration*, William Popple (trans.), 1689 available at <https://socialsciences.mcmaster.ca/econ/ugcm/3il3/locke/toleration.pdf> (last accessed in September 2019).

<sup>14</sup> Matthew 22:21, *The New American Bible*, United States Conference of Catholic Bishops, 2002 available at [http://www.vatican.va/archive/ENG0839/\\_INDEX.HTM#fonte](http://www.vatican.va/archive/ENG0839/_INDEX.HTM#fonte) (last accessed in September 2019).

settle the just bounds that lie between the one and the other”.<sup>15</sup> Locke’s main reasoning for stemming governmental intrusion over the individual’s spiritual affairs points out the inconsistency of using “outward force” in order to foster the “inward and full persuasion of the mind”, which is “the life and power of true religion”.<sup>16</sup> But beyond the argument concerning the folly of coerced conviction, Locke also endorses a limited form of spiritual pluralism —and, thereby, rejects theocratic ambitions— by stressing the uncertainty of religious obligations in the following terms: “The one only narrow way which leads to heaven is not better known to the magistrate than to private persons, and therefore I cannot safely take him for my guide, who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am”.<sup>17</sup>

Without negating the significance of this historical passage and of Locke’s foundational theoretical achievement for contemporary understandings of state-religion relations, it is important to emphasise the dissimilar nature of the multiple rationales for calling for some kind of religious freedom back then, from the one which predominates presently. In this regard, Ronan McCrea observes that religious freedom may be justified “as an instrument to avoid the suffering brought about by religious intolerance [...] as a means of avoiding the recurrence of [religious] persecution [and] as a means by which adherents of the majority faith can ensure that their faith will be tolerated in places where other faiths predominate”.<sup>18</sup> Uniting all of these rationales is their *goal-based* nature.<sup>19</sup> Or, in Ronald Dworkin’s words, they all

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<sup>15</sup> John Locke, *A Letter Concerning Toleration*, William Popple (trans.), 1689, 6 available at <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/locke/toleration.pdf> (last accessed in September 2019).

<sup>16</sup> *ibid* 7. A similar point is made by H.L.A. Hart regarding the legal imposition of morality in *Law, Liberty, and Morality*, Stanford University Press, 1963.

<sup>17</sup> *ibid* 19. I say limited pluralism because Locke does not extend his request for toleration to atheists given that “Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon [them]” at *ibid* 36.

<sup>18</sup> Ronan McCrea, *Religion and the Public Order of the European Union*, Oxford University Press, 2010, 107.

<sup>19</sup> The distinction between right-based, duty-based, and goal-based theories of political morality is explained by Jeremy Waldron in ‘Introduction’, *Theories of Rights*, Jeremy Waldron (ed.), Oxford University Press, 12. Whether a political theory can be classified as one or the

involve a policy consideration, which he defines as a “standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community”.<sup>20</sup> This instrumental championing of religious freedom is juxtaposed with its recognition as a right: as Dworkin states, “policy arguments about the need for peace are inadequate to justify a basic right”.<sup>21</sup> Therefore, a right-based account for the recognition of religious freedom calls for a different kind of justification. Because this dissertation is exclusively concerned with the right to freedom of religion or belief, the rationales underlying the early attempts to curb religious strife and secure civil peace cannot account for this feature of liberal political morality.

Nevertheless, the conception of religion understood as “the aspirations to salvation of the individual soul”, such as the one found in Locke’s writings, would serve as an antecedent for the political philosophies that would later advocate for a right to freedom of religion or belief based on the values of liberty and equality.<sup>22</sup> In this sense, according to Larry Siedentop, Locke’s metaphysical intuition yielded the foundations of the modern relationship between religion and the state:

The foundation of modern Europe lay in the long, difficult process of converting a moral claim into a social status. It was pursuit in belief in equality of souls that made the conversion possible. A commitment to individual liberty sprang from that. Combining the two values gave rise to the principle which more than any other has defined modern liberal thinking, the principle of ‘equal liberty’.<sup>23</sup>

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other, following Waldron “has to do with the way in which [a given political theory’s] requirements are generated and justified” at *ibid* 13.

<sup>20</sup> Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977, 22.

<sup>21</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 111.

<sup>22</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 15. Moreover Laborde regards Locke’s work as “A sensible place to locate the building block of the liberal theory of religion” at *ibid*.

<sup>23</sup> Larry Siedentop, *Inventing the Individual. The Origins of Western Liberalism*, Penguin Books, 2015, 339.

While contemporary liberal theory does, as Siedentop states, recognise pride of place to the principle of equal liberty, its historical instantiation and religious roots no longer play a significant role in its justification.<sup>24</sup> In the following three subsections, I consider the defense of this principle and its relationship with the justification of a right to freedom of religion or belief in the work of two of the foremost liberal thinkers of the late XXth and early XXIst centuries: John Rawls and Ronald Dworkin. I will, of course, focus on those aspects of their work that are most directly related to the appropriate place of religion in a liberal state. The main purpose of this inquiry will be to expose these authors' commitment to the two proposals I stipulated above as defining the liberal conception of the right to freedom of religion or belief: to restate, the instrumental valuing of religion and the authority of the individual over her religious beliefs.

### 1.1 Rawls: the first principle of justice and the political conception of the person

The archetypical statement and defense of the principle of equal liberty in contemporary liberal thought is advanced by John Rawls' in *A Theory of Justice*.<sup>25</sup> As is well-known, Rawls posits that in the original position —“an initial situation of equality”—,<sup>26</sup> “free and rational persons concerned to further their own interests” would agree on two principles of justice for the basic structure of their society.<sup>27</sup> The first of these principles, to which Rawls accords lexical priority,<sup>28</sup> dictates that “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of

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<sup>24</sup> A noteworthy counterexample is found in Michael J. Perry, ‘Morality and Normativity’, *Legal Theory* 13 (2007) 211.

<sup>25</sup> John Rawls, *A Theory of Justice*, rev. ed., Belknap Press-Harvard University Press, 1999.

<sup>26</sup> *ibid* 19.

<sup>27</sup> *ibid* 10.

<sup>28</sup> Rawls defines lexical priority as follows: “By the priority of liberty I mean the precedence of the principle of equal liberty over the second principle of justice. The two principles are in lexical order, and therefore the claims of liberty are to be satisfied first. Until this is achieved no other principle comes into play”. John Rawls, *A Theory of Justice*, rev. ed., Belknap Press-Harvard University Press, 1999, 214.

liberties for others”.<sup>29</sup> In a nutshell, what this principle requires is for “social primary goods” —ie “things that any rational man is presumed to want”—<sup>30</sup> to be doled out as extensively as possible so long as the distribution is able to benefit every individual equally. Basic liberties are social primary goods, meaning that any particular liberty must be recognized in the widest sense which is compatible with an equal range of liberty for all.

Among the “important” basic liberties, Rawls lists “liberty of conscience and freedom of thought”.<sup>31</sup> In fact, he goes as far as to say that “the question of equal liberty of justice is settled”, by which he means that it “is the *only* principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes”.<sup>32</sup> The intuitive appeal of the justice of setting up the basic institutions of society according to a principle that maximizes the equal distribution of liberty in matters of conscience —ie “moral, religious, or philosophical interests”—<sup>33</sup> is so strong that Rawls uses it as argumentative evidence for the principle of equal liberty in his conception of justice as fairness.

Later, in *Political Liberalism*, Rawls offered a detailed account of what he calls “a political conception of the person”, which seeks to explain the sense in which individuals “are conceived as thinking of themselves as free” in the original position.<sup>34</sup> The personal freedom presupposed of individuals according to Rawls is threefold. Individuals are free, first, “in that they conceive of themselves and of one another as having the moral power to have a conception of the good”.<sup>35</sup> Importantly, Rawls emphasizes that this aspect of individual freedom implies the capability of “revising and changing” the

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<sup>29</sup> John Rawls, *A Theory of Justice*, rev. ed., Belknap Press-Harvard University Press, 1999, 53.

<sup>30</sup> *ibid* 54.

<sup>31</sup> *ibid* 53.

<sup>32</sup> *ibid* 181. Emphasis added.

<sup>33</sup> *ibid* 180.

<sup>34</sup> John Rawls, *Political Liberalism*, exp. ed., Columbia University Press, 2005, 29.

<sup>35</sup> *ibid* 30.

conceptions which an individual affirms throughout her lifetime.<sup>36</sup> In fact, for Rawls, this allowance for the shifting of conceptions is constitutive of “equal citizenship”, given that an individual’s rights and recognition remains equal even when her conceptions vary.<sup>37</sup> In other words, changes in religious affiliation, social class, or any other akin attributes, have no bearing on an individual’s political status.<sup>38</sup>

A second respect in which individuals are free is “that they regard themselves as self-authenticating sources of valid claims”.<sup>39</sup> What this means is that an individual can “make claims on their institutions so as to advance their conceptions of the good” and that these claims are regarded “as having weight of their own apart from being derived from duties and obligations specified by a political conception of justice”.<sup>40</sup> The validity of an individual’s claim, then, is independent from any considerations regarding its pedigree. What matters, from a political perspective, is solely that a free person has made a claim on the institutions of the community, and this fact is enough for the claim to be taken seriously: ie as something which deserves to be engaged with on its own terms. To clarify this point, consider an individual whose conception of the good calls for a certain action *X* to be performed. If the validity of her claim is self-authenticating, then it is not necessary for this person to couch her claim within a given conception *Y*. Although it is perfectly possible for such an action *X* to be contained in such a conception *Y*, this fact is beside the point because the claim that action *X* is required derives its authority from the fact that a person considers it to be the case, independently of whether some additional authoritative source, such as a conception *Y*, can also be adduced for the requirement of action *X*.

The third, and final, respect in which individuals can be regarded as free, according to Rawls, is “that they are viewed as capable of taking responsibility

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<sup>36</sup> John Rawls, *Political Liberalism*, exp. ed., Columbia University Press, 2005, 30.

<sup>37</sup> *ibid*

<sup>38</sup> Though it may impact their “noninstitutional or moral identity”. John Rawls, *Political Liberalism*, exp. ed., Columbia University Press, 2005, 30.

<sup>39</sup> *ibid* 32.

<sup>40</sup> *ibid*.

for their ends”.<sup>41</sup> This entails the commitment, on the part of the individual, of “[adjusting] their ends so that those ends can be pursued by the means they can reasonably expect to acquire in return for what they can reasonably expect to contribute”.<sup>42</sup> This is closely related to the principle of equal liberty because it conditions the potential universe of ends pursued by an individual’s conception based on the possibilities that are also available to others. The fairness of a system of social cooperation depends on the acknowledgement that the distribution of social primary goods among individuals cannot depend on the “strength and psychological intensity of their wants and desires” but, rather, on considerations that take note of the burdens that the pursuit of certain ends by any particular individual imposes on others.<sup>43</sup>

## 1.2 Dworkin: dignity, ethical independence, and equal concern and respect

Another prominent statement of the principle of equal liberty is found in the work of Ronald Dworkin, who justifies “the institution of rights against the Government” on “one or both of two important ideas”: human dignity and political equality.<sup>44</sup> In *Justice for Hedgehogs*, Dworkin argued that the only “available justification” underlying the right to freedom of religion or belief is dignity.<sup>45</sup> However, he does not use this term vaguely, or merely as a “placeholder” that “[carries] an enormous amount of content, but different content for different people”.<sup>46</sup> On the contrary, Dworkin offers a very detailed account of this concept, which he constructs from very accessible ethical standards that focus on “how we ought to live ourselves”.<sup>47</sup> Ethics, he explains,

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<sup>41</sup> John Rawls, *Political Liberalism*, exp. ed., Columbia University Press, 2005, 33.

<sup>42</sup> *ibid.* 34.

<sup>43</sup> *ibid.*

<sup>44</sup> Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1978, 198.

<sup>45</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 375-76.

<sup>46</sup> Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’, 19(4) (2008) *European Journal of International Law* 655, 678.

<sup>47</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 191.

“is the study of how to live well”.<sup>48</sup> Living well is objectively important.<sup>49</sup> This means that “[w]e are charged to live well by the bare fact of our existence as self-conscious creatures with lives to lead [...]”.<sup>50</sup>

The value of living well is based on the principles of self-respect and authenticity.<sup>51</sup> The principle of self-respect “insists that I must recognise the objective importance of my living well”.<sup>52</sup> The principle of authenticity holds that “each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses”.<sup>53</sup> Authenticity, however, should not be confused with eccentricity: the relevant aspect of this principle is that “you live in response to, rather than against the grain of, your situation and the values you find appropriate”.<sup>54</sup> Together, these two principles of living well construct Dworkin’s conception of dignity.<sup>55</sup> Of course, a personal account of what makes one’s own life successful —ie the ethical judgements that guide one’s own thoughts and actions— is not fixed indefinitely.<sup>56</sup> A person can, and most probably will, slightly adjust or radically modify her ethical perceptions in accordance with her experiences, personal reflections, interactions with others and the influence of the cultural environment that surrounds her. The ethical persona of every individual, therefore, has the potential of being in a state of constant flux. This is true of every individual, including those who espouse what many may consider to be extreme forms of religious identity, because, as George Letsas notes: “It would be disrespectful

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<sup>48</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 13.

<sup>49</sup> *ibid* 196.

<sup>50</sup> *ibid*

<sup>51</sup> *ibid* 203-04.

<sup>52</sup> *ibid* 205.

<sup>53</sup> *ibid* 203-04.

<sup>54</sup> *ibid* 209-10.

<sup>55</sup> *ibid* 203-04.

<sup>56</sup> *ibid* 210.

of the rational agency of believers to assume that their religious convictions are unshakable, not subject to change”.<sup>57</sup>

More recently, in his posthumous *Religion Without God*, Dworkin defended a self-described “radical”<sup>58</sup> interpretation of the right to freedom of religion or belief, which consists in “abandoning the idea of a special right to religious freedom [and] consider instead applying [...] only the more general right to ethical independence”.<sup>59</sup> Dworkin points out that the use of the term “religion” in the First Amendment to the American Constitution was the result of the historical circumstances of its drafting, but argues that “we make best contemporary sense of the right, and supply the best available justification for it, by taking religious tolerance as an example of [a] more general right”.<sup>60</sup> In other words, the right to freedom of religion or belief, understood as a general right to ethical independence “fixes on the relation between government and citizens: it limits the reasons government may offer for any constraint on a citizen’s freedom at all”.<sup>61</sup>

The limits imposed by this conception of this right against governmental action observes a distinction suggested by Dworkin between the “freedom” and the “liberty” of the person: the former refers to the “power to act in whatever way he might wish, unimpeded by constraints or threats imposed by others or by a political community”, while the latter consists of “the area of his freedom that a political community cannot take away without injuring him in a special way: compromising his dignity by denying him equal concern or an essential feature of responsibility for his own life”.<sup>62</sup> So while the political community may, in some cases, legitimately restrict the freedom of the individual, it may

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<sup>57</sup> George Letsas, ‘Is There a Right Not to Be Offended in One’s Religious Beliefs?’, *Law, State and Religion in the New Europe: Debates and Dilemmas*, Lorenzo Zucca and Camil Ungureanu (eds.), Cambridge University Press, 2012, 257.

<sup>58</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 129.

<sup>59</sup> *ibid* 132.

<sup>60</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 158.

<sup>61</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 133.

<sup>62</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 366.

never negate his liberty without also compromising his ethical independence. Traffic signals are an excellent example of an instance where freedom is plainly restricted by the state. However, this restriction does not affect the liberty of any individual, even if one is to hold an unorthodox ethical conviction regarding the immorality of highway regulations, because the idea of ethical independence acknowledges a distinction “between what a government may not do to its citizens for any reason and what it may not do to them for certain reasons”.<sup>63</sup> In order to uphold the ethical independence of its citizens, the liberal state may never forbid the individual from pursuing the options that his ethical duties require of him because it considers them to be “unworthy”.<sup>64</sup> This would be an illegitimate exercise of state power in a liberal democracy. However, the state may legitimately constrain his options for reasons that are ethically neutral: ie reasons that do not prejudge the worthiness or value of any ethical conviction. So, to John Stuart Mill’s famous statement that “over himself, over his own body and mind, the individual is sovereign”,<sup>65</sup> one must add that “government may not constrain foundational independence for any reason except when this is necessary to protect the life, security, or liberty of others”,<sup>66</sup> or as long as it does so for ethically neutral reasons.

Running alongside this dignity-based justification of the right to freedom of religion or belief is another based on political equality, which is captured by Dworkin’s well-known postulate that government must treat people with “equal concern and respect”.<sup>67</sup> Although commonly repeated as a self-evident mantra, it is important to acknowledge what each of these two terms actually require: by “concern”, Dworkin means that the government must treat

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<sup>63</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 368.

<sup>64</sup> *ibid* 212.

<sup>65</sup> John Stuart Mill, *On Liberty*, 1859, 13 available at <https://socialsciences.mcmaster.ca/econ/ugcm/3il3/mill/liberty.pdf> (last accessed in September 2019). The gist of this idea had been acknowledged earlier by Article 4 of the Declaration of the Rights of Man and of the Citizen (1789): “Liberty consists in the freedom to do everything which injures no one else [...]”.

<sup>66</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 368-69.

<sup>67</sup> Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1978, 273.

individuals “as human beings who are capable of suffering and frustration”; whereas by “respect”, he means “as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived”.<sup>68</sup> Equal concern, therefore, stands against the privileging or burdening of certain persons because they are thought to be less or more able, respectively, to withstand suffering or more or less able, again respectively, of enjoying certain aspects of the human experience. Equal respect, on the other hand, entails a commitment not obstruct an individual’s pursuit of her conception of the good on the basis of societal disapproval.

### 1.3 The two features of the liberal conception of the right to freedom of religion or belief

These two influential accounts of the liberal state and, more specifically, of the values that justify a right to freedom of religion or belief in such a polity, are in agreement with the two features that I stipulated as constitutive of its liberal conception. In other words, the politico-legal relevance of religion is *instrumental* and *individual*. A good shorthand for this conception appears in a text co-authored by a former United Nations Special Rapporteur on freedom of religion or belief: “freedom of religion or belief protects ‘believers rather than beliefs’”.<sup>69</sup> While naturally related, for the purpose of clarity, it is important to consider each of the two aspects of the liberal conception of the right to freedom of religion or belief in turn. The instrumentality of religious freedom highlights the distinction that exists between the beliefs themselves—to which the liberal state accords no inherent value—and the benefits which an individual draws from them—where the entirety of their politico-legal relevance is to be found. On the other hand, the individualism of this conception is a corollary of its instrumentality: because beliefs are not accorded any inherent

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<sup>68</sup> Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1978, 272.

<sup>69</sup> Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief. An International Law Commentary*, Oxford University Press, 2016, 11.

value, it is only possible for the state to pick out those which deserve political-legal protection based on an individual's identification of certain beliefs as such. As will become apparent throughout this dissertation, particularly in chapters 3 and 4, the upshot of this individualism has not been fully grasped by advocates of this conception. It's instrumentality, on the other hand, seems settled.

### 1.3.1 The instrumentality of religious freedom

In line with this broad agreement regarding its instrumentality, most recently, Tarunabh Khaitan and Jane Calderwood Norton suggest that the right to freedom of religion or belief is to be understood from "the committed perspective of the (non)adherent".<sup>70</sup> More fully, they state that:

The *committed* or *internal* point of view is the point of view of the religious adherent. An adherent strives to believe in (what she thinks are) the tenets of her religion, and tries to practise (what in her view) it demands of her. From the *committed* perspective, in other words, religious adherence involves a commitment to some combination of a set of *beliefs* and *practices*.<sup>71</sup>

They contrast this committed or internal perspective with a "non-committal (public) point of view" that is to be adopted with regard to the right against religious discrimination.<sup>72</sup> The adoption of these two different points of view is meant to evidence the distinct interest underlying each right: "Religious freedom is best understood as protecting our interest in religious (non)adherence. The right against religious discrimination is best understood as protecting our interest in the unsaddled membership of our religious

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<sup>70</sup> Tarunabh Khaitan and Jane Calderwood Norton, 'The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions', *International Journal of Constitutional Law* (forthcoming) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274123](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123) (last accessed in June 2019).

<sup>71</sup> *ibid*

<sup>72</sup> *ibid*

group”.<sup>73</sup> The right to freedom of religion or belief is, therefore, to be understood *subjectively*, as protecting a person’s interest in holding beliefs and engaging in practices informed by those beliefs. It, therefore, eschews any attempt to protect beliefs and practices as such, ie independent from the interest of some person who holds them or engages in them.

This instrumental justification of religious freedom is familiar in the work of many liberal scholars. Timothy Macklem, for instance, straightforwardly explains that: “The justification for religious freedom is not to be found in the articles of religious belief, however ecumenically described those articles may be”.<sup>74</sup> But perhaps the best-known statement of this instrumentality is found in Jocelyn Maclure and Charles Taylor’s *Secularism and Freedom of Conscience*, where in a chapter titled The Subjective Conception of Freedom of Religion and the Individualization of Belief, they begin by categorically asserting that: “The special legal status of religious beliefs is derived from the role they play in people’s moral lives rather than from an assessment of their intrinsic validity”.<sup>75</sup> The reason for grounding this special status instrumentally, they explain, is the fact that “A liberal and democratic state acknowledges the limits of practical reason with respect to the question of the meaning and ultimate aims of existence” and, therefore, such a state must acknowledge that “It is up to individuals, perceived as *moral agents* capable of providing themselves with a conception of the good, to position themselves in relation to the different understandings of the world and of the meaning of human life”.<sup>76</sup>

Recall that Rawls’ conjecture regarding the recognition of liberty of conscience in the original position also followed from the intuition that individuals under the veil of ignorance would not gamble their religious

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<sup>73</sup> Tarunabh Khaitan and Jane Calderwood Norton, ‘The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions’, *International Journal of Constitutional Law* (forthcoming) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274123](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123) (last accessed in June 2019).

<sup>74</sup> Timothy Macklem, ‘Faith as a Secular Value’, *McGill Law Journal* 45 (2000) 1, 4.

<sup>75</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, Jane Marie Todd (trans.), Harvard University Press, 2011, 81.

<sup>76</sup> *ibid*

interests on the off chance that they align with those of the majority. Instead, individuals in those conditions would choose to safeguard those interests by allowing everyone to freely pursue them. Dworkin, for his part, bases the right to freedom of religion or belief on the individual's dignity, which he connects to the notion of living well, and more precisely, "the basic principle that questions of fundamental value are a matter of individual, not collective, choice".<sup>77</sup> The logical upshot of these justifications for the right to freedom of religion or belief is a normative account that focuses exclusively on the well-being of the individual and which, at the same time, renders illegitimate any attempt on the part of the state to assign any ultimate value to certain beliefs and practices. The reason for this prohibition is obvious: governmental assignment of intrinsic value to some beliefs and practices but not to others would limit—either condition or restrict—the individual's pursuit of certain conceptions of the good. This would have an impact on the political equality or, in Rawls' terms, on everyone's equal citizenship, which is a staple of the liberal state and which would, therefore, make this kind of polity indistinguishable from those that recognize different political statuses on the basis of religious affiliation. A political arrangement which, as I stated earlier, was characteristic in Europe during the wars of religion.

Although it is not the ambition of this project to envelop the multiplicity of political and legal issues arising from the phenomenon of religion, it is worth noting that the discussion of these affairs has started to turn away from its traditional discursive parameters and towards the broader values of freedom and equality, in line with this project.<sup>78</sup> In this sense, the appeal of relying on the notions of equality and liberty when approaching these issues instead of resorting to the more restricted and history-laden concepts of *laïcité* and secularism is beginning to become more apparent in the academic literature. As Eduardo Mendieta and Jonathan Vanantwerpen explain: "the very

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<sup>77</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 123.

<sup>78</sup> In doing so, it defies the debates that "pervasively employ a distinction dividing the 'secular' from the 'religious'". Steven Smith, 'The 'Secular', the 'Religious', and the 'Moral': What Are We Talking About?', *Wake Forest Law Review* 36 (2001) 487, 496.

categories of the religious and the secular —and of secularism and religion— are being revisited, reworked, and rethought”.<sup>79</sup> One distinguished move in this regard, is Charles Taylor’s observation that “the idea that secularism makes a special case of religion arises from the history of its coming to be in the West (as does, indeed, the name)”<sup>80</sup> and, therefore, proposes to replace the concept of secularism by disaggregating it into the principles of the French Revolution: equality, liberty and fraternity.<sup>81</sup> This proposal allows him to question and reframe the locus of the concerns arising from the growing pluralism in contemporary societies in the following terms: “We think that secularism (or *laïcité*) has to do with the relation of the state and religion; whereas in fact it has to do with the (correct) response of the democratic state to diversity”.<sup>82</sup> In this same vein, Larry Siedentop substitutes a historically rooted account of secularism for one which captures its more abstract aspirations, as evidenced in the following quote: “What is the crux of secularism? It is that belief in an underlying moral equality of humans implies that there is a sphere in which each should be free to make his or her own decisions, a sphere of conscience and free action”.<sup>83</sup> Given that the right to freedom of religion is grounded in precisely these same values and, as will be stated below, given that it is present in the legal orders of all liberal states, shifting attention from the contested concept of secularism towards this more straightforward and more agreement-generating legal tool might prove useful.

### 1.3.2 The individualism of religious freedom

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<sup>79</sup> Eduardo Mendieta and Jonathan Vanantwerpen, ‘Introduction: The Power of Religion in the Public Sphere’, *The Power of Religion in the Public Sphere*, Eduardo Mendieta and Jonathan Vanantwerpen (eds.), Columbia University Press, 2011, 1.

<sup>80</sup> Charles Taylor, ‘Why We Need a Radical Redefinition of Secularism’, *The Power of Religion in the Public Sphere*, Eduardo Mendieta and Jonathan Vanantwerpen (eds.), Columbia University Press, 2011, 37.

<sup>81</sup> *ibid* 34-35.

<sup>82</sup> *ibid* 36.

<sup>83</sup> Larry Siedentop, *Inventing the Individual. The Origins of Western Liberalism*, Penguin Books, 2015, 361.

However, this account of the liberal conception of the right to freedom of religion or belief would be incomplete if it were not complemented by a further precision regarding the beliefs and practices that are capable of attaining the instrumental value underlying religious freedom. In other words, it is important to answer the question: should any belief or practice receive the protection of the right to freedom of religion or belief or, to the contrary, should this protection be restricted only to a subset of beliefs and practices? On this point, there seem to be a multitude of competing views amongst liberal scholars.

On the Rawlsian and Dworkinian accounts considered above, there seems to be no reason for restricting the beliefs and practices deemed to fall within the scope of this right. At least explicitly, neither of these two authors call for any limitation of this sort. On the contrary, their justification of this right based on the pursuit of the conception of the good points in the opposite direction. In Rawls' case, this view seems to be strengthened by the second sense of personal freedom which, to restate, entails the recognition of individuals as self-authenticating sources of valid claims. This self-authenticating quality appears to rule out any kind of second-guessing or elimination of beliefs and practices by third parties against an individual's claim to the contrary. If it were possible to defeat an individual's claim that something is a belief or practice attaching to her religious freedom by offering reasons against that claim, it is hard to see how this would respect any notion of self-authentication. In Dworkin's case, the commitment to an all-encompassing right based on an individual's ethical independence and, more specifically, the principle of authenticity, appears to contradict the possibility of limiting the right only to certain beliefs and practices even more clearly. This is rendered even less contestable when considering the examples he offers in defense of his interpretation of this right as a general right to ethical independence: namely, he equates the political significance of consuming drugs as part of a religious ritual with consuming the same drugs simply in order to get high.<sup>84</sup>

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<sup>84</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 125-26.

Cécile Laborde recently declared her alignment with this position when stating the following:

My approach, therefore, departs from objective conceptions of the demands of religion (or culture). Individuals might be mistaken about what is demanded of them; they might come up with wildly eccentric or idiosyncratic beliefs and practices; they might press highly heterodox interpretations of their religion, and so forth. But as integrity is understood as an individual, subjective value, it follows that only the individual is competent to determine what her own integrity demands. The alternative—judging individual practices in relation to some religious orthodoxy—is unacceptable to liberal egalitarians.<sup>85</sup>

The meaning and relevance of Laborde’s mention of integrity in the above passage will be considered further below but, what is most pertinent for present purposes, is the inclusion of “wildly eccentric or idiosyncratic beliefs and practices” into the category of matters protected by religious freedom. I consider that Laborde’s statement—which I also take to be consistent with Rawls and Dworkin on this point—represents the best account of the liberal egalitarian ethos. The ethical pluralism among individuals cannot be captured by any subset of beliefs and practices. If individuals are to be truly free to pursue their own conceptions of the good, then it is not possible to rule out any beliefs and actions as not being susceptible of aiding individuals in doing so.

Moreover, this broad approach seems to be more capable of dealing with the manifestations of pluralism in contemporary liberal societies given that, to quote Charles Taylor: “Something has happened in the last half century [...] which has profoundly altered the conditions of belief in our societies”.<sup>86</sup> Taylor credits this alteration to what he terms a “culture of ‘authenticity’” which acknowledges that “each of us has his or her own way of realizing one’s own humanity, and that it is important to find and live out one’s own, as against

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<sup>85</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 205-06.

<sup>86</sup> Charles Taylor, *Varieties of Religion Today: William James Revisited*, Harvard University Press, 2003, 79-80.

surrendering to conformity with a model imposed from outside, by society, or the previous generation, or religious or political authority”.<sup>87</sup> This more individualised *ethos* cannot be fully accounted for under a framework that assumes that certain beliefs and practices cannot play an important role in the life plan of any particular individual. In this sense, I agree with John Bishop’s suggestion that the justifiability of beliefs and practices falling within the scope of the right to freedom of religion or belief is “ultimately a question about *moral* justifiability, and, in particular, a question about the moral justifiability of *taking those beliefs to be true in one’s practical reasoning*”.<sup>88</sup>

While I, therefore, consider that the best account of the liberal conception of the right to freedom of religion or belief is one that does not rule out a priori any kind of belief and practice from the catalogue of beliefs and practices protected by this right, it is necessary to acknowledge other viewpoints within this tradition of thought. However, it is important to note also that in arguing for a limitation of the beliefs and practices protected by the right, these authors remain committed to the individualistic feature insofar as they leave it up to the individuals to determine which of those beliefs and practices have instrumental value for them. It is possible to identify two different strategies for circumscribing religious freedom only to certain beliefs and practices: evaluative and sociological.

The evaluative strategy employs an objective distinction based on the substance of beliefs and practices and assigns them a divergent value. Martha Nussbaum, for instance, suggests that the beliefs and practices that should concern religious freedom are those that have to do with “ultimate questions, questions of life and death, the meaning of life, life’s ethical foundation, and so forth”.<sup>89</sup> I suggest that this evaluative agenda is incompatible with the liberal conception of the individual because it fails to respect the authenticity of free

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<sup>87</sup> Charles Taylor, *Varieties of Religion Today: William James Revisited*, Harvard University Press, 2003, 83.

<sup>88</sup> John Bishop, *Believing by Faith. An Essay in the Epistemology and Ethics of Religious Belief*, Oxford University Press, 2007, 33.

<sup>89</sup> Martha Nussbaum, *Liberty of Conscience. In Defense of America’s Tradition of Religious Equality*, Basic Books, 2008, 168.

persons. What gives meaning to one's life—in response to Maclure and Taylor—and what can be considered ultimate or foundational in ethical matters—in response to Nussbaum—should not be exogenously established. Taking pluralism seriously entails the acknowledgement that the importance, depth, seriousness, or any other evaluative label applied to beliefs and practices, cannot be assigned objectively without benefiting or impairing certain conceptions of the good and, more specifically, the authenticity and self-authenticating prerogatives of at least some individuals. The comprehensive critical analysis of this evaluative strategy will be fully fleshed out in Chapter 3.

There is, however, a different limiting strategy that sorts out beliefs and practices based on their social backing. According to this strategy, the beliefs and practices protected by the right to freedom of religion or belief protect “features of a collective way of life”.<sup>90</sup> Andrew Koppelman, for instance, interprets Rawls’ defense of liberty of conscience in a manner that distinguishes the commitments made in the original position with those that are later enshrined in the constitutional arrangements of a given polity.<sup>91</sup> In this latter stage, Koppelman asserts that it is perfectly legitimate for the contours of the right to be determined with regard to the beliefs and practices that actually exist in that particular society. In his words: “At the constitutional stage, then, it is possible for the parties to take account of which ‘forms of belief and conduct’, in *this* culture, are particularly likely to be important to the natives. The constitutional convention, aiming to institutionalize ‘liberty of conscience’, should try to discern which interests have that degree of urgency”.<sup>92</sup>

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<sup>90</sup> Michael Walzer, *On Toleration*, Yale University Press, 1999, 69.

<sup>91</sup> Andrew Koppelman, ‘A Rawlsian Defence of Special Treatment of Religion’, *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélie Bardón (eds.), Oxford University Press, 2017, 31-32. (“Fulfilling the commitments made in the original position, for people in the world here and now, requires taking account of the values that those people hold.”)

<sup>92</sup> *ibid* 34.

Koppelman's support for this limiting strategy is grounded on the psychological merits of beliefs and actions that are socially entrenched.<sup>93</sup> He traces this idea to Taylor's notion of "hypergoods", defined as "goods which not only are incomparably more important than others but provide the standpoint from which these must be weighed, judged, decided about".<sup>94</sup> In other words, these types of goods are qualitatively different from those that are available to humans simply as individual matters. This tracks a Durkheimian view of religion, defined as "a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them".<sup>95</sup> This view is manifested in recent sociological accounts of religion, such as Christian Smith's, which conceive of religion as "a complex of culturally prescribed practices"<sup>96</sup>, as well as in the view of moral psychologists, such as Jonathan Haidt, who states that: "Religions are social facts. Religion cannot be studied in lone individuals any more than hivehness can be studied in lone bees".<sup>97</sup>

A more legally grounded illustration of this view is found in Khaitan and Calderwood Norton's definition of religion as "a complex and multifaceted *intersubjective* phenomenon, in the sense that its existence depends on its shared acceptance in the consciousness of several persons".<sup>98</sup> They relate

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<sup>93</sup> Andrew Koppelman, 'A Rawlsian Defence of Special Treatment of Religion', *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélie Bardon (eds.), Oxford University Press, 2017, 33. ("Discerning which set of actions should be especially protected depends on one's knowledge of the general facts about human psychology".)

<sup>94</sup> Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, Harvard University Press, 1989, 63 cited in Andrew Koppelman, 'A Rawlsian Defence of Special Treatment of Religion', *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélie Bardon (eds.), Oxford University Press, 2017, 39.

<sup>95</sup> Émile Durkheim, *The Elementary Forms of Religious Life*, K.E. Fields (trans.), Free Press, 1995, 62 cited in Jonathan Haidt, *The Righteous Mind. Why Good People Are Divided by Politics and Religion*, Penguin Books, 2012, 287.

<sup>96</sup> Christian Smith, *Religion. What It Is, How It Works, and Why It Matters*, Princeton University Press, 2017, 22.

<sup>97</sup> Jonathan Haidt, *The Righteous Mind. Why Good People Are Divided by Politics and Religion*, Penguin Books, 2012, 287.

<sup>98</sup> Tarunabh Khaitan and Jane Calderwood Norton, 'The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions', *International Journal of*

this criteria of intersubjectivity to Joseph Raz’s notion of “social forms”, which he defines as “forms of behaviour which are in fact widely practised in [one’s] society”.<sup>99</sup> In Raz’s view, “a comprehensive goal” —by which Raz means a goal which has “ramifications which pervade important dimensions of [one’s] life”— making up one relevant aspect of a person’s well-being can only be based on social forms.<sup>100</sup> Here again, much as in Taylor’s notion of hypergoods, the selection of certain beliefs and practices based on said beliefs and practices’ social presence relies on a qualitative distinction between social goods that are only available if some sort of social provision actually exists and other social goods which an individual can access irrespective of this feature, with religion belonging to the former category. Khaitan and Calderwood Norton, therefore, state that one’s “personal cult of bunny worship” would not satisfy this intersubjectivity requirement, but one might presume that celebrating Christmas holidays —in a polity which recognizes this social form— would.<sup>101</sup>

Although, similarly to what I stated with regard to the evaluative strategy for limiting beliefs and practices pertinent to religious freedom, I think that this sociological strategy is problematic from a liberal perspective, it does have some empirically sound premises regarding human psychology on its side. For the purposes of this dissertation, however, this kind of limitation does not excessively affect the critical analysis and proposals that will be advanced regarding the adjudication of the right to freedom of religion or belief. Nevertheless, it is important to mention two criticisms that may be directed at this limiting strategy. First, relying on hypergoods and social forms as a means of ascertaining properly religious beliefs and practices seems to be both over

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*Constitutional Law* (forthcoming) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274123](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123) (last accessed in June 2019).

<sup>99</sup> Joseph Raz, *The Morality of Freedom*, Clarendon Press-Oxford University Press, 1986, 308.

<sup>100</sup> *ibid*

<sup>101</sup> Tarunabh Khaitan and Jane Calderwood Norton, ‘The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions’, *International Journal of Constitutional Law* (forthcoming) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274123](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123) (last accessed in June 2019).

and underinclusive. Its overinclusivity is twofold: first, this is due to the fact that there are a number of social forms that also trigger the same psychological benefits but that scholars might be hard-pressed to recognize as religious. Jonathan Haidt, for instance, exemplifies the “hivish” nature of religion by pointing to the rituals surrounding American football games in university campuses.<sup>102</sup> This first kind of overinclusivity can, of course, be easily overcome simply by extending the cover of religious freedom to all social forms carrying this kind of psychological meaning. Perhaps, then, the arguments of authors espousing this strategy might benefit from exploring these non-traditionally religious social forms instead of referring to more common practices such as marriage or Sunday services. The same criticism can be levelled from the perspective of underinclusivity since not all religious beliefs and practices, as they are commonly understood, will fall within established social forms. Furthermore, it opens the door for public authorities to arbitrate what does and doesn’t fall within a particular social form, a role that courts adopting the liberal conception, as will be evidenced further below, are averse to undertake.

The second kind of overinclusivity affecting this strategy, however, is more difficult to overcome and is closely related with the concerns of this dissertation. It is possible to illustrate this issue by referring to the abovementioned social form of Christmas holidays: start from the assumption that having dinner with one’s family on the 24<sup>th</sup> of December—or lunch on the 25<sup>th</sup>—is a practice that undisputedly forms part of a social form within a given polity. Now consider the case of two individuals, John and Sara, both of whom regularly participate in this practice. However, when asked about the meaning of this practice, John responds that this is a special occasion while Sara considers it to be no more special than any other gathering with friends and family. John’s action would clearly qualify as a religious practice but, should

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<sup>102</sup> Jonathan Haidt, *The Righteous Mind. Why Good People Are Divided by Politics and Religion*, Penguin Books, 2012, 287. (“From a Durkheimian perspective these behaviors serve a different function, and it is the same one that Durkheim saw at work in most religious rituals: *the creation of a community.*”)

we say that Sara’s participation is also religious? Notice that an affirmative answer to this question would seem to place this limiting strategy awfully close to theories which value religion objectively and, therefore, far away from the instrumental valuation which is characteristic of the liberal conception. A negative answer, for its part, would revindicate its liberal character but would make the intersubjectivity requirement insufficient—and ultimately, as I will argue in Chapter 4, superfluous—in any case brought before the courts for adjudication.

Moreover, perhaps the most difficult criticism to overcome for this strategy is that it seems to rely on a static view of society and of religions, in particular. If religious freedom is only deemed to cover the beliefs and practices currently existing in a given society, this inevitable stifles the development of new kinds of religious experiences. Even the organic growth of established religious beliefs and practices will be determined on the sufferance of the public authorities on whom an authoritative determination regarding what should count as a belief or practice within a certain social form would fall. Even if conceived of in more generous theoretical terms, there is an inherent danger that in practice authorities will use this power in a manner akin to an “essential practice” test that exists in some jurisdictions and against which liberal scholars have usually positioned themselves.<sup>103</sup>

The individualistic character of religious freedom under a liberal conception, therefore, is best captured by a commitment to “the sanctity of personal conscience”,<sup>104</sup> in the sense that no belief or practice is to be discounted a priori from the category of protected beliefs and practices under the right to freedom of religion or belief. Now that the two features of the liberal conception of this right stemming from the underlying principle of equal liberty

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<sup>103</sup> For different forms of state-religion relationships beyond the liberal paradigm see *Regulating Religion in Asia*, Jaclyn L. Neo, Arif A. Jamal and Daniel P. S. Gogh (eds.), Cambridge University Press, 2019.

<sup>104</sup> Edmund Fawcett, *Liberalism. The Life of an Idea*, Princeton University Press, 2014, 131 referring to one of the conceptual varieties of individualism identified by Steven Lukes in *Individualism*, ECPR Press, 2006.

have been expounded, it is necessary to establish more precisely what this equality refers to.

#### 1.4 Equality of what: settling on integrity

Recently, Farrah Ahmed has observed that “There is widespread agreement that religious freedom ought to be protected as a legal right. There is much less agreement on why”.<sup>105</sup> Thus far, I have offered a liberal answer to this question on the basis of very abstract first-order principles. In this section, I try to specify more clearly what it is that is being equalized under the heading of religious freedom. In this regard, many candidates have been advanced as direct rationales for a specific right to freedom of religion or belief. While Koppelman mentions “human flourishing [...], sources of meaning epistemically inaccessible to other people, and psychologically urgent needs [...]”,<sup>106</sup> Macklem, for his part, argues that “the moral foundation of freedom of religion is to be found in the value that the practice of faith, understood as a mode of belief distinct from reason, contributes to human well-being”.<sup>107</sup> Standing out amongst these proposals, however, is the principle of autonomy. In this regard, Khaitan and Calderwood Norton exemplify this point of view when stating that: “Freedom of religion is valuable because it protects our decisional autonomy in matters of religious adherence.”<sup>108</sup>

The ideal of personal autonomy, however, seems to be overinclusive if understood broadly as the ideal of controlling, creating, authoring or shaping one’s own life”.<sup>109</sup> This is so for two reasons: first, as Ahmed has recently

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<sup>105</sup> Farrah Ahmed, ‘The Autonomy Rationale for Religious Freedom’, *The Modern Law Review* 80 (2) (2017) 238, 238.

<sup>106</sup> Andrew Koppelman, *Defending America’s Religious Neutrality*, Harvard University Press, 2013, 131.

<sup>107</sup> Timothy Macklem, ‘Faith as a Secular Value’, *McGill Law Journal* 45 (2000) 1, 4.

<sup>108</sup> Tarunabh Khaitan and Jane Calderwood Norton, ‘The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions’, *International Journal of Constitutional Law* (forthcoming) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274123](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123) (last accessed in June 2019).

<sup>109</sup> Farrah Ahmed, ‘The Autonomy Rationale for Religious Freedom’, *The Modern Law Review* 80 (2) (2017) 238, 239.

argued, there are certain kinds of beliefs and practices that are traditionally considered religious which “[do] not always enhance, and may even diminish, autonomy”.<sup>110</sup> This is because some beliefs are resistant to revision and others are liable to “manipulative proselytism”.<sup>111</sup> Regarding these types of beliefs, the principle of autonomy would not serve to justify their protection. Secondly, and more importantly for the purposes of this dissertation, this understanding of personal autonomy brings together aspects of an individual’s life that have different moral weight from the perspective of the individual concerned. In this regard, Joseph Raz explains that personal autonomy covers “options with long term pervasive consequences as well as short term options of little consequence”<sup>112</sup> and that, therefore, “It is intolerable that we should have no influence over the choice of our occupation or of our friends. But it is equally unacceptable that we should not be able to decide on trivia such as when to wash or when to comb our hair”.<sup>113</sup> By incorporating morally significant as well as trivial beliefs and practices, this conception of autonomy seems to miss out on a crucial distinction of the human existence between things that are morally relevant and others that aren’t and which make the former worthy of special protection but not the latter.

Laborde calls this oversight the “ethical salience challenge”, by which she means that “liberalism, for all its claims to neutrality, cannot dispense with an ethical evaluation of the salience of different conceptions, beliefs, and commitments”.<sup>114</sup> In fact, she says, the liberal state is not committed to an across-the-board kind of neutrality because it “is not neutral toward higher-order interests or moral powers: it grants special protection to a class of

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<sup>110</sup> Farrah Ahmed, ‘The Autonomy Rationale for Religious Freedom’, *The Modern Law Review* 80 (2) (2017) 238, 239.

<sup>111</sup> *ibid*

<sup>112</sup> Joseph Raz, *The Morality of Freedom*, Clarendon Press-Oxford University Press, 1986, 374.

<sup>113</sup> *ibid*

<sup>114</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 7.

ethically salient interests”.<sup>115</sup> The most evident example of this is given by the decision to include certain rights but not others in the rights catalogues that form part of most constitutional texts. Liberalism, therefore, is not necessarily committed to the view that every belief held, and practice engaged in, by an individual should have the same moral valuation from a political perspective. In fact, the possibility of making this distinction is what allows Rawls to say that liberty of conscience is important even among the basic liberties, as I related above. Acknowledging the issue of ethical salience, therefore, requires pointing to a rationale for religious liberty other than a bare principle of autonomy.

I think that Laborde’s notion of integrity is best fit for this purpose. For Laborde, the right to freedom of religion or belief protects “*integrity-protecting commitments*”, which she defines as “a commitment, manifested in a practice, ritual, or action (or refusal to act), that allows an individual to live in accordance with how she thinks she ought to live”.<sup>116</sup> This proposal is akin to Michael Perry’s proposal of interpreting the right to freedom of religion or belief as a right to moral freedom understood as “the right to freely practice one’s morality: to live one’s life in harmony with one’s moral convictions and commitments”.<sup>117</sup> This is also similar to Maclure and Taylor’s suggestion that the beliefs and practices attracting the protection of the right to freedom of religion or belief should only include “meaning-giving beliefs and commitments”.<sup>118</sup> This rationale combines both a “functional” and a “substantive” conception of

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<sup>115</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 200. A similar view is presented by Stephen A. Gardbaum, ‘Why the Liberal State Can Promote Moral Ideals after All’, *Harvard Law Review* 104 (6) (April 1991) 1350.

<sup>116</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 203-04. Laborde further breaks down this category into “obligation” and “identity” integrity-protecting commitments, but I won’t consider this distinction at *ibid* 215. Laborde offers another definition of integrity protecting commitments as being those with which “people identify with most deeply, constituting what they consider their life is fundamentally about” at *ibid* 204.

<sup>117</sup> Michael J. Perry, ‘From Religious Freedom to Moral Freedom’, *San Diego Law Review* 47 (2010) 993, 996.

<sup>118</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, Jane Marie Todd (trans.), Harvard University Press, 2011, 12 where they define them as “the reasons, evaluations, or grounds stemming from the conception of the world or of the good adopted by individuals that allow them to understand the world around them and to give a meaning and direction to their lives”.

religious freedom because it both “fixes on the role of the putative conviction in a person’s overall personality” and “designates only certain convictions about how to live as deserving constitutional protection”.<sup>119</sup> However, its liberal virtue rests on the fact that it does not limit the beliefs and practices capable of attaining this salience in any objective sense. All that it says is that not all beliefs and practices have equal importance in the life of the individual but — in line with the individualism of the liberal conception— leaves it entirely up to the individual to determine which beliefs and practices have that importance for them.

Moreover, this approach dissolves any concern regarding the illegitimacy of awarding special treatment —either beneficial or detrimental— to religion, in any politically problematic sense of the term. As Laborde acutely observes “religion is not uniquely special: whatever treatment it receives from the law, it receives in virtue of features that it shares with nonreligious beliefs, conceptions, and identities”.<sup>120</sup> That shared feature is given by the ethical salience of commitments protecting the integrity of individuals. This rationale not only captures the ethical sensibility overlooked by the principle of autonomy but also renders superfluous any distinction between religious and non-religious beliefs and practices from a politico-legal perspective. I have thus far used the term freedom of religion or belief as a shorthand for the right in question in order to comply within common usage as well as to capture the full array of beliefs and practices commonly understood to fall within its scope. But this should not be cause for confusion: this right does not protect different kinds of beliefs but, rather, only one category, ie ethically salient because integrity protecting beliefs and practices.<sup>121</sup>

This brings to an end the inquiry over the philosophical underpinnings of the liberal conception of the right to freedom of religion or belief. Before moving

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<sup>119</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 118.

<sup>120</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 3.

<sup>121</sup> For contesting viewpoints see Micah Schwartzman, ‘Religion, Equality, and Anarchy’ *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélia Bardon (eds.), Oxford University Press, 2017, 16.

on to consider its manifestation in the legal realm, it is appropriate to close this first section by clarifying some common misconceptions regarding this understanding of the right in question.

### 1.5 Common misconceptions regarding the liberal conception of the right to freedom of religion or belief

There are three common misconceptions commonly directed at the liberal conception of the right to freedom of religion or belief which is convenient to dispel. First, this conception is not committed to a view that privileges beliefs over practices, or individual over collective experiences.<sup>122</sup> Nothing in my characterization of this conception lends credence to this criticism: first, I have sustained throughout that the right protects both beliefs and practices. For practices to receive the protection of this right they must only be backed by a belief in the very weak sense of having a reason for action. In other words, if an individual considers that her integrity is at stake regarding a particular action, then that action is protected by this right without the need to sustain any deeper thoughts to justify it. Moreover, individuals are free to hold beliefs and to engage in practice either alone or along with others. While the agency of the individual regarding which beliefs and practices have ethical salience — ie impact their integrity— is a non-negotiable premise of the liberal conception, there is nothing in this conception which limits the ability of individuals to exercise this agency collectively. That the right is grounded in the individual does not have a bearing over its potential forms of manifestation. In this regard, the description of the conception that I have offered here seems to comply with Smith’s call for focusing on “the *reality* of religion as it is found in actual human lives and societies”.<sup>123</sup> Moreover, as will become apparent throughout the

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<sup>122</sup> Laborde calls this the “*Protestant critique*” which she describes as the opinion that “liberal law is biased toward individualistic, belief-based religions.” Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 21.

<sup>123</sup> Christian Smith. *Religion: What It Is, How It Works, and Why It Matters*, Princeton University Press, 2017, 21.

following chapters, I also agree that we “should put on hold our interest in the *ideas and beliefs* of religious people, and concentrate on their religious *practices*, that is, on repeated, religiously meaningful behaviors”.<sup>124</sup>

Another criticism points to the privatization of religion in the liberal state. I suggest that this criticism is most pressing in discussions concerning the secular character of the state, especially in those that have to do with reasoning in the public sphere.<sup>125</sup> However, the right-based approach to religion and the state defended here does not fall into this pitfall. To the extent that practices covered by this right are susceptible to regulation in public spaces, this is not due to their religious nature but, rather, to public interest concerns that have the potential to impact collective action more generally, such as the protection of the rights of others. There is no doubt that at times the political and legal practice has not lived up to these theoretical expectations, but the fault of this occurrence cannot be attributed to the liberal conception as such.<sup>126</sup>

Finally, there is a concern that the liberal conception misunderstands certain religious experiences by focusing on the notion of choice and autonomy. In this sense, Ahmed states that “The autonomy rationale is also criticised for its incongruity with religious views of religious lives as shaped by religious authority, rather than individual choices”.<sup>127</sup> Again, I have avoided this characterization of individual agency and focused instead on the notion of integrity which does not presuppose or limit the manner in which an individual comes to think of a particular belief and practice as engaging their integrity.

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<sup>124</sup> Christian Smith. *Religion: What It Is, How It Works, and Why It Matters*, Princeton University Press, 2017, 21. To this he adds that: “The common bias toward an ‘intellectual’ view of religion needs to be corrected with a primary focus instead on people’s reiterated actions” at *ibid* 21.

<sup>125</sup> Two especially relevant texts in this regard are John Rawls, ‘The Idea of Public Reason Revisited’, *The University of Chicago Law Review* 64 (3) (Summer 1997) 765 and Jürgen Habermas, ‘Religion in the Public Sphere’, *European Journal of Philosophy* 14 (1) (2006) 1.

<sup>126</sup> In this regard, McCrea refers to the case of the ECtHR as follows: “The ECtHR views individual religious freedom as a right that is principally private in nature and focuses on an individual right to develop and adhere to a religious identity”. Ronan McCrea, *Religion and the Public Order of the European Union*, Oxford University Press, 2010, 103.

<sup>127</sup> Farrah Ahmed, ‘The Autonomy Rationale for Religious Freedom’, *The Modern Law Review* 80 (2) (2017) 238, 244.

Both self-chosen beliefs and practices and exogenously imposed ones are covered by this conception.

Having confronted these common misconceptions of the liberal conception of the right to freedom of religion or belief, it is now pertinent to consider its legal instantiation.

## 2. The jurisprudential reception of the liberal conception of the right to freedom of religion or belief

Today, a freestanding right to freedom of religion or belief is recognised by the constitutions of all liberal democracies, as well as by every universal and regional treaty on civil and political rights.<sup>128</sup> Most constitutions and treaties make close reference to said right, albeit opting for nuanced variations for its formulation.<sup>129</sup> Despite its widespread and relatively uniform textual recognition, the interpretation of the right to freedom of religion or belief varies widely from one jurisdiction to another.<sup>130</sup> A particularly dissimilar interpretive feature among different contexts concerns the scope of protection accorded to said right. The United States of America is a good example of a jurisdiction adopting an equivocal position on this point since the SCOTUS, as Martha Nussbaum has observed, has yet to conclusively determine whether its constitution protects “conscientious commitments that do not take a religious form”.<sup>131</sup> This is a surprising state of affairs given that it is the polity in which

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<sup>128</sup> France is a notable exception in this regard. Its constitutional order, by way of Article 10 of the Declaration of the Rights of Man and of the Citizen (1789) only protects the right to hold religious opinions. A self-standing right to freedom of conscience, guaranteeing the free exercise of worship, is only found in ordinary legislation, in Article 1 of the Law concerning the separation of the Churches and of the State (1905).

<sup>129</sup> Jim Murdoch, ‘Freedom of Thought, Conscience and Religion: A Guide to the Implementation of Article 9 of the European Convention on Human Rights’, *Human Rights Handbooks no. 9*, Council of Europe, 2007, 6.

<sup>130</sup> This is at odds with George Letsas’s accurate observation that “what moral rights individuals have by virtue of being human, and what institutional responsibility courts have when they apply the law, are not things we would normally expect to differ from country to country in the way taste in food and clothes do”. George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, 6.

<sup>131</sup> Martha Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality*, Basic Books, 2008, 102.

constant judicial controversies over this right have long overshadowed those taking place in most other liberal democracies, as well as the jurisdiction with arguably the most recognisable constitutional enshrinement of this right in the First Amendment of its constitution, which only mentions the term 'religion'.<sup>132</sup>

The text of the European Convention of Human Rights, as well as most other national and international legal instruments, however, manages to bypass this particular difficulty by recognising this right in a way that explicitly protects 'thought' and 'conscience', alongside 'religion'.<sup>133</sup> In fact, the ECtHR has explicitly acknowledged this point by affirming that the right to freedom of religion or belief is "in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned".<sup>134</sup> This statement seems to endorse a sweeping protection, in line with the text of Article 9 of the European Convention of Human Rights, which may be reasonably interpreted to include the full range of ethical convictions that individuals might conceivably adopt.<sup>135</sup> The ECtHR, to its credit, has been particularly generous with regard to the plurality of beliefs that it has admitted for consideration.<sup>136</sup>

The SCC, for its part, has also adopted a broad understanding of the scope of the right, which Maclure and Taylor summarise as follows:

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<sup>132</sup> The relevant portion of the First Amendment's text is the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; [...]".

<sup>133</sup> This particular textual formulation first appeared in Article 18 of the Universal Declaration of Human Rights (1948) and was later reproduced in Article 18 of the International Covenant on Civil and Political Rights (1966). It is also present in Article 10 of the Charter of Fundamental Rights of the European Union (2007). Article 12 of the American Convention on Human Rights (1969) protects the right to freedom of conscience and of religion and Article 8 of the African Charter on Human and Peoples' Rights (1981) guarantees freedom of conscience, the profession and free practice of religion.

<sup>134</sup> *Kokkinakis v Greece*, App. no. 14307/88, 25 May 1993, [31]. This is in line with the view expressed in Council of the European Union, *EU Guidelines on the promotion and protection of religious freedom*, 2013 available at <https://eeas.europa.eu/sites/eeas/files/137585.pdf> (last accessed in February 2017).

<sup>135</sup> However, it can be argued that the Court has inexplicably decided not to go this far based on its decisions in the cases of *Johnston and others v. Ireland*, App. no. 9697/82, 18 December 1986 and *Pretty v. the United Kingdom*, App. no. 2346/02, 29 April 2002.

<sup>136</sup> See P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd. ed., Kluwer Law and Taxation Publishers, 1990.

As the Supreme Court of Canada has implicitly recognized, *religious* beliefs are not the only ones liable to play the role of a compass and criteria of judgment in an individual's life. Secular convictions of conscience, as in the case of the pacifist, can just as surely aid the agent in giving a direction to his life and in exercising his faculty of judgment when faced with conflicts of values. What unites these beliefs is that they appeal to the individual conscience, and the person holding them cannot disregard or transgress them without finding his sense of moral integrity violated.<sup>137</sup>

In these three jurisdictions —barring the interpretive difficulties concerning the American case—,<sup>138</sup> the apex courts have thus settled for a broad interpretation of the scope of the right to freedom of religion or belief. Furthermore, as is also evidenced in the passage reproduced above, as well as in the lines concerning the ECtHR, the protection of the right is clearly understood instrumentally in terms of the well-being that certain beliefs and practices have for an individual. In this sense, the SCC's position is clearly represented in the following passage: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices".<sup>139</sup> In a subsequent judgement, the SCC reaffirmed this understanding when stating that: "religion is about freely and deeply held *personal convictions or beliefs* connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment".<sup>140</sup> The ECtHR, for its part, has also pointed to autonomy as the rationale underlying the right to freedom of religion or belief as is evidenced in the following passage: "the

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<sup>137</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, Jane Marie Todd (trans.), Harvard University Press, 2011, 90.

<sup>138</sup> Dworkin acutely observed that, for legal purposes, "It makes a considerable practical difference what counts as a religion". Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 106.

<sup>139</sup> *R v Edward Books and Art Ltd.*, [1986] 2 SCR 713, 759.

<sup>140</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [39]. Emphasis added.

State has a narrow margin of appreciation and must advance serious and compelling reasons for an interference with the choices that people may make in pursuance of the religious standard of behaviour within the sphere of their personal autonomy”.<sup>141</sup>

Moreover, regarding the individualism that is characteristic of the liberal conception according to the stipulation proposed in this dissertation, all of these courts have also committed to an interpretation of this right that seems to be in line with it. The SCOTUS, for instance, has made it clear that what constitutes a belief or practice engaging the right to freedom of religion or belief must be left to the individual. In a case concerning a claimant with a highly idiosyncratic belief, the SCOTUS held that: “[the claimant] drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is “struggling” with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ”.<sup>142</sup> This is also the standpoint from which the SCC held that: “It is the religious or spiritual essence of an action [...] that attracts protection [...] [t]he focus of the inquiry is not on what others view the claimant’s religious obligations as being, but what the claimant views these personal religious ‘obligations’ to be”.<sup>143</sup> Finally, in this regard, the ECtHR has recognized that states have a “duty of neutrality and impartiality”.<sup>144</sup> This means that if a state is to perform its role as “the neutral and impartial organiser of the exercise of various religions, faiths and beliefs”, it must abstain from assessing the legitimacy of religious beliefs.<sup>145</sup> In the case of *Manoussakis and others v Greece*, the ECtHR clearly stated that the right to freedom of religion or belief

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<sup>141</sup> *Jehovah’s Witnesses of Moscow and others v Russia*, App. no. 302/02, 10 June 2010, [119].

<sup>142</sup> *Thomas v Review Board of Indiana Employment Security Division*, (1981) 450 U.S. 707, 715.

<sup>143</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, 553.

<sup>144</sup> *Refah Partisi (the Welfare Party) and others v. Turkey*, App. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, [91].

<sup>145</sup> *ibid*

“excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate”.<sup>146</sup>

What these succinct referrals to the caselaw of these influential courts shows is that the liberal conception of the right to freedom of religion or belief has taken deep roots in their jurisprudence. Regarding the scope of the right, it is clear that these courts do not seek to establish a limitation based on any traditional notion of religion. Moreover, this is precisely because they adopt an instrumental understanding of religion which acknowledges that its legal relevance is based on the protection of the individual. Finally, it is also evident that these courts favour an individualism which grants the individual the final word over the beliefs and actions that are to be protected by the right.

In order to avoid excessive repetitions throughout this dissertation, the account of the relevant features of the jurisprudence of these courts will be expanded in the following chapters. For now, it is only necessary to evidence the jurisprudential reception of the liberal conception of the right to freedom of religion or belief, specifically pointing to those features which I have proposed as fundamental for this conception.

### 3. Conclusion

Although it is not an aim of this project to defend the liberal commitment to the principle of equal liberty from critiques originating from outside this tradition of thought, it is important to take note of its relative advantage for the prospect of a principled and peaceful resolution of the political controversies arising from the growing pluralism in contemporary liberal democracies.<sup>147</sup> What this principle offers is “a framework within which individuals and groups enjoy the

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<sup>146</sup> *Manoussakis and others v Greece*, App. no. 18748/91, 26 September 1996, [47].

<sup>147</sup> I draw the liberal line in terms similar to Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Polity Press, 2001. For further consideration of these different proposals see ‘Chapter 4 Models of Religion-State Relations’ in Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, Oxford University Press, 2013.

maximum level of liberty and equal rights”<sup>148</sup> and which, therefore, complies with the basic moral aspiration contained in Martha Nussbaum’s proclamation that: “we want not just enough freedom, but a freedom that is itself equal, and that is compatible with all citizens being fully equal and being equally respected by the society in which they live”.<sup>149</sup> It also follows François Mitterrand’s recommendation to “never dissociate liberty and equality [because] they are the basis of every democracy”.<sup>150</sup> If, as Micah Schwartzman suggests, the two debates currently dominating political thought regarding religion involve the justification of state action and the meaning of religious liberty,<sup>151</sup> it is difficult to point to a more suitable building-block for generating the broadest possible agreement than the principle of equal liberty.

The characterization of the right to freedom of religion or belief sketched in this chapter aims to overcome Avigail Eisenberg’s observation that the “practical instantiation of abstract rights” is always determined by the “kinds of debates and historical struggles between certain groups and not others” in order to arrive at “determinant and meaningful policies and protections”.<sup>152</sup> Instead, while acknowledging the historical roots of the right in question, I defend a liberal conception of it that draws from first-principles, specifically on the principle of equal liberty, in order to evidence “the importance of what is shared across the territory”.<sup>153</sup> This is the basis of a forward-looking strategy that aims to provide the best justification for this right which is capable of solving the controversies arising in contemporary societies in light of their growing pluralism.

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<sup>148</sup> Lorenzo Zucca, ‘Law v. religion’, *Law, State and Religion in the New Europe: Debates and Dilemmas*, Lorenzo Zucca and Camil Ungureanu (eds.), Cambridge University Press, 2012, 151.

<sup>149</sup> Martha Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality*, Basic Books, 2008, 19.

<sup>150</sup> François Mitterrand, *Derniers vœux aux Français*, 31 December 1994 available at <https://fresques.ina.fr/miterrand/fiche-media/Mitter00158/derniers-voeux-aux-francais.html> (last accessed in September 2019). Translation is mine.

<sup>151</sup> Micah Schwartzman, ‘Religion, Equality, and Anarchy’ *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélia Bardou (eds.), Oxford University Press, 2017, 15.

<sup>152</sup> Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims*, Oxford University Press, 2009, 4.

<sup>153</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 5.

From the starting point of the principle of equal liberty, it is possible to trace the reasons for the two features of the liberal conception that I have identified as fundamental. Because the liberal state must respect the ethical integrity of every individual, it must remain neutral among the integrity protecting commitments that form an important part of an individual's moral life. Therefore, it can only accord politico-legal value to those commitments insofar as they are instrumental to an individual's well-being, but never because of their objective merits, whatever they may be. Moreover, this also entails a form of individualism because it must be left to the individual to determine what beliefs and practices constitute said commitments for her. Therefore, the liberal conception best aligns with an approach that does not rule out a priori any beliefs or practices as incapable of receiving the protection of the right to freedom of religion or belief. These features, finally, are present in the jurisprudence of the courts where academic defences of the liberal conception are most apparent.

## **Chapter 2.** The dominant approach to the adjudication of the right to freedom of religion or belief

If, as established in the previous chapter, the right to freedom of religion or belief protects the ethical integrity of individuals which, to recall, refers to those commitments which are ethical salient, it is still an open matter how judges should approach an individual's claim alleging that her right to freedom of religion or belief has been violated. One possible strategy would be for the court to presume that the beliefs and practices at issue in any particular case have the requisite ethical salience and, therefore, falling within the scope of the right to freedom of religion or belief. Alternatively, the court could decide to inquire into this matter in order to ascertain whether the beliefs and practices at issue in a particular litigation do, in fact, possess the requisite ethical salience for attracting its protection. Faced with this choice, scholars and courts observing the liberal conception have overwhelmingly opted for the latter, which I will therefore refer to as the dominant approach to the adjudication of the right to freedom of religion or belief.

The consensus underpinning this particular adjudicative strategy in both the academic literature and the courts' judgments can hardly be understated. The purpose of this chapter is to offer an account of the characteristic traits of this approach and advance a possible rationale for its intuitive appeal. I suggest that the origin of this approach is found in the SCOTUS's landmark case of *Sherbert v Verner*.<sup>154</sup> In introducing the language of exemptions — which I will use throughout this dissertation synonymously with reasonable accommodations and conscientious objections—, the SCOTUS, I will argue, gave rise to a new adjudicative paradigm which calls for the policing of the ethical salience of the beliefs and practices at issue in the particular case before a court.

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<sup>154</sup> *Sherbert v Verner*, (1963) 374 U.S. 398.

In the first section of this chapter, I draw attention to the ubiquity of the exemption-based understanding of the right to freedom of religion or belief and expound on the connection between it and the dominant approach. Then, in the second section, I identify the two features of the dominant approach and consider some notable academic considerations regarding each of them. Lastly, in the final section, I account for the particular manifestations of these features in the jurisprudence of the SCOTUS, SCC, and ECtHR.

### 1. The exemption-based approach to the right to freedom of religion or belief as the rationale for the dominant approach

Talk of exemptions in the literature is the common starting point when considering the right to freedom of religion or belief. By exemptions I refer to the idea that a finding of a violation of the right to freedom of religion or belief should have the upshot of excluding the successful claimant(s) from the application of the norm —broadly understood— that causes said violation, but that the offending norm should continue to apply to everyone else.<sup>155</sup> As will be observed in Chapter 5, the logic of exemptions is uniquely reserved for the right in question: it rarely, if ever, appears in discussions regarding other civil and political rights, not to mention human rights more generally. Here, however, the limited purpose of this chapter is to demonstrate its presence in the academic literature and to offer an explanation for its connection with the dominant approach.

In describing the exemption-based understanding of the right to freedom of religion or belief as a starting point, I mean to reveal its lack of underlying justification: scholars seem willing to engage in this discussion, taking for granted that this is a problem that must be solved in some manner or other.

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<sup>155</sup> The procedural particularities in different jurisdictions might mean that all cases have an *inter partes* effect as opposed to an *erga omnes* one. My claim here is not to do with these procedural particularities but rather with the more logical conclusion that follows from the way in which the arguments are tailored to fit the particular case of the claimant such that extending the benefit to others would not follow from the structure of the argument.

Consider, for example, Laborde's statement that "The great bulk of philosophical hard cases in academic discussions has concerned exemptions from laws that burden religious *practices*",<sup>156</sup> which she then follows up by asking: "Are there any grounds, as a matter of justice (not merely expediency), for exempting some citizens, on grounds of their beliefs or conceptions of the good, from the burdens of general laws?"<sup>157</sup> Dworkin, for his part, interprets the right to religious freedom as one which "requires government, in principle, to exempt people from general regulations that prevent the exercise of their own faith".<sup>158</sup> Letsas characterizes the theoretical discussion over religion's specialness as follows: "Political theorists ask whether religion is in some relevant sense special within liberal democracies, by which they mean whether religious practices warrant some preferential treatment, such as duties to accommodate them or exempt them from general laws".<sup>159</sup> Schwartzman explains, regarding the political debate over the meaning of religious liberty, that "The central issue is whether the state is required in some circumstances to grant special exemptions from generally applicable laws that impose substantial burdens on religious believers".<sup>160</sup> Finally, Brian Leiter states that: "The central puzzle in this book is why the state should have to tolerate exemptions from generally applicable laws when they conflict with *religious* obligations but not with any other equally serious obligations of conscience".<sup>161</sup>

This sampling of some notable authors working in this area of knowledge adopting both political and legal perspectives evidences the parameter-setting character of the exemption-based understanding of the right to freedom of religion or belief, as well as its unquestioned status as a fundamental building-block for any proposals regarding this right. While I reserve my criticism of this

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<sup>156</sup> Cécile Laborde, *Liberalism's Religion*, Harvard University Press, 33.

<sup>157</sup> *ibid*

<sup>158</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 124.

<sup>159</sup> George Letsas, 'The Irrelevance of Religion to Law', *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélia Bardou (eds.), Oxford University Press, 2017, 44.

<sup>160</sup> Micah Schwartzman, 'Religion, Equality, and Anarchy', *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélia Bardou (eds.), Oxford University Press, 2017, 15.

<sup>161</sup> Brian Leiter, *Why Tolerate Religion?*, Princeton University Press, 2013, 3.

paradigm for Chapter 5, it is necessary to highlight this aspect of the discussion because, in my opinion, it serves as the implicit rationale for the dominant approach. Because individual exemptions call for a remedy that benefits only a successful claimant, it makes intuitive sense to reserve such a special advantage only to those cases in which the beliefs and practices at issue are actually ethically salient for the claimant. In other words, if the right to freedom of religion or belief only protects ethically salient beliefs and practices and, moreover, if a successful claimant will be exempt from a norm of general applicability, then judges should make sure that the beliefs and practices at issue in a particular case do in fact have the requisite ethical salience. Anticipating the discussion of Chapter 5, if the upshot of a successful claim did not entail an exemption but, rather, the striking down of the offending norm from the legal order, the claimant's particular situation would not matter. The relevance of the distinction can also be explained from two possible standpoints regarding the instrumentality of the beliefs and practices and the individual: a belief or practice can be instrumental for an individual in particular, or they can be instrumental for all individuals. The exemption-based logic is based on the former, requiring that the instrumental relationship be present in the case of a particular individual, ie the claimant. The dominant approach, then, involves judges in the determination regarding whether the relevant beliefs and practices are ethically salient for the claimant.

In order to verify the existence of this instrumental relationship, scholars and courts have devised a series of tests. In the next section, I disaggregate the dominant approach into two distinctive features.

## 2. The two features of the dominant approach

The dominant approach is constituted by two key features. Both of these features seek to verify different aspects of a claim of the sort "*P* violates my (our) right to freedom of religion or belief" —where *P* is any law, policy, or action that directly or indirectly imposes an obligation on the claimant to act or

to refrain from acting—. While the first feature accords relevance to the motivations or reasons which underpin said claim, the second addresses a claimant’s sincerity. While the former is justificatory in nature, meaning that judges are tasked with justifying whether the merits of a belief or practice are such that they are worthy of receiving the protection of the right, the latter is evidentiary, meaning that judges must determine whether there is evidence in favour of a claimant’s sincerity.

## 2.1 The inquiry into the merits of beliefs and practices

This first characteristic enjoins judges to take notice of the merits of the beliefs and practices which the claimant considers to be in conflict with the law, policy, or action which she points to as violating her right. By bestowing significance to the claimant’s motivations, the dominant approach seeks to draw a dividing line between claims that display the requisite normative standing in order to fall within the scope of the right to freedom of religion or belief and those that fail to achieve this status. The scope of the right is reserved for the protection of ethical salient commitments and, therefore, does not extend to mere preferences. This first feature of the dominant approach, then, tracks the distinction between Martin Luther’s “Here I stand, and I cannot act otherwise” and a mere “I’d rather not act otherwise”.

Clowning,<sup>162</sup> Jediism,<sup>163</sup> bunny worship,<sup>164</sup> are but some of the beliefs and practices that are mentioned in the literature as examples of the sort that would not qualify for protection. Far more common than singling out concrete beliefs and practices, however, is to propose a more abstract category that

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<sup>162</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 199. (“Workplace uniform regulations that accommodate Muslim veils but not clown hats implicitly judge Muslim veils to have greater ethical salience than clown hats.”)

<sup>163</sup> Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief. An International Law Commentary*, Oxford University Press, 2016, 19.

<sup>164</sup> Tarunabh Khaitan and Jane Calderwood Norton, ‘The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions’, *International Journal of Constitutional Law* (forthcoming) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274123](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123) (last accessed in June 2019).

beliefs and practices must comply with in order to attract the right's protection. Take, for instance Laborde's recent proposal to assess a claimant's integrity, suggesting that "Individuals must show that the practice for which they claim an exemption is *nontrivial*: that it touches on something that is connected to their sense of self, to their moral or ethical identity, not simply to a whim, preference, or unreflected prejudice".<sup>165</sup> Moreover, she argues that additionally "they must show that it is *important*: that it actually occupies a pivotal place in their life as they want to live it, and is not simply a peripheral, incidental, or occasional commitment".<sup>166</sup> Although she advances these ideas as part of what she calls a test of "*thick sincerity*",<sup>167</sup> I suggest that the triviality and importance which she proposes to establish as a threshold should be understood as an example of the first feature of the dominant approach because a claimant can be sincere about her attachment regarding a trivial or unimportant belief or practice. Furthermore, one of the categories that Laborde defends as the basis for exemptions is that of a "*Disproportionate burden*", which she exemplifies by noting that "it would be unfair to compel Orthodox Jews to endure an invasive post-mortem autopsy in case of nonsuspicious death, if they consider this a desecration of the body. There seems to be a *disproportion* between the aims pursued by the law and the burden it inflicts on the claimants".<sup>168</sup>

The notion of a burden is, as will be indicated below, a staple of the jurisprudence of the American court that the academic literature has taken up. In this regard, Frederick Mark Gedicks has recently come out in defense of the judicial assessment of burdens, explicitly detaching this inquiry from the question of sincerity.<sup>169</sup> Because he further identifies two types of burdens, civil

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<sup>165</sup> Cécile Laborde, *Liberalism's Religion*, Harvard University Press, 2017, 207.

<sup>166</sup> *ibid*

<sup>167</sup> *ibid*

<sup>168</sup> *ibid* 220. A case based on similar facts was recently decided by The High Court of Justice Queen's Bench Division in *Adath Yisroel Burial Society v HM Senior Coroner for Inner London*, [2018] EWHC 969 (Admin).

<sup>169</sup> Frederick Mark Gedicks, 'Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA', *George Washington Law Review* 85 (2017) 94.

and religious, with the former pointing to the legal penalties arising from not conforming with a law while the latter have to do with the “suffering of ‘substantial *religious* costs’”, it is important to specify that I am only concerned with the latter kind of burden.<sup>170</sup> For Gedicks, it is possible for judges to rule on these religious burdens “by relying on relevant doctrines of secular law”, pointing to “common law tort principles”.<sup>171</sup> Paul Billingham has also recently proposed an “an account of how the *weight* of a claim to exemption ought to be determined”.<sup>172</sup> His proposal seeks to determine the “importance” of a belief or practice by taking note of “its level of obligatoriness and centrality, according to the beliefs and values of the individual claimant”.<sup>173</sup> A most extreme version of this first feature would allow judges to consult religious experts in order to ascertain the merits of a belief or practice.<sup>174</sup>

Underlying all of these different proposals is an aspiration to find a way of evaluating beliefs and practices in order to filter out those lacking the requisite ethical salience, while at the same time remaining faithful to the liberal conception of the right to freedom of religion or belief. Moreover, they are all, in a sense, proposals for objective inquiries because they seek to flesh out the objective merits of a belief or practice, even if the merit is to be assessed from the standpoint of the claimant’s worldview. In other words, they all envisage the possibility of justifiably contradicting a claimant who in alleging a violation of her right, explicitly or implicitly asserts that the belief or practice in question is ethically salient for her. In the next chapter, I address this first feature of the dominant approach and argue that these two objectives —ie evaluation of the merits of a claimant’s beliefs and practices and commitment to the liberal

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<sup>170</sup> Frederick Mark Gedicks, ‘Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA’, *George Washington Law Review* 85 (2017) 94, 96.

<sup>171</sup> *ibid* 131-32.

<sup>172</sup> Paul Billingham, ‘How Should Claims for Religious Exemptions be Weighed’, *Oxford Journal of Law and Religion*, 6(1) (2017) 1, 2.

<sup>173</sup> *ibid* 3.

<sup>174</sup> See eg Jeroen Temperman, ‘Freedom of Religion or Belief in Prison A Critical Analysis of the European Court of Human Rights’ Jurisprudence’, *Oxford Journal of Law and Religion*, 6(1) (2017) 48, 88-89.

conception of the right to freedom of religion or belief— pull in opposite directions, making this endeavor difficult to defend.

## 2.2 The inquiry into the sincerity of the claimant

The second feature of the dominant approach consists in assessing the sincerity of a claimant. For the dominant approach, it is not enough for a claimant to couch her assertion in terms which are ethically salient. In order to successfully locate her claim within the ambit of protection of the right to freedom of religion or belief, she must actually hold the religious or moral commitments that she claims to hold. In simple terms, the dominant approach demands honesty of the claimant.

While some authors consider that the inquiry into the sincerity of an individual in this setting is simply another instance of a common judicial practice not raising any discrete challenges,<sup>175</sup> the last few years have seen a rise in the number of academic works directed at this second feature of the dominant approach.<sup>176</sup> A classic example of opposition to submitting claimants to a test of sincerity is John T. Noonan Jr.'s assertion, criticizing its

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<sup>175</sup> Laborde, for instance, says that: "Sincerity tests are commonly used by judges in all areas of the law. Of course, judges cannot and should not pry into individual consciences, but should simply check minimum coherence between what is said and what is done by the claimant." Cécile Laborde, *Liberalism's Religion*, Harvard University Press, 2017, 207.

<sup>176</sup> Among the most relevant are Ben Adams and Cynthia Barmore, 'Questioning Sincerity: The Role of the Courts after Hobby Lobby', *Stanford Law Review Online* (2014) 59; Nathan S. Chapman, 'Adjudicating Religious Sincerity', *Washington Law Review* 92 (2017) 1185; and Anna Su, 'Judging Religious Sincerity', *Oxford Journal of Law and Religion* 5 (1) (2016) 28. While Adams and Barmore assert that "There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity" (in Ben Adams and Cynthia Barmore, 'Questioning Sincerity: The Role of the Courts after Hobby Lobby', *Stanford Law Review Online* (2014) 59, 59-60), Gedicks claims that "The government rarely questions the sincerity of exemption claims. Since the development of religious liberty jurisprudence in the early 1960s, the government has conceded claimant sincerity in virtually every religious exemption case to reach the Supreme Court, including all of the religious nonprofit cases remanded by *Zubik*. The only such cases in which the government seriously questioned claimant sincerity are *Thomas* and *Hosanna-Tabor*—both of which the government lost" (in Frederick Mark Gedicks, 'Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA', *George Washington Law Review* 85 (2017) 94, 110). Chapman, for his part acknowledges that this facet of the accommodation regime has "escaped sustained scholarly attention" (in Nathan S. Chapman, 'Adjudicating Religious Sincerity', *Washington Law Review* 92 (2017) 1185, 1185).

endorsement by the SCOTUS, that “Governmental involvement of this kind is coercive, antithetical to the creativity, the liberty, the response to the Spirit that has marked religious endeavors”.<sup>177</sup> The mainstream academic position, however, endorses this judicial practice. Kent Greenawalt, for instance, considers that authorities “must apply a standard of sincerity” in order to “distinguish genuine from fraudulent claims”,<sup>178</sup> adding that “Inquiries into sincerity do not require anyone to determine the intrinsic truth of religious claims”.<sup>179</sup> Nathan S. Chapman, for his part, believes that “a court should evaluate a claimant’s sincerity by applying the ordinary rules of evidence”.<sup>180</sup>

The overwhelming appeal of this test relies on the fact that it seems to be a perfectly legitimate means of filtering claims according to the liberal conception of the right to freedom of religion or belief because it is supposedly based entirely on the subjective religious worldview of the individual. In Anna Su’s words: “The attractiveness of a sincerity-centred analysis is easy to explain and justify. By removing the requirement that an act or manifestation of belief be supported by official religious texts or doctrine, it allows room for and recognizes the evolving and fluid nature of religion, and moreover, empowers the individual believer”.<sup>181</sup> This observation, however, is countered by Justice Jackson’s dissenting opinion, delivered in the case of *United States v Ballard* of the American court, a landmark precedent for this test, in which he stated that: “[a]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is

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<sup>177</sup> John T. Noonan Jr., ‘How Sincere Do You Have To Be To Be Religious?’, *University of Illinois Law Review* 3 (1988) 713, 724.

<sup>178</sup> Kent Greenawalt, *Religion and the Constitution: (Volume 1) Free Exercise and Fairness*, Princeton University Press, 2006, 109. Here Greenawalt seems to concede some latitude when stating that: “Administrators may not have to ask exactly whether a particular individual claimant is probably telling the truth or probably lying [...]” in *ibid* 109, as well when observing that: “As I have said, the exact inquiry need not be whether an individual is probably sincere or not. Judges, or legislators, may adjust the precise question or the standard of probability, or both” in *ibid* 118.

<sup>179</sup> *ibid* 110.

<sup>180</sup> Nathan S. Chapman, ‘Adjudicating Religious Sincerity’, *Washington Law Review* 92 (2017) 1185, 1185.

<sup>181</sup> Anna Su, ‘Judging Religious Sincerity’, *Oxford Journal of Law and Religion* 5 (1) (2016) 28, 30.

believable. [...] If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer".<sup>182</sup> The critical inquiry into the plausibility of performing a test of sincerity which respects the liberal conception of the right in question that I perform in Chapter 4 is undertaken in the same spirit as Justice Jackson's concern.

To clarify the conceptual distinction between these two features of the dominant approach, reconsider Laborde's example concerning Orthodox Jews. Suppose that an individual who identifies as an Orthodox Jew—and is an active member of that community—brings a claim before the court alleging that a coroner's examination of the body of her family member violates her right to freedom of religion or belief. Suppose, further, that she considers the tenets of her faith concerning the treatment of bodies to be non-trivial, important matters, the nonobservance of which would cause her a substantial religious burden. However, the reason for objecting to the coroner's actions regarding this particular body is that she fears that they will reveal that the deceased individual was the victim of a homicide carried out by her. Although her claim embodies a substantial religious burden, and an objective inquiry of the sort envisaged by the proposals concerning the first feature of the dominant approach would grant the ethical salience of her claim, her claim is not sincere because her motivation for filing it is not to protect her religious beliefs. The appeal to her actual religious beliefs is only a useful excuse for the litigation which she decides to engage in as a way of obstructing a police investigation. In offering this example, I am not concerned about its plausibility but, rather, its illustration of the distinction between both features of the dominant approach. Nor does the usefulness of this example as a tool for conceptual clarification disappear if we allow for a dual motivation of both a sincere religious belief and an excuse to evade prosecution.

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<sup>182</sup> Justice Jackson's dissenting opinion in *United States v Ballard*, (1944) 322 U.S. 78, 92-93.

These features, as will be made apparent in the next section, are clearly identifiable in the jurisprudence of the courts under scrutiny.

### 3. Paradigmatic precedents reflecting the dominant approach

In order to evidence the courts' reliance on the dominant approach, I anchor my analysis of their jurisprudence on what are arguably the most notable cases in each jurisdiction and mention other noteworthy illustrations of the dominant approach in their case law.

#### 3.1 United States of America: *Sherbert v Verner*

In the United States of America, the SCOTUS's landmark decision in the case of *Sherbert v Verner* is a common starting point for discussions regarding religious accommodations and the inauguration of the dominant approach in its jurisprudence.<sup>183</sup> Its historical significance, according to Martha Nussbaum, derives from the fact that it put an end to: "The Court's jolting alternation between a generous spirit of accommodation and a defense of exceptionless rules [...]".<sup>184</sup> Its legacy, despite the fact that the SCOTUS's decision in *Employment Division v Smith*<sup>185</sup> a little under three decades later replaced it as the controlling precedent, remains untouched in many cases in light of the fact that the United States' Congress—as well as many state legislatures—enshrined its eponymous test in statutory form.<sup>186</sup> Moreover, the

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<sup>183</sup> *Sherbert v Verner*, (1963) 374 U.S. 398.

<sup>184</sup> Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*, Basic Books, 2008, 135. Nussbaum offers a very detailed description of the facts of this case in *ibid* 135-36.

<sup>185</sup> *Employment Division v Smith*, (1990) 494 U.S. 872,

<sup>186</sup> At the federal level, the Religious Freedom Restoration Act (RFRA) as well as the Religious Land Use and Institutionalized Persons Act (RLUIPA) have been crucial for the continued presence of the dominant approach. RFRA reintroduced the *Sherbert* standard in the following terms: "(a) IN GENERAL Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b). (b) EXCEPTION Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

circumstances of this case accentuate the persuasive concerns with fairness and equality from which the dominant approach draws its appeal.

Adell Sherbert, the claimant, was fired by her employer for refusing to work on Saturdays. Although she looked for alternative employment opportunities, she was unable to find any which would not require her to work on Saturdays. She subsequently filed a claim for unemployment compensation benefits, but the administrative authority concluded that her failure to accept suitable employment based on her unavailability to work on Saturdays disqualified her from receiving the benefits which she sought.<sup>187</sup> In what is of most interest for present purposes, the first feature of the dominant approach is to be found in the first sentence of the SCOTUS's decision. It identifies Sherbert as "a member of the Seventh-day Adventist Church", thereby circumscribing the merits of her beliefs within a socially established system of beliefs, and explains that Saturdays are "the Sabbath Day of her faith".<sup>188</sup> Moreover, in a footnote to this description of the facts, it incorporates the second feature of the dominant approach by adding that "[Sherbert] became a member of the Seventh-day Adventist Church in 1957" and noting that "No question has been raised in this case concerning the sincerity of [Sherbert's] religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible".<sup>189</sup>

A particularly noteworthy aspect of this case consists in the SCOTUS's identification of an interference with Sherbert's right to freedom of religion or belief, even though the law did not directly compel her to act contrary to her religion because she was free not to work on Saturdays if that is what her beliefs required her to do. Her disqualification from the compensation that she

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furthering that compelling governmental interest". A similar standard is enshrined in RLUIPA. For information concerning the existence of religious freedom regulations at the state level see <https://civilrights.findlaw.com/discrimination/religious-freedom-acts-by-state.html> (last accessed in September 2019).

<sup>187</sup> *Sherbert v Verner*, (1963) 374 U.S. 398, 401.

<sup>188</sup> *ibid* 399.

<sup>189</sup> *ibid* footnote 1 at 399.

sought resulted from her own choice not to work on Saturdays. Against this argument, the SCOTUS considers that the denial of the benefits imposes a burden on Sherbert by placing her in the following dilemma: “The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand”.<sup>190</sup> In this passage, the SCOTUS acknowledges that indirect disadvantages are just as capable of impacting the right to freedom of religion or belief of an individual as are direct sanctions. In a striking sentence, the SCOTUS makes this point with utmost clarity: “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege”.<sup>191</sup>

Furthermore, if one observes —as the SCOTUS does— that persons whose religion assigned Sunday as a day of rest did not have to face Sherbert’s conscientious conundrum, the interference with Sherbert’s right to freedom of religion or belief is compounded by the injustice of her situation from the standpoint of equality.<sup>192</sup> Peter Jones explains the two-pronged plight that claimants in Sherbert’s position face in the following words: “A government may simultaneously subject a group to (i) non-comparative injustice in denying them a religious freedom to which they have a right and, (ii) distributive injustice in allowing them less religious freedom than others”.<sup>193</sup> Because majorities are capable of purposely penalizing or of inadvertently

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<sup>190</sup> *Sherbert v Verner*, (1963) 374 U.S. 398, 404. In *Braunfeld v. Brown*, (1961) 366 U.S. 599 at 607, the SCOTUS had previously stated that: “if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect”.

<sup>191</sup> *Sherbert v Verner*, (1963) 374 U.S. 398, 404.

<sup>192</sup> *ibid* 406. In this sense, the SCOTUS observed that: “Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian’s religious liberty” in *ibid*.

<sup>193</sup> Peter Jones, ‘Religious Exemption and Distributive Justice’, *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélie Bardon (eds.), Oxford University Press, 2017, 167. For a view that contradicts this perception of dual-wrongness see Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution*, Harvard University Press, 2007, 15. (“In our view, equality was what was really at stake in Adell Sherbert’s case, and equality was what lent appeal to the proposition that religion enjoyed some sort of unique presumption of immunity to otherwise applicable regulation.”)

disadvantaging the religious freedom of minorities in either of these two manners, the appeal of carving out exemptions from otherwise valid laws in order to remedy the injustice suffered by said minorities is easy to understand.

Beyond taking note of Sherbert's burden, the SCOTUS considered that her ineligibility for the unemployment benefits constituted a "*substantial* infringement" of her right.<sup>194</sup> Although the SCOTUS does not explain what made this infringement substantial, as opposed to one of less importance, it is this categorization of Sherbert's claim that gave it the necessary salience in order to engage the Free Exercise clause of the First Amendment. In other words, the first feature of the dominant approach in the United States of America is expressed in terms of the substantiality of the burden imposed on the religious freedom of the claimant.<sup>195</sup> Regarding the second feature, the fact that the SCOTUS did not delve further into Sherbert's sincerity is not exceptional given that, as Frederick Mark Gedicks observes: "Since the development of religious liberty jurisprudence in the early 1960s, the government has conceded claimant sincerity in virtually every religious exemption case to reach the Supreme Court".<sup>196</sup> What is worthy of attention

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<sup>194</sup> *Sherbert v Verner*, (1963) 374 U.S. 398, 406. Emphasis added.

<sup>195</sup> For an excellent analysis of this concept see Frederick Mark Gedicks, 'Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA', *George Washington Law Review* 85 (2017) 94.

<sup>196</sup> *ibid* 110. Gedicks exemplifies his assertion by pointing to the following cases: "Holt v. Hobbs, 135 S. Ct. 853, 862 (2015); Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting in the granting of an injunction); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *Smith*, 494 U.S. at 919 (Blackmun, J., dissenting); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833 (1989); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987); Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 138 n.2 (1987); Bowen v. Roy, 476 U.S. 693, 725, 729 (1986) (O'Connor, J., concurring in part and dissenting in part); Goldman v. Weinberger, 475 U.S. 503, 525 (1986) (Blackmun, J., dissenting); United States v. Lee, 455 U.S. 252, 257 (1982); Wisconsin v. Yoder, 406 U.S. 205, 209 (1972); *Sherbert v. Verner*, 374 U.S. 398, 399 n.1 (1963); Braunfeld v. Brown, 366 U.S. 599, 601-02 (1961); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 584 (1983) (noting lower court assumed sincerity of university's racially discriminatory beliefs for purposes of summary judgment motion); *Gillette v. United States*, 401 U.S. 437, 440 (1971) (noting lower court rejected exemption "not because of doubt about the sincerity or the religious character of petitioner's objection to military service, but because his objection ran to a particular war"); *United States v. Seeger*, 380 U.S. 163, 166 (1965) (noting lower court found claimant's anti-war beliefs sincere)" in *ibid* at footnote 78.

for present purposes, however, is not the fact that the SCOTUS is usually satisfied with claimants' sincerity without looking closely into it. Rather, what matters is that it is a fixed part of its analysis.

After considering the merits of the case, the SCOTUS concluded that the substantial infringement of Sherbert's right to freedom of religion or belief based on her sincerely held religious beliefs was not justified by the pursuit of a "compelling state interest".<sup>197</sup> Several influential scholars understand the *Sherbert* decision as instituting a "presumptive right" for religious believers to be exempted from the laws which substantially burden them.<sup>198</sup> This presumption could only be defeated if the government demonstrates that the law, policy, or action seeks to further a compelling state interest.<sup>199</sup> Although, as mentioned above, *Sherbert* was eventually overturned by *Smith*,<sup>200</sup> courts now apply the legislation which revived its ratio at the statutory level, and it continues to be a focal point for academic discussions.

Since its decision in *Sherbert*, the SCOTUS has followed the dominant approach in the bulk of its cases concerning the right to freedom of religion or belief. In *Wisconsin v Yoder*, to name another salient case, the SCOTUS decided to exempt Amish children from attending the last two years of compulsory secondary education, based on the parental claim that this requirement burdened their religious practices because it endangered the continued survival of their way of life.<sup>201</sup> In this regard the SCOTUS held that:

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<sup>197</sup> *Sherbert v Verner*, (1963) 374 U.S. 398, 406-409.

<sup>198</sup> See eg Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution*, Harvard University Press, 2007, 40 and Cécile Laborde, *Liberalism's Religion*, Harvard University Press, 2017, 237. Eisgruber and Sager express that: "Hence *Sherbert's* case became precedent for the idea that religious conduct is uniquely and specially entitled to a constitutional exemption from generally applicable laws" in Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution*, Harvard University Press, 2007, 14.

<sup>199</sup> According to Eisgruber and Sager, this standard does not correspond to the practice of the SCOTUS. Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution*, Harvard University Press, 2007, 43. Here however, I am more interested with what the courts say they are doing than what they actually do.

<sup>200</sup> Justice Scalia denied that this was the upshot of the holding but the literature and the legislative reaction point to a very different understanding.

<sup>201</sup> *Wisconsin v Yoder*, (1972) 406 U.S. 205.

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education.<sup>202</sup>

In this paragraph are contained both of the features of the dominant approach: the first, which consists in noting both the historic and communal backing of the claimants' beliefs and practices, as well as the second, which it considers satisfied based on the communities continued engagement with certain practices.

More recently, in *Burwell v Hobby Lobby*, the SCOTUS had to determine whether the governmental requirement that corporations provide health insurance for their employees, including coverage for contraceptive methods, violated the right to freedom of religion or belief of closely held for-profit corporations.<sup>203</sup> The SCOTUS held that this requirement did, in fact, violate the claimants' right. In the opinion of the majority, the claimants are characterised as follows: "Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages ... shares humanity with those who conceived it", while "David and Barbara Green and their three children are Christians who own and operate two family businesses [who] Like the Hahns, [...] believe that life begins at conception and that it would violate their religion to facilitate access to

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<sup>202</sup> *Wisconsin v Yoder*, (1972) 406 U.S. 205, 235.

<sup>203</sup> *Burwell v Hobby Lobby*, (2014) 573 U.S. \_\_\_\_.

contraceptive drugs or devices that operate after that point”.<sup>204</sup> Moreover, the SCOTUS goes on to assert that: “the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control”, adding that “By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs”.<sup>205</sup>

The adoption of the dominant approach in this case is made clear by the SCOTUS’s mention of the Christian pedigree of the claimants’ beliefs, its conclusion regarding their sincerity, and its qualification of their situation as one which “seriously” violates said beliefs. With regard to these last two points, it is important to note that the SCOTUS does not offer any justification for its finding regarding the claimants’ sincerity, nor for its perception that the interference with their beliefs was serious.

The vast jurisprudence of the SCOTUS on this subject makes it unamenable for exhaustive scrutiny. However, because the purpose of this part of the dissertation is to reveal the presence of the dominant approach in its jurisprudence, not to perform a complete exegesis of its case law, it is sufficient to refer only to some of the most notable examples embracing this approach.

### 3.2 Canada: *Syndicat Northcrest v Amselem*

In the Canadian context, the SCC’s decision in the case of *Northcrest Syndicat v Amselem* is commonly held up as a paradigmatic example of the liberal adjudication of the right to freedom of religion or belief.<sup>206</sup> The majority judgment of the SCC in *Amselem* exhibits a couple of noteworthy features: on the one hand, it offers a remarkably clear and comprehensive account of the

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<sup>204</sup> *Burwell v Hobby Lobby*, (2014) 573 U.S. \_\_\_\_.

<sup>205</sup> *ibid*

<sup>206</sup> See eg Jocelyn Maclure and Charles Taylor *Secularism and Freedom of Conscience*, Jane Marie Todd (trans), Harvard University Press, 2011, 81.

liberal conception of religious freedom; on the other, it explicitly acknowledges and defines the two key features of the dominant approach. In this sense, the SCC states that an individual who claims a violation of her right to freedom of religion or belief must demonstrate that “he or she *sincerely believes* or is *sincerely undertaking* [practices] in order to connect with the divine or as a function of his or her spiritual faith [...]”.<sup>207</sup> Also, the SCC understands that: “Once religious freedom is triggered, a court must then ascertain whether there has been *non-trivial* or *non-insubstantial* interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion [...]”.<sup>208</sup>

At issue in *Amselem* was a claim by several divided co-owners of residential units comprising individual balconies against the syndicate of co-ownership of the apartment complex’s refusal to allow them to erect ‘succahs’—a religious structure—in their own balconies. Moïse Amselem, a new resident at the time of the events, was first to set up a succah in his balcony. The syndicate of co-ownership subsequently ordered him to remove this structure because it violated the by-laws of the apartment complex which prohibited decorations, alterations, and constructions to be placed in the balconies of the units. All of the claimants had signed the declaration of co-ownership containing said by-laws.<sup>209</sup> Shortly afterwards, Gabriel Fonfeder, who had lived there for a couple of years, decided to also erect an analogous structure. Save for these two instances, the claimants had never before acted in this manner. In fact, in previous years, the claimants had been satisfied with using the succahs that their family and friends had set up in their own homes.

The following year, Amselem sought permission to once again set up a succah in his balcony, but the syndicate refused his request citing the aforementioned prohibition. The syndicate, nevertheless, proposed to allow

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<sup>207</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, 553 and [46]. Emphasis added.

<sup>208</sup> *ibid* 554. Emphasis added.

<sup>209</sup> Although the SCC notes that: “None of the appellants had read the declaration of co-ownership prior to purchasing or occupying their individual units.” *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [9].

the claimants and other residents of the apartment complex to place a communal succah in the gardens instead. The claimants then expressed their dissatisfaction with this alternative and explained why this option “would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs which, they claimed, called for ‘their own succah, each on his own balcony’”.<sup>210</sup> They then all proceeded to place succahs on their own balconies notwithstanding the prohibition. The syndicate, for its part, was eventually granted a permanent injunction prohibiting the claimants from setting up succahs in their balconies and permitting the syndicate to demolish them, if necessary. The claimants alleged that the syndicate’s actions infringed their right to freedom of religion.

With regards to the sincerity of belief or the sincere purpose of an action, which is the first hurdle that a claim must overcome under this version of the dominant approach, the SCC makes it clear that this “simply implies an honesty of belief [...]”.<sup>211</sup> The SCC then breaks down its understanding of honesty as follows: “[t]he court’s role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in *good faith*, neither *fictitious* nor *capricious*, and that it is not an *artifice*”.<sup>212</sup> This more precise dissection of the kind of motivation to which the SCC reserves the protection of the right to freedom of religion or belief is extremely valuable for the critical discussion of this feature of the dominant approach which I will carry out in Chapter 4. While honesty and good faith are synonyms, and both are antonymous to fictitious, by adding capricious and artificial claims to the list of those which fall foul of the sincerity requirement, the SCC explicitly narrows down the universe of successful claims only to those which seek to fulfil a fixed religious prescription for the purpose of fulfilling said prescription.<sup>213</sup> In other

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<sup>210</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, 552 and [14].

<sup>211</sup> *ibid* [51].

<sup>212</sup> *ibid* [2004] 2 SCR 551, [52].

<sup>213</sup> *ibid* [69]. (“...provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective

words, the SCC thereby eliminates claims which are fickle or with ulterior motives —ie motives other than the fulfilment of the religious mandate—. Moreover, the SCC makes it clear that it considers the assessment of sincerity to be a question of fact, thereby eliminating any doubts about its epistemological position regarding the possibility of uncovering a person’s mental state.<sup>214</sup> In its judgment, beyond setting out the parameters of the sincerity test, the SCC also mentions the evidentiary tools which judges may use in connection with this purpose.<sup>215</sup>

After sketching the principles of the sincerity requirement, in *Amselem* the SCC concluded that the claimants had successfully demonstrated their sincerity. Interestingly, although the SCC is explicit in stating that the scope of the right to freedom of religion or belief is to be ascertained “*irrespective* of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials”,<sup>216</sup> the probative value it subsequently assigns to expert testimony is ambiguously defined as either “[r]elevant to a demonstration of sincerity, [but] not necessary” or “inappropriate”.<sup>217</sup> One way to interpret this seemingly inconsistent determination might be to say that while expert testimony may serve to demonstrate the claimant’s sincerity, it may not be used as evidence of insincerity. However, this interpretation of the SCC’s opinion —ie that expert testimony can only benefit but not hurt a claimant’s case— still fails to accord with its own assertion that the protection of the religious freedom of individuals is *irrespective* of extraneous authority. This discussion is of particular relevance in *Amselem* given that the SCC based its conclusion regarding the “positive finding of sincerity and honesty of the [claimant’s] belief” on the expert testimony which the claimants had submitted.<sup>218</sup> In the SCC’s own words:

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connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection.”)

<sup>214</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [53].

<sup>215</sup> *ibid* [53]-[54].

<sup>216</sup> *ibid* [46]. Emphasis added.

<sup>217</sup> *ibid* [54].

<sup>218</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [73].

When the appellants adduced Rabbi Ohana's expert testimony, they were submitting evidence of their sincere individual belief as to the inherently personal nature of fulfilling the commandment of dwelling in a succah. As expounded upon by Rabbi Ohana, according to Jewish law the obligation of 'dwelling' must be complied with festively and joyously, without causing distress to the individual. Great distress, such as that caused by inclement weather, extreme cold or, in this case, the extreme unpleasantness rendered by forced relocation to a communal succah, with all attendant ramifications, for the entire nine-day period would not only preclude the acknowledged obligation of dwelling in a succah but would also render voluntary compliance wrongful and inappropriate, thus necessitating the setting up of a private succah.<sup>219</sup>

In terms of satisfying the first feature of the dominant approach, the elaborate account that the SCC offers of the religious motivations underlying the claimants' actions is unparalleled. The SCC explains that the claimants are "all Orthodox Jews" and that they set up the succahs "for the purposes of fulfilling a biblically mandated obligation during the Jewish religious festival of Succot".<sup>220</sup> Moreover, the SCC also gives a detailed description of a succah's physical features, as well as of several apposite commandments of the Jewish faith, all of which is worth quoting at length:

A succah is a small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas, and open to the heavens, in which, it has been acknowledged, Jews are commanded to 'dwell' temporarily during the festival of Succot, which commences annually with nightfall on the fifteenth day of the Jewish month of Tishrei. This nine-day festival, which begins in late September or early- to mid-October, commemorates the 40-year period during which, according to Jewish tradition, the Children of Israel wandered in the desert, living in temporary shelters.

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<sup>219</sup> *ibid*

<sup>220</sup> *ibid* [4]-[5].

Under the Jewish faith, in commemoration of the festival's historical connection and as a symbolic demonstration of their faith in the divine, Jews are obligated to dwell in these succahs, as their ancestors did in the desert. Orthodox Jews observe this biblically mandated commandment of 'dwelling' in a succah by transforming the succah into the practitioner's primary residence for the entire holiday period. They are required to take all their meals in the succah; they customarily conduct certain religious ceremonies in the succah; they are required, weather permitting, to sleep in the succah; and they are otherwise required to generally make the succah their primary abode for the entirety of the festival period, health and weather permitting.

Technically, a succah must minimally consist of a three-walled, open-roofed structure which must meet certain size specifications in order to fulfill the biblical commandment of dwelling in it properly according to the requirements of the Jewish faith. While a succah is usually festively decorated interiorly, there are no aesthetic requirements as to its exterior appearance.

During the first two and last two days of the Succot holiday, as well as during any intermittent Saturday, Orthodox Jews are normally forbidden from *inter alia* turning electricity on or off and riding in cars or elevators. Similarly, during the Saturday(s) falling within the nine-day festival, Orthodox Jews are forbidden from carrying objects outside of their private domiciles in the absence of a symbolic enclosure, or *eruv*.<sup>221</sup>

The difficulties with this long passage will be fleshed out when scrutinising the dominant approach in the following chapters. For now, it is enough to point out that the SCC's decision to relay its understanding of the tenets of Orthodox Judaism in such precise terms could be interpreted as intending to establish or as having the —unintentional— effect of establishing an objective normative standard against which to evaluate the merits of the claimants' own religious beliefs. In the following chapters, I will offer a comprehensive explanation as to why the apparent innocuousness of this narrative is, at best, superfluous but, at worst, a corrupting influence on the

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<sup>221</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [5]-[8].

adjudicative process. The fact that the liberal conception of religious freedom champions the subjective value of religious beliefs, however, offers a powerful reason to be wary of accounts of religious tradition that employ a descriptive—but easily confusable with an orthodox or official—tone.

Having established that the claimants were sincere, thereby triggering the right to freedom of religion or belief, the SCC explains that “a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion [...]”.<sup>222</sup> In other words, a law, policy, or action may constitutionally burden a person’s religious manifestations as long as the burden is trivial and insubstantial.<sup>223</sup> It is only when a claimant shows that such a burden is non-trivial or non-insubstantial that the right to freedom of religion or belief establishes a prohibition.<sup>224</sup> As for how exactly courts are to determine whether this threshold has been met, the SCC explains that “[a]s a general matter, one can do no more than say that the context of each case must be examined [...]”.<sup>225</sup> However, the justification it offers for its finding in *Amselem* that the claimants’ right to freedom of religion or belief had been “significantly impaired” offers some clues as to the criteria that might be employed.<sup>226</sup>

The SCC bases this conclusion on two different senses of substantiality. In the first place, the SCC equates a substantial interference with one in which the law, policy, or action comes into direct conflict with the content of the religious mandate at issue. Evidence for this conception of substantiality is found in the following sentence: “For if [...] Mr. Amselem sincerely believes that he is obligated by the Jewish religion to set up and dwell in his own succah, then a prohibition against setting up his own succah obliterates the substance

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<sup>222</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [57].

<sup>223</sup> *ibid* [59].

<sup>224</sup> *ibid* [58]. In this regard, in *R v Edward Books and Art Ltd.*, [1986] 2 SCR 713, 759 the SCC stated that: “In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial”. This is also the SCC’s position in *R. v Jones*, [1986] 2 SCR 284, 314.

<sup>225</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [60].

<sup>226</sup> *ibid* [64].

of his right, let alone interferes with it in a non-trivial fashion”.<sup>227</sup> This understanding of substantiality seems to track the same distinction as the one which the *Arrowsmith* test of the European Court of Human Rights (ECtHR) makes between, on the one hand, actions which are motivated by religious beliefs and, on the other, manifestations of religious beliefs —and which is discussed below—. The substantiality of an interference, in this sense, is ascertained by comparing the content of the belief asserted by the claimant with the content of the law, policy, or action in question, in order to highlight the extent to which they are at odds. The more they come into the conflict — ie the more the fulfilment of latter renders impossible the fulfilment of the former— the more substantial the interference will be.

In a subsequent passage, however, the SCC introduces a different, more colloquial understanding of substantiality: one that attaches to considerations of social, mental or physical hardship. The SCC explains the social substantiality of the burden faced by the claimants in the following terms: “Imposing on others for the entire holiday amounts to a severe burden, especially when dealing with children [...]”.<sup>228</sup> The SCC also notes the physical adversity involved in not being allowed to erect a personal succah and of acquiescing instead to the communal option offered by the syndicate as follows: “[a] communal succah [...] would force the appellants to carry food and utensils from their units on elevated floors to the succah, and traverse the expanse of the property to the Sanctuaire’s gardens for every course at every meal throughout the holiday”.<sup>229</sup> This inconvenience is compounded by the fact that “Orthodox Jews are precluded from using elevators on the Sabbath and on the first two and last two days of the Succot holiday [...]”.<sup>230</sup> Finally, the SCC notes that a communal option would “preclude the intimate celebration of the holiday with immediate family [and] Those who choose to sleep in the succah, weather permitting, would have to do so communally and in the open,

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<sup>227</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [74].

<sup>228</sup> *ibid* [76].

<sup>229</sup> *ibid* [77].

<sup>230</sup> *ibid*

far from the proximity and safety of their individual units”.<sup>231</sup> All of these instances, the SCC describes as being “objectively substantial”.<sup>232</sup>

In light of all of the above, in a split decision, the SCC determined that the claimants had suffered a substantial infringement of their sincere religious beliefs and ruled that they were “legally entitled to set up succahs on their balconies for a period lasting no longer than the holiday of Succot [...]”.<sup>233</sup> *Amselem* is exceptional in its explicit endorsement and detailed exposition of the dominant approach. Unlike the SCOTUS in *Sherbert*, the SCC in *Amselem* makes an effort to define and to explain its application of its features. The richness of the *Amselem* ruling, therefore, makes it an outstanding reference point for the scrutiny of the dominant approach over the next chapters.

Another prominent case of the SCC is *Multani v. Commission scolaire Marguerite-Bourgeoys*, in which it found in favour of a claimant who argued the total prohibition against wearing “a religious object that resembles a dagger and must be made of metal”<sup>234</sup> to school violated his right to freedom of religion or belief. The school’s code of conduct “prohibited the carrying of weapons and dangerous objects”<sup>235</sup> for the purpose of protecting “the safety of the students and the staff”.<sup>236</sup> In short, the court held that:

G and his father B are orthodox Sikhs. G believes that his religion requires him to wear a kirpan at all times; a kirpan is a religious object that resembles a dagger and must be made of metal. [...] The council of commissioners’ decision prohibiting G from wearing his kirpan to school infringes his freedom of religion. G genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan, and none of the parties have contested the sincerity of his belief. The interference with G’s freedom of religion is neither trivial nor insignificant, as it has deprived

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<sup>231</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [77].

<sup>232</sup> *ibid*

<sup>233</sup> *ibid* [103].

<sup>234</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, [3].

<sup>235</sup> *ibid* [4].

<sup>236</sup> *ibid* [44].

him of his right to attend a public school. The infringement of G's freedom of religion cannot be justified under s. 1 of the *Canadian Charter*. Although the council's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective, namely to ensure a reasonable level of safety at the school, and although the decision had a rational connection with the objective, it has not been shown that such a prohibition minimally impairs G's rights.<sup>237</sup>

In this case, the SCC's commitment to the dominant approach is also evident. It identifies the motivations for the claimant's practice within the Sikh belief-system, asserts that the claimant's beliefs are genuine and sincere, and also makes clear that the interference with the claimant's beliefs is neither trivial nor insignificant. The adherence to the *Amselem* precedent is patent.

Other relevant cases in which the issues of triviality and insubstantiality, and sincerity make an appearance in the SCC's caselaw citing *Amselem* include *Alberta v Hutterian Brethren of Wilson Colony*, where a majority of the SCC agreed that the regulation requiring the inclusion of a photograph in every driver's license was proportionate<sup>238</sup> and *Law Society of British Columbia v Trinity Western University* in which the SCC held that the regulator of the legal profession's decision not to recognize the university's faculty of law as an approved law school owing to the latter's requirement for its students and faculty's to observe a code of conduct—both on and off-campus—in line with its religious tenets was proportionate.<sup>239</sup>

In *Alberta*, the SCC asserted the claimants' sincerity in the following terms: "Members of the Wilson Colony, like many other Hutterites, believe that the Second Commandment prohibits them from having their photograph

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<sup>237</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 257.

<sup>238</sup> *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567. The judgment refers to the standards set in *Amselem* in *ibid* [32].

<sup>239</sup> *Law Society of British Columbia v Trinity Western University*, [2018] 2 SCR 293. The judgment refers to the standards set in *Amselem* in *ibid* [63]. In *Trinity Western Canada v Law Society of Upper Canada*, [2018] 2 SCR 453 the SCC reached the same conclusion concerning an identical controversy but reached by a different regulator and also citing *Amselem* in *ibid* [32].

willingly taken. This belief is sincerely held”.<sup>240</sup> Then, regarding the non-triviality of their claim, the SCC explained that “The record does not disclose a concession on the second element of the test — whether the universal photo requirement interferes with Colony members’ religious freedom in a manner that is more than trivial or insubstantial”, but nevertheless concluded that “the courts below seem to have proceeded on the assumption that this requirement was met. Given this assumption, I will proceed to consider whether the limit is a reasonable one, demonstrably justified in a free and democratic society”.<sup>241</sup>

In *Law Society of British Columbia*, the SCC determined that: “It is clear from the record that evangelical members of TWU’s community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development”<sup>242</sup> and regarding the substantiality of the interference the SCC was of the opinion that “the LSBC has interfered with TWU’s ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU’s community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs”.<sup>243</sup>

While SCC’s jurisprudence regarding the right to freedom of religion or belief is more modest than that of the SCOTUS, it stands out for its more open commitment to the liberal conception, as well as for its more detailed rendition of the dominant approach it adopts.

### 3.3 Council of Europe: *Eweida and others v the United Kingdom*

When compared with the SCOTUS’s lengthy experience with the dominant approach or with the SCC’s textbook adoption of it, the ECtHR’s jurisprudence

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<sup>240</sup> *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, [7].

<sup>241</sup> *ibid* [34].

<sup>242</sup> *Law Society of British Columbia v Trinity Western University*, [2018] 2 SCR 293, [70].

<sup>243</sup> *ibid* [75].

might at first appear to be an outlier in this regard.<sup>244</sup> In this sense, it was not until its landmark ruling in the case of *Eweida and others v the United Kingdom* that the language of sincerity first entered its judgments.<sup>245</sup> However, while this second feature of the dominant approach is a recent fixture of its opinions, the ECtHR's fixation with its other feature is evidenced from its earliest decisions. The significance of *Eweida* derives not only from the fact that it marks the ECtHR's full acceptance of the dominant approach —although it is what is most important for present purposes—, but also because it was in this case that the ECtHR revoked the European Commission of Human Rights' longstanding, restrictive position concerning the impossibility of interfering with the right to freedom of religion or belief wherein the claimant had the option of resigning from the employment which conflicted with her religious beliefs.<sup>246</sup>

*Eweida* comprised the claims of four individuals whose religious commitments conflicted with their employers' policies. Nadia Eweida was employed by an airline and her work required her to be in contact with the public.<sup>247</sup> After several years of working for the company, Eweida suddenly decided to start wearing the cross which until then she concealed under her uniform, "openly, as a sign of her commitment to her faith".<sup>248</sup> Because the visible wearing of this religious symbol was not allowed by the airline's uniform

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<sup>244</sup> Su explains that the ECtHR is a relative newcomer to what she terms "the subjective turn" regarding the interpretation of the right to freedom of religion or belief in Anna Su, 'Judging Religious Sincerity', *Oxford Journal of Law and Religion* 5 (1) (2016) 28.

<sup>245</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013.

<sup>246</sup> The most salient cases of the European Commission of Human Rights evidencing this more restrictive approach are: *X v the United Kingdom*, App no 8160/78, concerning a Muslim seeking permission to attend a mosque on Friday afternoons; *Konttinen v Finland*, App no 24949/94, in which a Seventh-Day Adventist refused to work on Friday evenings, and; *Stedman v the United Kingdom*, App no 29107/95, concerning a Christian who refused to work on Sundays. In *Copsey v WWB Devon Clays Ltd*, [2005] EWCA Civ 932 at [35] Lord Justice Mummery is very critical of this jurisprudential line. ("The rulings are difficult to square with the supposed fundamental character of the rights. It hardly seems compatible with the fundamental character of Article 9 that a person can be told that his right has not been interfered with because he is free to move on, for example, to another employer, who will not interfere with his fundamental right, or even to a condition of unemployment in order to manifest the fundamental right.")

<sup>247</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013. The facts of Eweida's case are found in *ibid* [9]-[17].

<sup>248</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [12].

code and Eweida refused to comply with the management's orders to conceal or remove the cross, she was offered administrative work which would not involve contact with the public, which she also rejected. Eventually, the airline amended its uniform policy to authorise the wearing of religious symbols such as Eweida's and reinstated her to her former employment but refused to compensate her for the period which she had not worked. The ECtHR describes Eweida as a "practising Coptic Christian"<sup>249</sup> and explains that her "insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith".<sup>250</sup>

Shirley Chaplin, a nurse, had worn a cross around her neck "since her confirmation in 1971, as an expression of her belief".<sup>251</sup> To remove the cross, she asserted, "would be a violation of her faith".<sup>252</sup> When a new uniform design was introduced, Chaplin was asked to remove her necklace in accordance with the hospital's uniform policy on the grounds of protecting her patients from injury. The alternatives proposed by both the claimant and the hospital turned out to be unsuitable for both parties and Chaplin was transferred to a position which eventually ceased to exist. For the ECtHR, Chaplin is "also a practicing Christian".<sup>253</sup>

Lillian Ladele worked for a local authority as a registrar for birth, deaths, and marriages.<sup>254</sup> After the United Kingdom adopted the Civil Partnership Act 2004, all registrars at Ladele's place of work were required to register civil partnerships between people of the same sex. Although she was initially allowed to make informal arrangements with her colleagues in order to avoid conducting these ceremonies—to which she objected—, after some of her colleagues complained about her behavior, the local authority informed her that her refusal to perform these duties went against its code of conduct and equality policy. The administrative difficulties and the feelings of discrimination

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<sup>249</sup> *ibid* [9].

<sup>250</sup> *ibid* [89].

<sup>251</sup> *ibid* [18]. The facts of Chaplin's case are found in *ibid* [18]-[22].

<sup>252</sup> *ibid* [18].

<sup>253</sup> *ibid* [18] and [96].

<sup>254</sup> The facts of Ladele's case are found in *ibid* [23]-[30].

of other employees resulting from Ladele's actions, as well as a decision of the local authority to the effect that she failed to comply with the employer's equality policy and, finally, her refusal to "carry out straightforward signings of the civil partnership register and administrative work in connection with civil partnerships, but with no requirement to conduct ceremonies", eventually led to her dismissal.<sup>255</sup>

The ECtHR's account of Ladele's religious commitments is more telling of the dominant approach than in the case of the two previous claimants. As with Eweida and Chaplin, the ECtHR describes Ladele as a "Christian", and adds that "She holds the view that marriage is the union of one man and one woman for life, and *sincerely* believes that same-sex civil partnerships are contrary to God's law".<sup>256</sup> Later in the judgement, the ECtHR reasserts her conception of marriage, describing it as "*the orthodox* Christian view", and then goes on to explain that this belief is complemented by another, in the sense that "it would be wrong for her to participate in the creation of an institution equivalent to marriage between a same-sex couple".<sup>257</sup> This is the first allusion to a claimant's sincerity to be found in the jurisprudence of the ECtHR. Moreover, the description of Ladele's beliefs regarding the institution of marriage as orthodox reproduces the concerns which I expressed above regarding the SCC's statement of Orthodox Judaism in *Amselem*.

The last claimant, Gary McFarlane, worked as a counsellor for a company which provides sex therapy and relationship counselling.<sup>258</sup> McFarlane was concerned about counselling same-sex couples and admitted that "he had difficulty in reconciling working with couples on same-sex sexual practices and his duty to follow the teaching of the Bible".<sup>259</sup> The management of the company informed McFarlane that refusing to work with same-sex couples on certain issues amounted to discrimination and was contrary to the

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<sup>255</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [26].

<sup>256</sup> *ibid* [23]. Emphasis added.

<sup>257</sup> *ibid* [102]. Emphasis added.

<sup>258</sup> The facts of McFarlane's case are found in *ibid* [31]-[40].

<sup>259</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [34].

company's policies. McFarlane stated that he had no issues providing counselling to same-sex couples, but he explained that his "views on providing psycho-sexual therapy to same-sex couples were still evolving".<sup>260</sup> Although the company was not satisfied with this response and, therefore, decided to suspend him and start a disciplinary investigation, McFarlane confirmed that he would comply with the company's policies notwithstanding that he "acknowledged that there was a conflict between his religious beliefs and psycho-sexual therapy with same-sex couples".<sup>261</sup> Eventually, due to continuing difficulties concerning McFarlane's discharge of his responsibilities, the company decided to dismiss him.

As in the case of *Ladele*, the ECtHR's description of the facts in McFarlane's case is revealing of its commitment to the dominant approach. The ECtHR states that McFarlane is "a practising Christian", noting that he "was formerly an elder of a large multicultural church in Bristol".<sup>262</sup> Moreover, the ECtHR explains that McFarlane "holds a *deep* and *genuine* belief that the Bible states that homosexual activity is sinful and that he should do nothing which directly endorses such activity".<sup>263</sup> The ECtHR also describes McFarlane's objection as being "directly motivated by his orthodox Christian beliefs".<sup>264</sup> It is important to note that the characterization of McFarlane's beliefs as deep and genuine is exceptional in the ECtHR's jurisprudence.

Beside the ECtHR's individual accounts of the facts of each claimant in *Eweida*, the most noteworthy aspect of its judgement, for present purposes, is to be found in the section where it sets out the general principles of the right to freedom of religion or belief under the ECHR.<sup>265</sup> Although the ECtHR's inquiry into the sincerity of the claimants —ie the second feature of the dominant approach— is exhausted by what has already been mentioned above, the tests that it has established in order to demarcate the scope of the

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<sup>260</sup> *ibid* [35].

<sup>261</sup> *ibid*

<sup>262</sup> *ibid* [31].

<sup>263</sup> *ibid*. Emphasis added.

<sup>264</sup> *ibid* [108]. Emphasis added.

<sup>265</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [79]-[84].

right to freedom of religion or belief —ie the first feature of the dominant approach— are entirely set out in general terms. A conclusion to the effect that the claimants successfully met those thresholds follows from the fact that, in each case, the ECtHR found that there had been a interference with the claimants’ right, but no justification whatsoever is provided in support of these findings.<sup>266</sup>

The ECtHR has set up a dual standard in order to filter out the claims which fall within the scope of the right to freedom of religion or belief from those that don’t. The first test, which I will call the *Campbell* test, originated in the ECtHR’s decision in the case of *Campbell and Cosans v the United Kingdom*, in which it held that the word ‘belief’ in Article 9 ECHR “denotes views that attain a certain level of *cogency, seriousness, cohesion and importance*”.<sup>267</sup> Moreover, in the later case of *Leela Förderkreis E.V. and others v. Germany*, it extended the threshold’s relevance by stating that it is the right to freedom of thought, conscience and religion —not just the term ‘belief’— which denotes views that fulfil said criteria.<sup>268</sup> If the ECtHR is satisfied that a particular claim meets this test, it then proceeds to declare that there has been an interference with the claimant’s right to freedom of religion or belief. If, on the contrary, the ECtHR deems a claimant’s views to fall short of the threshold, it simply declares the complaint inadmissible for being incompatible *ratione materiae* with said right.

While the ECtHR has consistently alluded to the *Campbell* test in its judgement concerning the right to freedom of religion, as in *Eweida*, it rarely states its reasons for finding —as it does in the majority of cases—<sup>269</sup> that the

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<sup>266</sup> *ibid* [91], [97], [103] and [108].

<sup>267</sup> *Campbell and Cosans v. the United Kingdom*, App. no. 7511/76 and 7743/76, 25 February 1982, [36]. Emphasis added.

<sup>268</sup> *Leela Förderkreis E.V. and others v. Germany*, App no 58911/00, 6 February 2009, [80].

<sup>269</sup> See eg *Buldu et autres c Turquie*, App. no. 14017/08, 03 September 2014; *S.A.S. v France*, App. no. 43835/11, 01 July 2014; *Vartic v Romania (no. 2)*, App. no. 14150/08, 17 March 2014; *Tarhan c Turquie*, App. no. 9078/06, 17 October 2012; *Savda c Turquie*, App. no. 42730/05, 12 September 2012; *Herrmann v Germany*, App. no. 9300/07, 26 June 2012; *Feti Demirtas c Turquie*, App. no. 5260/07, 17 April 2012; *Bukharatyan v Armenia*, App. no. 37819/03, 10 April 2012; *Tsaturyan v Armenia*, App. no. 37821/03, 10 April 2012; *Erçep c Turquie*, App. no. 43965/04, 22 February 2012; *A.S.P.A.S. et Lasgrezas c France*, App. no. 29953/08, 22

beliefs of a claimant have successfully met the threshold or, alternatively —as in some marginal cases— why they have failed to do so.<sup>270</sup> More troublesome still is the fact that it has never thought it necessary to explain its reasons for adopting the threshold in the first place nor, at the very least, striven to shed light on the meaning of the criteria that conform it. The same can be said about the doctrinal scholarship dedicated to this right and which, for the most part, reproduces the criteria approvingly without engaging with its merits.<sup>271</sup>

The second test, referred to as the *Arrowsmith* test, has its origin in the decision of the now extinct European Commission of Human Rights in the case of *Arrowsmith v the United Kingdom*.<sup>272</sup> According to this test, not every action which is *motivated* by a religion or belief counts as a *manifestation* of a religion or belief. Only actions which amount to manifestations —as opposed to actions which are merely motivated by— a religion or belief engage the right to freedom of religion or belief. In *Arrowsmith*, for example, the Commission applied this test in order to justify its decision to the effect that the distribution of leaflets to soldiers containing information about different ways of quitting the British armed forces did not amount to a manifestation of the claimant's pacifist beliefs —a philosophy which nevertheless, according to the Commission, “falls within the ambit of the right [...]”.<sup>273</sup> Because the leaflet in question did not actually spell out the pacifists beliefs of the claimant, but rather gave soldiers

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September 2011; *Bayatyan v Armenia*, App. no. 23459/03, 07 July 2011; *Lautsi and others v Italy*, App. no. 30814/06, 18 March 2011; *Jakóbski v Poland*, App. no. 18429/06, 07 March 2011; *Herrmann v Germany*, App. no. 9300/07, 20 January 2011; *Blumberg v Germany*, App. no. 14618/03, 18 March 2008; *Hasan and Eylem Zengin v Turkey*, App. no. 1448/04, 09 January 2008; *Baudiniere et Vauzelle c France*, App. no. 25708/03 et al, 06 December 2007; *Schneider c Luxembourg*, App. no. 2113/04, 10 October 2007; *Folgerø and others v Norway*, App. no. 15472/02, 29 June 2007; *Chassagnou and others v France*, App. no. 25088/94 et al, 29 April 1999; *Efstratiou v Greece*, App. no. 24095/94, 18 December 1996, and; *Valsamis v Greece*, App. no. 21787/93, 18 December 1996.

<sup>270</sup> See eg *Gough v the United Kingdom*, App. no. 49327/11, 23 March 2015 and *Szwed v Poland*, App. no. 36646/09, 05 December 2013.

<sup>271</sup> See eg Ronan McCrea, *Religion and the Public Order of the European Union*, Oxford University Press, 2010, 140; Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, 2001, 54 and; Pieter van Dijk et al, *Theory and Practice of the European Convention on Human Rights*, Intersentia, 2006, 760.

<sup>272</sup> *Arrowsmith v. the United Kingdom*, App. no. 7050/75.

<sup>273</sup> *Arrowsmith v. the United Kingdom*, App. no. 7050/75, [69].

advice about how to go about absenting themselves from service, the Commission concluded that the claimant's actions, while motivated or influenced by her beliefs, did not count as a manifestation of them.<sup>274</sup>

Carolyn Evans explains that the *Arrowsmith* test should be interpreted as a “necessity test”, by which she means that “requires [claimants] to show that they were required to act in a certain way because of their religion or belief”.<sup>275</sup> Evans also points out that in a limited number of cases, the *Arrowsmith* test can be interpreted less restrictively as a “giving expression’ test”, where the standard to be met is “whether the actions of the applicant ‘give expression’ to his or her religion or belief”.<sup>276</sup> In either of these two versions of this test, I suggest that the best understanding of it points in the direction of a similar analysis to the one that the SCC hinted at in *Amselem* under the first sense of substantiality explained above: whether something is a manifestation of a religion or belief depends on the level of conflict that exists between the belief which the claimant asserts, on the one hand, and her actions—or refusal to act—, on the other.

Although in *Eweida* the ECtHR concluded—after implicitly applying these two tests—that all of the claimants had suffered an interference with their right to freedom of religion or belief, only in the case of the first claimant did it rule that there had been a violation of this right. This conclusion was rendered possible by the ECtHR's reversal of its earlier interpretation of the right to freedom of religion, according to which “if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief”, such as resigning, there could be no interference with said right.<sup>277</sup> From *Eweida* onwards, the ECtHR is of the following opinion:

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<sup>274</sup> *ibid* [75].

<sup>275</sup> Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, 2001, 115.

<sup>276</sup> *ibid* 123.

<sup>277</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [83].

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.<sup>278</sup>

#### 4. Conclusion

Most scholars and judges favour an approach to claims concerning the right to freedom of religion or belief that submits the beliefs and practices of claimants to different types of scrutiny. The purpose of this treatment is to filter out claims that reflect the requisite ethical salience and sincerity from those that don't. One possible explanation for the adoption of this practice points to the exemption-based regime that many scholars consider inextricable from a finding of a violation of someone's religious freedom. More precisely, this dominant approach can be broken down into two distinct evaluations: the first of these has the purpose of assessing the merits of the beliefs and practices that the claimant alleges to be in violation of a certain law, policy, or action. As evidenced above, courts tend to locate the beliefs or practices adduced by claimants within broader, familiar and identifiable belief systems as a means of satisfying this first threshold. On the other hand, while they routinely express their opinion about a claimant's sincerity, they rarely, if ever, justify this finding, except to say that it has not been questioned.

Importantly, while the dominant approach seems to be a desirable, or even, an inevitable trait of litigation concerning the right to freedom of religion or belief because of the unquestioned assumption about the exemption-based relief that should be awarded to successful claimants, it is by no means a necessary feature of the right when this starting point is dropped. If only a general remedy were to be available, the appeal of the dominant approach

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<sup>278</sup> *ibid*

would fade. The logic of burdens and exemptions introduced by *Sherbert* provoked a paradigmatic shift of such proportions that it is difficult to envisage a judicial treatment of the right to freedom of religion or belief that avoids following the dominant approach. The pervasiveness of this logic is well captured by Winnifred Fallers Sullivan who, in exposing the tension between “the promise of universal claims and the realization of guarantees in national law schemes”,<sup>279</sup> referring specifically to the right under consideration, settles for the impossibility of “justly enforcing laws granting persons rights that are defined with respect to their religious beliefs and practices”.<sup>280</sup> I contend that this impossibility might be true for an exemption-based adjudicative scheme which adopts the dominant approach, but not for understandings that transcend this paradigm.

This brings to an end Part I of this dissertation. In this part, I offered an account of two fundamental considerations regarding the adjudication of the right to freedom of religion or belief. In Chapter 1, I presented the liberal conception of the right in question, based on the political values that the academic literature and the courts have identified as underpinning it and, furthermore, explaining the features—instrumentality and individuality—that result from this justification. Then, in Chapter 2, I considered the academic and judicial endorsement of an approach to claims alleging a violation of this right, which seeks to identify the merits of the beliefs and the motivations of claimants, in order to determine whether the claim attracts the protection of the right. Having set out the theoretical conception and practical application of the right to freedom of religion or belief, in the next part of the dissertation, I submit the dominant approach to a critical scrutiny with the purpose of establishing its compatibility with the liberal conception of the right.

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<sup>279</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, Princeton University Press, 2005, 157.

<sup>280</sup> Pieter van Dijk et al, *Theory and Practice of the European Convention on Human Rights*, Intersentia, 2006, 8.

**Part II.** Critical evaluation of the dominant approach to the adjudication of the right to freedom of religion or belief

In this part, I critically examine each of the two features of what I termed the dominant approach and argue that there is a tension between it and the liberal conception which cannot be reconciled without falling back on *non-liberal* conceptions of religion in order to determine whether a belief and/or action (or refusal to act) brought to the court's attention by an individual or group should receive the protection of the right in question. In Chapter 3, I consider the difficulties concerning the first feature of the dominant approach and argue that judges are unable to justify a decision contradicting a claimant's assertion that a belief or practice is ethically salient for her. Then, in Chapter 4, I consider the evidentiary difficulties concerning the second feature of the dominant approach, explaining why even a mild test of sincerity contradicts the liberal conception of the right to freedom of religion or belief.

### **Chapter 3.** The *justificatory* difficulty of the dominant approach

'Chaplain,' he asked casually, 'of what religious persuasion are you?'

'I'm an Anabaptist, sir.'

'That's a pretty suspicious religion, isn't it?'

'Suspicious?' inquired the chaplain in a kind of innocent daze. 'Why, sir?'

'Well, I don't know a thing about it. You'll have to admit that, won't you? Doesn't that make it pretty suspicious?'

Joseph Heller, *Catch-22*<sup>281</sup>

As I explained in the previous chapter, according to the first feature of the dominant approach, claimants who allege a violation of their right to freedom of religion or belief are required to disclose the beliefs which they take to be in conflict with the law, policy, or action in question, so that the court may, in turn, determine whether those beliefs fall within the scope of that right. In this chapter, I demonstrate that this feature of the adjudicative strategy under scrutiny—which, to restate, calls on judges to pick out claims on the basis of the ethical salience of the claimants' beliefs—is at odds with the liberal conception of the right to freedom of religion or belief because conforming to this conception makes it impossible to *justify* a decision regarding the normative merits of any particular claim. In the absence of justificatory means by which to fulfil this first mandate of the dominant approach, any decision to the effect that a claim either does or does not possess the requisite ethical value to attract the protection of said right is, by definition, arbitrary.

I will develop this argument in the following sections. First, I make clear that my position does not entail an across-the-board statement regarding the state's legitimacy regarding judgements of ethical salience. Instead, as I explain in the second section, my assertion is limited to the judicial setting where judges must contradict a claimant's assertion that something is ethically

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<sup>281</sup> Joseph Heller, *Catch-22*, Vintage, 1961, 237.

salient for them. I defend this argument by revealing the internalist character of the normative reasons that are accepted by the liberal conception of the right to freedom of religion or belief. Then, in the third section, I take on the ill-advised practice of evaluating the ethical salience of a belief or practice for a particular claimant by relying on proxies that are deemed religious in some non-politico-legal sense. Finally, in the fourth section, I turn to consider each of the different thresholds established by the courts in application of this first feature of the dominant approach, as described in the previous chapter.

#### 1. Legitimate state-sponsored judgments of ethical salience: Laborde's refutation of Dworkin

In *Jakobski v Poland*, the ECtHR held that prison authorities had interfered with the right to freedom of religion or belief of a prisoner by failing to provide him with the meat-free diet which he had requested.<sup>282</sup> Subsequently, in *Swed v Poland*, that same judicial body declared that the claim of another prisoner seeking an analogous benefit was manifestly ill-founded.<sup>283</sup> The contrasting conclusions of the ECtHR in these two cases are explained by the fact that, in the former case, the claimant appealed to his Buddhist beliefs while, in the latter case, the claimant simply reasoned that a vegetarian diet would “help him to feel better”.<sup>284</sup> In applying its particular thresholds to the aforementioned claims, the ECtHR observed, in *Jakobski*, that: “Buddhism is one of the world's major religions officially recognised in numerous countries”; that he “requested to be provided with a meat-free diet because as a practising Buddhist he wished to avoid eating meat”; and, that his “decision to adhere to a vegetarian

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<sup>282</sup> *Jakóbski v Poland*, App. no. 18429/06, 07 March 2011, [45].

<sup>283</sup> *Szwed v Poland*, App. no. 36646/09, 05 December 2013, 4.

<sup>284</sup> *ibid.* The ECtHR says of *Jakobski* that: “On several occasions he requested to be served meat-free meals on account of his religious dietary requirements. He submitted that he was a Buddhist and that he adhered strictly to the Mahayana Buddhist dietary rules which required refraining from eating meat.” *Jakóbski v Poland*, App. no. 18429/06, 07 March 2011, [7]. Whereas regarding *Swed*, the ECtHR claimed that: “The applicant had not claimed to be a vegetarian. Neither had he given any other reason for his request, such as religion or other personal beliefs.” *Szwed v Poland*, App. no. 36646/09, 05 December 2013, 4.

diet can be regarded as motivated or inspired by a religion [...]”.<sup>285</sup> In *Szwed*, by contrast, the ECtHR was of the opinion that the claim “did not constitute an expression of a coherent view on a fundamental issue, and it cannot therefore be regarded as a ‘manifestation of personal beliefs’ [...]”.<sup>286</sup> The legal consequences that, for the ECtHR, are to follow from an assessment of the ethical worth of the motivations underlying two otherwise identical claims offer an unparalleled example of the relevance of the first feature of the dominant approach for the adjudication of the right to freedom of religion or belief.

The legitimacy of tracing the scope of this right based on state-sponsored judgments of ethical salience is contested amongst liberal scholars, as was explained in Chapter 1. In their recent masterworks, Ronald Dworkin and Cécile Laborde defend opposing sides of this divide. For Dworkin, judgements of this sort are not available to state officials because, as was mentioned earlier, for him they contradict “the basic principle that questions of fundamental value are a matter of individual, not collective, choice”.<sup>287</sup> Moreover, Dworkin thinks that even under the most capacious of understandings of the concept of religion —such as the one which he himself endorses— doing so is also inherently discriminatory.<sup>288</sup> Laborde, for her part, retorts that the liberal state’s commitment to the principle of neutrality is more limited than Dworkin suggests and that, therefore, at least some state-sponsored judgments of ethical salience do not violate this principle. In her own words: “[t]he state is not neutral toward higher-order interests or moral powers: it grants special protection to a class of ethically salient interests”.<sup>289</sup>

If Dworkin is correct, then by deeming the claim in *Jakobski* worthy of receiving the protection of the right to freedom of religion or belief while denying the same standing to the one in *Szwed*, the ECtHR engaged in an illegitimate and discriminatory practice. Moreover, because making judgments

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<sup>285</sup> *Jakóbski v Poland*, App. no. 18429/06, 07 March 2011, [45].

<sup>286</sup> *Szwed v Poland*, App. no. 36646/09, 05 December 2013, 4.

<sup>287</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 123.

<sup>288</sup> *ibid* 124-28.

<sup>289</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 200.

of this sort is precisely what the first feature of the dominant approach requires, siding with Dworkin entails an outright rejection of the dominant approach. From Laborde's perspective, to the contrary, the ECtHR's treatment of *Jakobski* and *Szwed* evidences a legitimate appraisal of two claims with evidently disparate ethical weight. In the remainder of this section, I consider Dworkin and Laborde's arguments in more detail and explain why Laborde successfully refutes Dworkin's *across-the-board* prohibition of state-sponsored judgements of ethical salience. Laborde, I argue, rightly calls out the overinclusiveness of Dworkin's position. The aim of this section, therefore, is to make it clear that my assertion concerning the arbitrariness of the first feature of the dominant approach according to a liberal conception of the right to freedom of religion or belief does not rely on a contested understanding of the state's duty of neutrality.<sup>290</sup>

In Chapter 3 of his posthumously published book, *Religion Without God*, Dworkin sets out to answer the following question: "How must we understand the concept of religion if we are to justify the assumption that freedom of religion is an important basic right?"<sup>291</sup> Here, Dworkin is looking for normative considerations capable of justifying the "dramatic political consequences" that result from establishing the scope of this right in a particular manner.<sup>292</sup> After surveying and discarding some potential candidates, he finally locates the value of religion in the imposition of duties and responsibilities, the fulfilment of which it would be wrong for governments to curtail.<sup>293</sup> Therefore, for Dworkin, the right to freedom of religion or belief should be interpreted as providing legal recognition to the idea "that each person has an intrinsic and

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<sup>290</sup> I am thinking about broader discussions regarding secularism or laïcité which fall beyond the scope of this project.

<sup>291</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 109. Religion, for Dworkin, is an interpretive concept and, as such: "We use them to decide what to protect as human and constitutional rights, and we must define them so as to make sense of that crucial role." in *ibid.*

<sup>292</sup> *ibid* 106.

<sup>293</sup> *ibid* 113. ("A government that prohibits its people from respecting those duties profoundly insults their dignity and their self-respect.")

inescapable ethical responsibility to make a success of his life”.<sup>294</sup> The upshot of singling out the fulfilment of imperative duties as the attribute which justifies granting special treatment to religion is that such a benefit must transcend theistic understandings of religion so as to include all other worldviews containing equally important obligations.<sup>295</sup> However, Dworkin notes, the problem with this view is that it is not possible to “extrapolate the special rights and privileges now restricted to conventional religion to all passionately held conviction”.<sup>296</sup> This observation mirrors Scalia J’s in the *Smith* judgement — where the SCOTUS held that neutral laws of general applicability, such as the one which criminalised peyote use in the State of Oregon, did not violate the Free Exercise Clause— when he said that “Any society adopting such a system would be courting anarchy”.<sup>297</sup>

Although Dworkin acknowledges the persuasiveness of adopting a “substantive” definition of religion —by which he means, one that “identifies religious convictions that qualify for protection through their subject matter, not the fervor with which they are held”—<sup>298</sup> as a means of curtailing the uncontrollable expansion of religious claims which would otherwise fit within his conception, he concludes that doing so would require the involvement of the government in matters of fundamental value which, in a liberal state, must be left up to the individual.<sup>299</sup> Moreover, Dworkin points to a further difficulty which attaches to the granting of any benefit on the grounds of religion: that state-sanctioned exemptions from otherwise valid laws discriminate against

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<sup>294</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 114. (“It includes a responsibility of each person to decide for himself ethical questions about which kinds of lives are appropriate and which would be degrading for him.”)

<sup>295</sup> *ibid*

<sup>296</sup> *ibid* 117.

<sup>297</sup> *Employment Division v Smith*, (1990) 494 U.S. 872, 888.

<sup>298</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 120.

<sup>299</sup> *ibid* 123. In this sense, he adds that: “We have now discovered, however, great difficulty in defining the scope of that supposed moral right. Its protection cannot sensibly be limited to godly religions. But neither can we sensibly define it as embracing all the convictions that fall under a more generous account of religion. And we found conflict in two ideas, both of which seem to belong to the supposed distinct moral right: that government may not burden the exercise of religion but also must not discriminate in favor of any religion.” in *ibid* 129.

those who are not exempted from them.<sup>300</sup> The extent of Dworkin's rejection of the permissibility of any governmental classification of ethical worth is made patent when he explains that exempting members of the Native American Church from the ban on peyote use for ritual purposes discriminates "against those who only want to get high".<sup>301</sup> The similarity of this scenario with the facts in *Jakobski* and *Szwed* evidence the pertinence of Dworkin's arguments in this discussion.

Dworkin, therefore, encounters two problems with trying to delimit the scope of the right to freedom of religion or belief: first, that doing so would require the state to make value judgements which are outside its ken; and, second, that if it did make said judgements, it would inevitably be discriminating against some individuals. For Laborde, the problem with Dworkin's argument is that it "dissolves" religion "into a maximally inclusive category that comprises, preferences, commitments, identities, beliefs, worldviews, and so forth."<sup>302</sup> In other words, in Dworkin's theory, "there is no ethically salient boundary between religious and other kinds of attitudes to life".<sup>303</sup> I agree with Laborde's reading of Dworkin's work on this point: in order to conclude that allowing drug use for the purposes of performing a religious ritual discriminates against someone who simply enjoys getting high, it is necessary to draw an ethical equivalence between both of those actions, and the idea that the liberal state should refrain from distinguishing between them is unappealing. A political theory that fails to capture the differing levels of value that exist amongst ethical convictions and mere preferences operates under a deficient understanding of the human experience. Fortunately, as Laborde explains, liberalism does not endorse such a view. In fact, she acknowledges that this misunderstanding of the liberal outlook is precisely what has given rise to a commonly levelled charge against the liberal conception of religion: that "liberalism, for all its claims to neutrality, cannot dispense with an ethical

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<sup>300</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 125.

<sup>301</sup> *ibid* 125-26.

<sup>302</sup> Cécile Laborde, *Liberalism's Religion*, Harvard University Press, 2017, 44.

<sup>303</sup> *ibid* 46.

evaluation of the salience of different conceptions, beliefs, and commitments.”<sup>304</sup>

Laborde confronts this challenge by noting that the liberal commitment to the principle of neutrality is not as broad as it is often assumed.<sup>305</sup> Instead, it is only limited to the protection of the value of “personal liberty” —which only disallows the imposition of *comprehensive* conceptions of the good and the infringement of individual *integrity*.<sup>306</sup> A law, policy, or action, according to this *restricted* principle of neutrality, can breach a person’s right to freedom of religion or belief either because it is justified on the basis of a comprehensive conception of the good and/or because it comes into conflict with an individual’s ethical integrity —to restate what was explained in Chapter 1, this refers to an individual’s ability “to live in accordance with how she thinks she *ought* to live”.<sup>307</sup> The first of these possibilities —a non-neutral justification because based on a comprehensive conception of the good— is of little importance to the present discussion because it is concerned not with the motivation of a law, policy, or action, but rather with the normative value of a claim asserting that a particular law, policy, or action conflicts with certain beliefs. Therefore, it is only the second possible violation of the principle of neutrality which is relevant for present purposes, given that what is determinative in this case is the existence of a conflict between the ethical commitments of claimants and what a particular law, policy, or action requires of them.

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<sup>304</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 5. Laborde provides another definition of the ethical salience problem in *ibid* 41. (“liberal egalitarians cannot avoid evaluating the normative salience of different kinds of beliefs, practices, and identities.”)

<sup>305</sup> *ibid* 80. In addition to Dworkin, Laborde refers to the following authors as sources of this claim: Sonu Bedi, Gemma Cornelissen, and Brian Leiter in *ibid* endnote 1 at 307.

<sup>306</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 146. (“At the level of justification, neutrality applies to *comprehensive* conceptions of the good; and concerning its subject matter, it applies primarily to what I call *integrity-related* liberties. The suggestion is that my liberty is egregiously violated by a freedom-restricting law if (1) the law is justified by appeal to a comprehensive worldview; or if (2) however the law is justified, it limits my liberty to live with integrity. Both demands are rooted in the particular importance of personal ethics, at the heart of liberalism’s commitment to ethical individualism.”)

<sup>307</sup> *ibid* 203-04. Emphasis added.

To exemplify the potential dual wrongness of Laborde's notion of limited neutrality, reconsider the dietary policy adopted by the Polish prison authorities in *Jakobski* and *Szwed* which did not include a meat-free option. Such a policy is capable of violating the principle of neutrality in either of two ways: if the policy is motivated by sympathy or hostility towards a comprehensive conception of the good —eg to carnivourism or vegetarianism, respectively— ; or —supposing that the policy is neutral in its justification— because it conflicts with someone's ethical integrity. In the first case, the lack of justificatory neutrality of the policy would render it illegitimate for all potential claimants, regardless of the existence of additional motivations underlying any particular claim. In other words, in this first scenario, even though the policy only frustrates *Szwed*'s preferences while affecting *Jakobski*'s religious beliefs, the policy is in breach of the principle of neutrality across both claims. However, if the policy is valid in terms of its justification, then it is only in *Jakobski*'s case that the policy engages his personal liberty given that only his ethical integrity is at stake. *Szwed*'s personal liberty, however, is not affected because the policy does not conflict with any ethical commitments of his, only with one of his preferences. Laborde's careful dissection of the value of personal liberty and its relationship with the principle of neutrality, therefore, successfully substantiates her thesis regarding the permissibility of state-sponsored judgments of ethical salience in a liberal polity. Liberalism, then, does not disallow a distinction to be made between ethical commitments and mere preferences. In fact, following Laborde, respect for the value of personal liberty requires that state officials make such value judgements precisely in order to acknowledge its distinct political significance.

The neutrality of the liberal state, therefore, does not prohibit all public judgements of ethical salience. In fact, the liberal state makes such judgments as a matter of course: from the funding of certain athletic or cultural activities, to the recognition of certain rights as fundamental. It is difficult to see why legitimacy of judgements of this sort should fare any differently when they engage the right to freedom of religion or belief. After all, it is precisely in order

to acknowledge that the claims in *Jakobski* and *Szwed* should not be viewed as equivalent from a political and legal standpoint in light of their differing ethical weight that Laborde engages in this discussion in the first place and why she says that “workplace uniform regulations that accommodate Muslim veils but not clown hats implicitly judge Muslim veils to have greater ethical salience than clown hats” but that they are not “*ipso facto* in breach of liberal neutrality”.<sup>308</sup> But, does this notion of restricted neutrality vindicate the legitimacy of the first feature of the dominant approach? In the next section I explain why, even conceding the correctness of this theoretical framework, its suitability to other institutional settings —eg the legislature—, or its applicability to cases like *Szwed*, it is unable to serve as the basis for the sifting of claims asserting a violation of the right to freedom of religion or belief.

## 2. Illegitimate judicial judgements of ethical salience: the *reasons internalism* of the liberal conception of the right to freedom of religion or belief

In order to understand why, even under a restricted conception of neutrality that allows for state-sponsored judgements of ethical salience, courts cannot justify a decision to the effect that any particular claim either meets or fails to meet the requisite level of ethical salience, it is important to consider the distinctness of the judicial role. Unlike in *Szwed* —where the claimant couched his claim in trivial, non-ethically salient terms— or in the hypotheticals offered by Dworkin and Laborde —where it is stipulated that someone just wants to get high or it is assumed that clown hats are mere preferences—, in the judicial context, courts must usually either *corroborate* or *contradict* a claimant’s assertion affirming the ethical salience of her claim. In other words, claimants who go before the courts alleging a violation of their right to freedom of religion normally assert that their religion or beliefs, and not merely their preferences,

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<sup>308</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 199-200. She adds that: “liberal neutrality does not prohibit judgment of ethical salience, at the relevant level of abstraction.” in *ibid* 201.

are what is at stake. It is, therefore, one thing to agree with the idea that liberalism does not disallow judgments of ethical salience and that the personal liberty of individuals is breached when a law, policy, or action conflicts with their integrity, but another thing altogether to explain *if* and *how* judges are able to reach such conclusions when faced with a claim to that effect. For such an exercise to be meaningful and/or legitimate under the liberal conception of the right to freedom of religion or belief, judges must be able to justify their decisions. The difficulty judges face is that the first feature of the dominant approach is incompatible with this conception's commitment to a *simple* form of *reasons internalism*.

Reasons internalism is a theory of normative reasons.<sup>309</sup> Normative reasons are “considerations that count in favour of an action”.<sup>310</sup> According to the internal reasons theory, a normative reason “must display a relativity of the reason to the agent's *subjective motivational set* [...]”.<sup>311</sup> What this means, in simple terms, is that for a person to have a normative reason to act—or to refrain from acting—that person must have a motivation that will be satisfied by the performance of that action—or refusal to act—.<sup>312</sup> One type of motivational attitude—or psychological state—giving rise to normative reasons are the beliefs that a person holds regarding her own ethical obligations. The liberal conception of the right to freedom of religion or belief, inasmuch as it accords political and legal relevance to actions—or refusals to

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<sup>309</sup> For an explanation of this subject see Stephen Finlay and Mark Schroeder, ‘Reasons for Action: Internal vs. External’, *Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), Fall 2017 available at <https://plato.stanford.edu/entries/reasons-internal-external/> (last accessed in September 2019).

<sup>310</sup> George Letsas, ‘The Positivist May Be Right’. Legal Conventionalism Revisited’, *Problema Anuario de Filosofía y Teoría del Derecho* 10 (2006) 63, 73 referencing Thomas M. Scanlon, *What We Owe to Each Other*, Harvard University Press, 2000, 17.

<sup>311</sup> Bernard Williams, *Moral Luck. Philosophical Papers 1973-1980*, Cambridge University Press, 1981, 102. Williams calls this the sub-Humean model given that it simplifies Hume's well-known theory of reasons.

<sup>312</sup> *ibid* 101. “A has a reason to  $\emptyset$ ” or “There is a reason for A to  $\emptyset$ ” are two sentences the truth of which according to reason internalism are satisfied by the claim that, following Williams: “A has some motive which will be served or furthered by his [ $\emptyset$ ]-ing” and “A has a reason to [ $\emptyset$ ] iff A has some desire the satisfaction of which will be served by his [ $\emptyset$ ]-ing. Alternatively, we might say...some desire, the satisfaction of which A believes will be served by his [ $\emptyset$ ]-ing.” in *ibid*.

act— based on the beliefs that a person holds, is committed to this philosophical outlook. Laborde, for example, explicitly endorses this position when she states that the normatively relevant features of religious beliefs are a function of their “instrumental importance to individuals’ well-being. The relevant interpretive principle is *how individuals relate to these features*. [...]”<sup>313</sup> The normativity of a claim —ie whether it falls within the scope of the right to freedom of religion or belief—, then, depends on the ethical salience of a belief and, this in turn, depends on whether that belief forms part of how a particular individual believes that she ought to live. The normativity of wearing of a veil, to take a favourite contemporary example, depends on a particular person’s belief that she ought to wear it and, if so, it will only be ethically salient for her.

Contrast this internalist bent with an external theory of reasons according to which the existence of normative reasons is independent of subjective motivations. In such a case, the normativity of wearing a veil —or of refusing to wear one— would need to be ascertained without taking into account the ethically salient beliefs of anyone in particular. From a reasons externalist perspective, therefore, a judgment regarding a law, policy, or action’s infringement of the right to freedom of religion or belief would apply across the board to all individuals in a particular context. This is the paradigm under which considered judgements about the profound wrongness of torture or slavery, for example, are usually justified. It is not common to encounter an opinion on these matters which makes their legality dependent —even to the slightest extent— on the motivation of a particular individual. Torture and slavery are, therefore, examples of issues concerning which an external reasons theory normally prevails. But the opposite is true under the liberal conception of the right to freedom of religion or belief. For an action —or refusal to act— to be legally relevant because ethically salient, it is *necessary* for the claimant to consider it as such. The scope of the right to freedom of religion or belief,

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<sup>313</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 203.

therefore, adopts the shape of a particular individual's religious convictions or, to borrow a sartorial example, it is not an *off-the-rack* item but rather a *custom-made* one.

The difference between these two theories regarding the normativity of reasons lays bare the judicial quagmire resulting from the first feature of the dominant approach. The reasons internalism of the liberal conception of the right to freedom of religion or belief makes it impossible for judges to make a *prima facie* determination regarding the normativity of any one claim. The agent-dependency of this normative theory means that, absent a particular individual holding an underlying ethically salient belief to that effect, the legal relevance of wearing a crucifix, a veil, or a clown hat is equally non-existent. Of course, this would be different according to an external theory, in which case it would likely be easier to come up with considerations capable of justifying the ethical salience of the wearing of veils and crucifixes than that of clown hats. But all such external candidate considerations would be superfluous from an internalist perspective, where what is necessary for the justification of the normativity of a certain action—or refusal to act—is the existence of a motivation—specifically, a belief, for present purposes—that favours it. Moreover, such external candidate considerations would not only be superfluous, but also illegitimate from the perspective of the liberal conception of the right to freedom of religion or belief, if judges were to take them into account. This assertion is of fundamental importance because what it means is that the existence of a belief is not only *necessary* for a claim to fall within the scope of this right, but also *sufficient* for the achievement of the requisite level of ethical salience.

That the existence of a claim affirming the ethical salience of a belief suffices for it to be accorded such a status, from a legal perspective, is given by the fact that the liberal conception of the right to freedom of religion or belief is committed to a *simple* kind of reasons internalism. I have thus far explained the notion of reasons internalism but not its simplicity. The version of reasons internalism of this conception of the right is simple because the beliefs of the

claimant cannot be falsified by the courts. In other words, a claimant cannot be charged by a judge with harbouring a false belief such that it is unable to give rise to a normative reason for action—or for refusing to act—. Consider Bernard Williams's straightforward example of a false belief and its consequences for the normativity of a reason based on such a belief.<sup>314</sup> Suppose that *A* desires to drink a gin and tonic. Does *A* have a reason to mix something which she thinks is gin, but is in fact petrol, with tonic in order to drink it? If *A*'s belief is susceptible of falsification, then the answer is no: she does not have a reason to mix the petrol with the tonic in order to then drink it because the resulting substance will not fulfil her desire to drink a gin and tonic. Her belief, because it is false, therefore, does not serve to give rise to a normative reason.<sup>315</sup> If, however, her belief is not susceptible of falsification, then—however odd it may seem—*A* does have a normative reason to drink the concoction, even if she is mistaken about its conduciveness for the fulfilment of her desire.

As I stated in Chapter 1, the liberal conception of the right to freedom of religion or belief does not allow the falsifiability of a claimant's beliefs. This means that a claimant's assertion in the sense that she believes that she ought to behave in a certain manner—ie that she has an ethically salient belief capable of giving rise to a normative reason to act or to refuse from acting—, cannot be either corroborated or contradicted by pointing to the falseness of her beliefs. Laborde makes this point as clearly as possible:

Individuals might be mistaken about what is demanded of them; they might come up with wildly eccentric or idiosyncratic beliefs and practices; they might press highly heterodox interpretations of their religion, and so forth. But as integrity is understood as an individual, subjective value, it follows that only the individual is competent to determine what her own integrity demands. The

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<sup>314</sup> Bernard Williams, *Moral Luck. Philosophical Papers 1973-1980*, Cambridge University Press, 1981, 102-03.

<sup>315</sup> *ibid* 103. ("A member of *S*, *D*, will not give *A* a reason for  $\emptyset$ -ing if either the existence of *D* is dependent on false belief, or *A*'s belief in the relevance of  $\emptyset$ -ing to the satisfaction of *D* is false.")

alternative—judging individual practices in relation to some religious orthodoxy—is unacceptable to liberal egalitarians.<sup>316</sup>

This view tracks Rawls’s political conception of the person, particularly concerning one of the respects in which persons conceive of themselves as being free.<sup>317</sup> For Rawls, it will be recalled, free individuals “regard themselves as *self-authenticating* sources of valid claims”.<sup>318</sup> What this means is that the political weight of persons’ claims —ie the concern and respect politically owed to them— is independent of their derivation from any particular conception of justice, the good, or moral doctrine.<sup>319</sup> Persons are free to develop, direct, and exercise their moral powers without having to worry about their conformity with any pre-existing political, social, moral, or religious moulds. A strict adherence to this principle, which bestows the individual with complete authority over the validity of her own claims, eliminates any means by which to justify whether a claim falls within the scope of the right to freedom of religion or belief because a claim asserting that a belief is ethically salient cannot be either corroborated or contradicted without appealing to some authority other than the claimant herself. The theoretical vindication of the non-falsifiability of a claimant’s beliefs, it will be recalled, has the doctrinal backing of the courts to which I have repeatedly made reference, and which forbid judges from being “arbiters of religious dogma”<sup>320</sup> or “scriptural interpretation”,<sup>321</sup> or from assessing “the legitimacy of religious beliefs”.<sup>322</sup>

So it seems that, at least when applied to the judicial scenario under scrutiny, Dworkin correctly observed that: “Once we break the connection between a religious conviction and orthodox theism, we seem to have no firm

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<sup>316</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 205-06.

<sup>317</sup> John Rawls, *Political Liberalism*, exp. ed., Columbia University Press, 2005, 29-35.

<sup>318</sup> *ibid* 32. Emphasis added.

<sup>319</sup> *ibid*

<sup>320</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, [50].

<sup>321</sup> *Thomas v Review Board of Indiana Employment Security Division*, (1981) 450 U.S. 707, 716.

<sup>322</sup> *Refah Partisi (the Welfare Party) and others v Turkey*, App. no. 41340/98 et al., 13 February 2003, [91].

way of excluding even the wildest ethical eccentricity from the category of protected faith".<sup>323</sup> The liberal conception requires judges to take the ethical salience of the beliefs underlying a claim making such an assertion at face value. If all that matters in order to determine whether a belief has the appropriate ethical worth to trigger the protection of the right to freedom of religion or belief is the claimant's assertion to that effect, then the first feature of the dominant approach is revealed to be a meaningless exercise. A corollary of this conclusion is that if a claim which makes such an assertion is held to fail the ethical salience test and, therefore, to fall outside of the scope of this right, such a finding must be illegitimate from a liberal perspective, either because it draws on extraneous justifications or because it is arbitrary. The importance of understanding that this conclusion applies with equal strength to any claim, regardless of whether they appeal to the doctrine of a mainstream religious denomination or rely on more obscure belief systems is the subject of the next section.

### 3. The misguided reliance on proxies

Thus far, I have argued that even if liberalism is understood to be compatible with some state-sponsored judgments of ethical salience, this possibility remains out of the reach of judges in light of the simple reasons internalism endorsed by the liberal conception of the right to freedom of religion or belief. In this section, my aim is to make plain the fact that the non-justifiability of a decision taken according to the first feature of the dominant approach—which I demonstrated in the previous section—applies to every single claim, no matter what the content of the motivational attitude—ie the belief expressed—by the claimant may be. This means that there is no justification to be found for judges to either favour or disadvantage any particular claim simply because

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<sup>323</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 124.

of their familiarity with or unawareness of the belief system referred to by a claimant.

Discussions concerning the scope of the right to freedom of religion or belief usually take the form of a quest to identify its outer-most limits. This perception of the right's scope assumes the existence of a more or less numerous collection of prototypical beliefs which engage the right incontestably.<sup>324</sup> Beyond this *terra firma*, whether or not a particular belief falls within the scope of the right or not becomes somewhat contested, up to the point where one comes across a believe that evidently does not qualify for its protection. Consider for instance, this passage co-written by the former United Nations Special Rapporteur on freedom of religion or belief in a section entitled "The Search for a Defining Line":

[a] broad interpretation [of the right to freedom of religion or belief] could open the floodgates to all sorts of trivial interests. For example, a national census conducted in the Czech Republic revealed that more than 15,000 people see themselves as followers of a 'Star Wars' religion. In addition, a group of people who call themselves 'Pastafarians' have created the worship of the 'big spaghetti monster'. Members of this group have insisted on their right to be photographed with noodle sieves on their heads for official documents. Do we have to take this seriously? It is generally wise not to jump to conclusions but rather to assess each case carefully on its own merits. And yet there is no denying that a danger of trivialization exists.<sup>325</sup>

First, the imagery of opening floodgates evokes the influx of foreign elements into an area containing certain autochthonous constituents. Then, a specific reference is made to Jediism and Pastafarianism as two instances of

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<sup>324</sup> Kent Greenawalt for example, states that: "no-one doubts that Roman Catholicism, Greek Orthodoxy, Lutheranism, Methodism, and Orthodox Judaism are religions. Our society identifies what is indubitably religious largely by reference to their beliefs, practices, and organizations." Kent Greenawalt, 'Religion as a Concept in Constitutional Law', *California Law Review* 72 (1984) 753, 767.

<sup>325</sup> Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief. An International Law Commentary*, Oxford University Press, 2016, 19-20.

such newcomers. Finally, a question is posed about their merits, only to conclude that a case by case analysis is required in order to answer it. The epigraph of this chapter is a quote drawn from a satirical novel, but the parallels between that fictitious interrogation and the well-intentioned —and by no means unique— exegesis are staggering. Both express a distrust of a belief system based its unconventionality. To be sure, in neither case is the legitimacy of the doctrines completely rejected, but their standing relative to others is certainly compromised. I do not provide evidence of the persistent hierarchisation of beliefs in order to denounce the disadvantageous treatment of novel or fringe religious denominations.<sup>326</sup> Nor do I wish to engage in the familiar argument in favour of a more generous or expansive scope of the right to freedom of religion or belief based on the latest whimsy that made its way through the court system. The argument of the previous section makes this unnecessary, having demonstrated the judicial inability to justify the turning down of any claim that asserts its own ethical salience. Instead, I want to debunk the idea that some beliefs should be considered fixed reference points for the scope of this right.

The misguided notion of the existence of a *terra firma* concerning the scope of the right to freedom of religion or belief that I seek to disperse is pervasive in the literature. There seem to be several reasons for this. Perhaps the simplest explanation is the confusion between a semantic and an interpretive conception of religion.<sup>327</sup> If one adopts an ordinary meaning of this concept, some designations, practices, and institutions are, of course, more natural extensions than others. ‘Christian’, ‘baptism’, and ‘Vatican’ are all terms that call religion to mind in this sense. The problem with this confusion is that

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<sup>326</sup> See eg *Leela Förderkreis E.V. and others v. Germany*, App no 58911/00, 6 February 2009.

<sup>327</sup> In other words, the adequate characterisation of the right in question “is best explained by taking its correct use to depend on the best justification of the role it plays for us” following Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 158. To do so, one must clearly identify the underlying value that justifies the existence of this right or, as Dworkin says: “We need to identify some particularly important interest people have, an interest so important that it deserves special protection against official or other injury”. Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 111.

the liberal conception of this right does not pick out the ordinary meaning of the term religion for protection. Instead, to quote George Letsas: “Whether ‘religion’ in human rights means *religion* depends on what the moral objective is, underlying the protection of human rights. Values individuate legal concepts, not the other way around”.<sup>328</sup> Because the legal value of religion for the liberal conception, as I have stressed from the start, is determined by the ethical value that something has from the perspective of the individual, there is no reason for favouring certain beliefs and practices based on some semantic or essentialist point of view. The independence of the interpretive conception of religion from any other understandings of it means that any overlap between them—for example, when some action satisfies both the interpretive and semantic conceptions—should add no normative weight to a claim. The liberal justification of the political and legal importance of the right to freedom of religion or belief simply cannot accommodate a different conclusion.

It is for this same reason that political influence, historical presence, demographic preponderance, or any other feature which does not figure in the justification for the normative value of the right to freedom of religion or belief which liberalism picks out, is irrelevant when it comes to determining the ethical salience of any particular claim. Someone might object that reference to traditional or marginal examples of religion is simply meant to reflect the actual distribution of ethically salient beliefs in a given context, and that no normative judgment should be inferred from doing so. Because any Western democracy is bound to have a majority of Christians and very few Pastafarians—or more Muslim than clown-hatters—, alluding to the former as ordinarily successful claims and to the latter as more peculiar instances is merely descriptive. The concern with this retort is two-fold: first, that individuals’ decision to identify themselves as members of a particular denomination in a census is at best inconclusive regarding the ethical salience they accord to

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<sup>328</sup> George Letsas, ‘The Irrelevance of Religion to Law’, *Religion and Liberal Political Philosophy*, Cécile Laborde and Aurélie Bardou (eds.), Oxford University Press, 2017, 47.

any particular tenet of that belief-system. Second, census results —if deemed an acceptable source of information— sometimes contradict common sense notions of religion: in the passage quoted above, for example, reference is made to a census in which 15,000 individuals identified with the Star Wars religion, compared to the 1,900 women which according to the report commissioned by the French National Assembly wear a full-faced veil in that country.<sup>329</sup> In the United Kingdom, 176,632 persons identified as Jedi Knights.<sup>330</sup> I suggest that these numbers should have no bearing whatsoever on a court's estimation regarding the ethical salience of any one particular claim before it.

Before taking note of a more appealing case for according some more weight to claims appealing to mainstream religious denominations relative to those that don't have such backing, I think it is important for the purposes of highlighting the normative value behind liberalism's defense of the right to freedom of religion or belief to point to some original issues of interest. Dworkin did something of this sort when he located women's abortion rights within the scope of the Free Exercise clause.<sup>331</sup> In doing so, he questioned the monopoly that one side of that debate has long enjoyed. However, I suggest that the liberal imagination should move further away from the recurrent themes facing the courts. Litigation over workplace regulations, for instance, is unfortunately almost uniquely focused on the place of veils and crucifixes when other equally valid and politically powerful grievance's over uniform codes are left completely outside this right's purview. To mention just one obvious example, in 2016 an online petition to the Parliament of the United Kingdom asking it to make it illegal for companies to require women to wear high heels at work received

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<sup>329</sup> *S.A.S. v France*, App. no. 43835/11, 01 July 2014, [16].

<sup>330</sup> As reported by The Guardian in 'Census 2011: religion, race and qualifications - see how England & Wales have changed' available at <https://www.theguardian.com/news/datablog/2012/dec/11/census-2011-religion-race-education#religion> (last accessed in September 2019).

<sup>331</sup> Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate*, Princeton University Press, 2008.

152,420 signatures.<sup>332</sup> The body of the petition stated that “Current formal work dress codes are out-dated and sexist”.<sup>333</sup> The upshot of this petition was a joint report by the Petitions and Women and Equalities Committee of the House of Commons, which considered the issue from the perspective of discrimination law.<sup>334</sup> If one reasonably understands the petition as being motivated by an ethically salient belief about the fair treatment of women and the laws, policies, or actions that harm their dignity, it is hard to anticipate an argument for why it should not fall within the scope of the right to freedom of religion or belief according to a liberal conception of it. Unsurprisingly, however, the pertinence of this right in this matter did not figure at all in this debate. Perhaps its absence should be regarded as an indictment of the limited influence of the liberal position on the public’s mind, even though the courts have repeatedly showed their commitment to this outlook.

The most appealing attempt to make use of proxies is the one that links the scope of the right to freedom of religion with the psychologically distinct benefits derived from engaging in established social practices, a matter which I considered in Chapter 1. According to this proposal, the religious experience is characterized by its “intersubjectivity”, to borrow Khaitan and Calderwood Norton’s preferred term.<sup>335</sup> But even if one agrees with G. K. Chesterton’s dictum that “A man can no more possess a private religion than he can possess a private sun and moon”,<sup>336</sup> it is still necessary to evaluate its application in the judicial forum. In this sense, recall that in Chapter 1 I offered a hypothetical example involving two individuals who value their participation

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<sup>332</sup> UK Government and Parliament, Petition. ‘Make it illegal for a company to require women to wear high heels at work’ available at <https://petition.parliament.uk/archived/petitions/129823> (last accessed in September 2019).

<sup>333</sup> *ibid*

<sup>334</sup> House of Commons Petitions Committee and Women and Equalities Committee, ‘High heels and workplace dress codes’, *First Joint Report of Session 2016-17*, 25 January 2017, HC291.

<sup>335</sup> Tarunabh Khaitan and Jane Calderwood Norton, ‘The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions’, *International Journal of Constitutional Law* (forthcoming) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3274123](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123) (last accessed in June 2019).

<sup>336</sup> G.K. Chesterton, ‘Introduction to the Book of Job’ available at <https://www.chesterton.org/introduction-to-job/> (last accessed in September 2019).

in Christmas activities differently: for one of the individuals the practice does in fact have the psychological effect exclusive to these social goods, the other simply regards it as an opportunity to spend time with family and friends. What this scenario makes clear is that, while these socially grounded practices may be *capable* of acquiring qualitatively enhanced ethical meaning, it is not the case that every individual who engages in them accords them said salience. If this is true, then narrowing the scope of the right down only to socially-backed practices still fails to offer grounds for a judge to justify a decision regarding a particular claimant.

Reliance on proxies as a means of justifying a judicial decision regarding the ethical salience of the beliefs and practices of any individual in particular seems to result from a cognitive illusion, specifically a halo effect, that correlates the familiarity of a claim with its ethical salience.<sup>337</sup> However, judges cannot, under the liberal conception, adopt a point of view such that would justify making the connection between these two concepts. Moreover, reliance on proxies seems to entail a commitment to “an objective conception of identity claims”<sup>338</sup>. The tension between the liberal conception’s subjective commitment and the common-sensical appeal of the first feature of the dominant approach is apparent in these two passages penned by Laborde:

“[Arguments in favour of objective evaluations of claims] wrongly assume that the moral force of exemption claims resides in their compatibility with communal traditions, and that individual exemptions should not undermine communal authenticity. But, I have argued, the moral force of individual exemption claims lies, instead in their importance to individual integrity, not in their advancement of objective or collective goods such as ‘religion’ or ‘tradition’. This obviously does not entail that communal membership has no value, but it does entail that communal membership has the value that the individual herself gives it.”<sup>339</sup>

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<sup>337</sup> See Daniel Kahneman, *Thinking, Fast and Slow*, Penguin Books, 2011, 82-85.

<sup>338</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 206.

<sup>339</sup> *ibid*

Which she then follows up in a footnote stating that: “What I would concede to Eisenberg, however, is that appeal to objective religious or cultural can serve as an epistemic proxy in cases of well-established, uncontested categorical protection—as per the presumption explicated above.”<sup>340</sup> I consider these two stances to be incompatible: either one commits to a position that individuals are free to accord value to whatever they deem fit, notwithstanding the popularity of their beliefs and practices, or one privileges socially-backed beliefs and practices over more idiosyncratic ones. I think the tension between these two positions is given by the apparent inevitability of evaluating beliefs and practices in the context of disposing of a claim in the judicial realm. In chapters 5 and 6, I explain why this is not so.

#### 4. Consideration of particular instantiations of the first feature of the dominant approach

In this section, each of the criteria that make up the thresholds of the courts examined in Chapter 2 will be subjected to an individual critical evaluation. Although, as it will be seen, these criteria overlap in several respects, maintaining their discreteness to the furthest possible extent makes for a more exhaustive analysis. Before proceeding, it is important to clearly state that a determination regarding a particular belief’s substantial burden, cogency, seriousness, cohesion and importance will not be understood to be undertaken from *within* a predefined system of beliefs. In other words, whether a belief fulfils these criteria cannot depend on its place within, for instance, Christianity. A belief’s evaluation must be understood to be undertaken from *outside* any pre-established web of belief. This is so for two reasons: first, because taking the existence of a system of beliefs for granted necessarily involves assessing the legitimacy of a belief under that system, in violation of the duty of neutrality. To offer an example, evaluating an individual’s belief concerning the wearing

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<sup>340</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, footnote 33 at 312.

a crucifix by analysing how this practice is regarded within Christianity entails taking sides, favouring certain theological views over others. A second reason for favouring an evaluation of beliefs that doesn't presuppose their incorporation into a set system, stems directly from the protection afforded specifically to individuals that the courts have acknowledged, as was evidenced in Chapter 1. If this is so, then an applicant's beliefs should be evaluated on their own merits, without assuming that they align with the mainstream or orthodox tenets of that denomination.

#### 4.1 Cogency, substantial burden, and non-triviality

Cogency, substantial burden and non-triviality seem to capture the same ethical concern. The use of these locutions by the courts is ambiguous since it can have at least two different meanings. A first possible definition of cogency refers to the quality of a view in terms of its clarity or logicity. This first possibility, however, seems to require beliefs to meet a standard that would conflict with the duty of neutrality and impartiality. In this sense, some (if not most) religious beliefs would run the risk of failing to meet it. A threshold calling for strict rationality would require judges to perform an exegesis that would be in opposition to any sort of hands-off approach to beliefs that the duty of neutrality seems to call for. The second possible definition of cogency suggests a sense of compulsion. This definition is more plausible since it does not, at least prima facie, encounter the same difficulty as the first one vis-a-vis the duty of neutrality espoused by the courts. In this second sense, they denote views that are persuasive or even forcible in an ethical sense. This is to be opposed to the figurative sense used in the phrase 'argumentative force', which essentially denotes an argument that satisfies the qualities captured by the first definition.<sup>341</sup> The critical evaluation of these criteria will, therefore,

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<sup>341</sup> In the french version of the ECtHR's judgments the term cogency is translated as 'force'. However, given that the phrase 'force argumentative' is equivalent in meaning to its English counterpart, attending to the judgments of the ECtHR handed down in its other official language does not serve to dissolve the ambiguity.

proceed on the reasonable assumption that the meaning pointing to some kind of ethical compulsion is the one that best aligns with the courts' intentions.

Here again, however, the courts run the risk of running afoul of the aforementioned duty of neutrality. In this sense, the ethical cogency of a belief should not be ascertained by submitting it to a 'thick' objective evaluation, since this would require a political authority to promote a particular conception of the good. A less demanding objective standard of ethical cogency, however, might be thought capable of overcoming this difficulty. To offer an example, suppose that a court were to seek to deduce a belief's cogency, non-triviality, or substantial burden from a claimant's consistent adherence to it—something akin to coherence—. Chaplin, the second applicant in the *Eweida* case, refused to accept the alternatives proposed by her employers which would have allowed her to wear her crucifix most of the time, save when in direct contact with patients.<sup>342</sup> If unwavering adherence to one's beliefs were to form the basis of a judgment concerning a belief's cogency, Chaplin's unwillingness to accept the accommodations she was offered might be seen as satisfying this test. However, under this ethical appraisal, the cogency of the beliefs alleged by the applicant in *S.A.S. v France* would not be established given that she acknowledged that she did not wear the niqab regularly, but only when "she chose to do so, depending in particular on her spiritual feelings".<sup>343</sup> The opposite conclusions that the courts would be impelled to reach following the adoption of even a seemingly 'thin' ethical postulate, such as strict adherence, illustrates the quandary that arises from trying to objectively infer the cogency, burden or non-triviality of a belief. In the aforementioned cases, it would mean negating the cogency or burden of a belief simply by virtue of the fact that the applicant's use of the niqab is sporadic rather than systematic, and doing so would in turn presuppose favouring a conception of the good that values constancy and devalues authenticity, thereby also incentivising inflexibility.

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<sup>342</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [20].

<sup>343</sup> *S.A.S. v France*, App. no. 43835/11, 01 July 2014, [12].

If it is not possible to determine the cogency or burden of a belief in any objective manner without violating the duty of neutrality of public authorities, then a belief's fulfilment of this quality must be subjective. In this sense, William James, famously argued that the appeal of a particular hypothesis, *ie* "anything that may be proposed to our belief", can be either "live" or "dead".<sup>344</sup> A "live" hypothesis is "one which appeals as a real possibility to him to whom it is proposed".<sup>345</sup> The upshot of this is that the "deadness and liveless in a hypothesis are not intrinsic properties, but relations to the individual thinker".<sup>346</sup> This means that when faced with an array of hypotheses, propositions or ethical viewpoints an individual will opt to follow those that she perceives as being 'live' from his particular standpoint. The appeal of Scientology, for instance, cannot be objectively established: some individuals will feel an attraction to its tenets that others will never experience. The same goes for any other philosophical position. In other words, the cogency of Scientology will depend entirely on the subjective experiences that cause them to have that quality. This view seems to be in line with Laws LJ's understanding of religious beliefs, when he says that "in the eye of everyone save the believer, religious faith is necessarily subjective' and that "it lies only in the heart of the believer who is alone bound by it; no one else is or can be so bound, unless by his own free choice he accepts its claims".<sup>347</sup>

In light of the above, a belief's cogency or burden must be spared any objective scrutiny in order to respect the duty of state neutrality. The cogency or burden of a belief is determined by the individual who holds it, making this quality entirely subjective. This is not to say that there aren't any objective reasons for endorsing or condemning beliefs within different settings. It simply means that an authority that acknowledges a duty of neutrality is not in a position to determine whether or not they attain a certain level of cogency or

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<sup>344</sup> William James, *The Will to Believe* (1896) available at <https://www.gutenberg.org/files/26659/26659-h/26659-h.htm> (last accessed in September 2019).

<sup>345</sup> *ibid*

<sup>346</sup> *ibid*

<sup>347</sup> *McFarlane v. Relate Avon*, [2010] EWCA Civ 880, [21].

burden for the individual claiming the protection of his right to freedom of thought, conscience and religion. If this is so, it is hard to think of a manner in which a court may ascertain a belief's cogency for a particular individual, other than by taking that person at his word, assuming that his claim fulfils this criterion by virtue of the fact that the applicant complained of a violation of her right.

#### 4.2 Seriousness

The second criterion enlisted specifically by the ECtHR is seriousness. This is the only requirement that the ECtHR has shed some extremely limited light on in its decision in the case of *Gough v the United Kingdom*.<sup>348</sup> The applicant in this case was arrested, prosecuted, convicted and detained on over forty occasions for the offence of breach of the peace for engaging in public nudity, which resulted in his imprisonment for a period of nearly seven years. The motives for Mr. Gough's nudity were manifold: he stated that "he was making a stand", that "he did not wear clothes in order to provoke a reaction" and that "he did it because he felt that it was right".<sup>349</sup> In dismissing the complaint under Article 9 ECHR, finding it to be manifestly ill-founded for being incompatible *ratione materiae*, the ECtHR held that: "Whether the requisite level of seriousness has been reached [...] may be doubted, having regard to the absence of support for such a choice in any known democratic society in the world".<sup>350</sup> In this passage, the ECtHR seems to equate the seriousness of a view with its social prevalence. The problem with this assumption, following Dworkin, is that it "seems itself to contradict the basic principle that questions of fundamental value are a matter of individual, not collective, choice".<sup>351</sup> The personal autonomy of individuals calls for the protection of even "the wildest ethical eccentricity" without regard to whether there is any evidence of support

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<sup>348</sup> *Gough v the United Kingdom*, App. no. 49327/11, 23 March 2015.

<sup>349</sup> *ibid* [55].

<sup>350</sup> *ibid* [184].

<sup>351</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 123.

for it from other individuals within the larger society.<sup>352</sup> Recall that the second sense in which liberal states must respect the freedom of individuals, according to Rawls, is by conceiving of them as “self-authenticating sources of valid claims”.<sup>353</sup> This means that each individual must be “entitled to make claims on their institutions so as to advance their conceptions of the good”.<sup>354</sup> The self-authenticating quality of a valid claim simply collapses if authorities impose a social standard of proof as a criterion for its validity. It also seems to conflict with the counter-majoritarian impetus of human rights provisions. Evidence of social support, however weak the standard may be, sits uncomfortably with the liberal principle of personal autonomy inscribed in Article 9 ECHR, which explicitly acknowledges the freedom to manifest one’s beliefs “*alone or in community with others*”. It also goes against the ECtHR’s characterisation of the right to freedom of thought, conscience and religion as being “primarily a matter of individual conscience”.<sup>355</sup>

The requirement of seriousness may also be meant to exclude frivolous claims. This is, of course, a legitimate concern for the ECtHR given its institutional significance for the protection of human rights in Europe and the increasing caseload that it must take care of. However, even conceding the legitimacy of this goal, the ECtHR’s decision in *Gough* is deeply troubling given that, as previously mentioned, the applicant endured great personal hardship for the sake of his beliefs. Therefore, the ECtHR’s decision to doubt this applicant’s seriousness is questionable given the high cost to his freedom that he was willing to incur in the absence of any indication of mental illness or of any other kind of diminished capacity on his part. An individual’s past commitment to a belief and his willingness to bear the costs associated with holding it seem like two appropriate candidates for determining a belief’s seriousness. The absence of these features, however, do not automatically point in the opposite direction. Here again, it seems that the seriousness of a

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<sup>352</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 124.

<sup>353</sup> John Rawls, *Political Liberalism*, exp. ed., Columbia University Press, 2005, 32.

<sup>354</sup> *ibid* 32.

<sup>355</sup> *Hasan and Chaush v Bulgaria*, App. no. 30985/96, 26 October 2000, [60].

belief cannot be ascertained objectively without violating the duty of neutrality or severely curtailing the principle of personal autonomy. If this is so, then as with the previous criteria, the seriousness of a belief depends on its relation with the individual claimant, thereby circumventing the possibility of undertaking a principled evaluation on the part of the courts.

### 4.3 Importance

The criterion of importance partly overlaps with that of cogency, substantial burden and non-triviality. The arguments against the latter apply to the former as well because the appeal of a proposition is a matter of degree. The stronger the attraction that an individual feels towards a particular view, the more important it will be for her. In this sense, the concern over the existence of god, for example, weighs more heavily on the mind of an atheist than on the mind of an unconcerned individual. For an atheist, therefore, this matter is of more importance. The importance of particular views will necessarily depend on their relevance for the realisation of the conception of the good that an individual has freely decided to pursue. As was previously noted, any threshold that allows public authorities to rule on the value of particular convictions, as Dworkin observes, “relies on the assumption that it lies within the power of government to choose among [them] to decide which are worthy of special protection and which not”.<sup>356</sup> Or to quote the SCOTUS: “it is not within the judicial ken to question the centrality of particular beliefs<sup>357</sup> [...]”. Importance and cogency, therefore, are two concepts that the value of personal autonomy leaves entirely up to a subjective evaluation. No authority ought to have the competence, under this liberal ideal, to deploy an objective analysis of either of these two categories.

However, there is another argument to be made against this third requirement that applies specifically to it. The value of personal autonomy

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<sup>356</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 123.

<sup>357</sup> *Employment Division v. Smith*, (1990) 494 U.S. 872, 887.

covers a broad range of decisions in an individual's life. In this sense, Carlos Nino says that "the most general good protected by the principle of personal autonomy is the freedom to perform any act which does not cause harm to other people".<sup>358</sup> Therefore, even if one were to concede to authorities the ability to evaluate the importance of certain views or beliefs, one would still have to justify the decision to limit the value of personal autonomy in this manner. This is because, as Joseph Raz notes, the exercise of personal autonomy must "include options with long term pervasive consequences as well as short term options of little consequence".<sup>359</sup> Under a liberal conception of personal autonomy there is no reason to allow individuals to pursue only the former and not the latter. To quote Raz once again: "It is intolerable that we should have no influence over the choice of our occupation or of our friends. But it is equally unacceptable that we should not be able to decide on trivia such as when to wash or when to comb our hair".<sup>360</sup> Personal autonomy is pervasive: it extends to all aspects of an individual's life. Individual freedom "is in itself, and not just for its consequences, the most distinctive value expressed by a morality of human rights".<sup>361</sup> In other words, "it is not the consequences, but the idea that State power may be legitimately used in such ways that seems grossly wrong [...] They simply have no right to control people in that way".<sup>362</sup> Therefore, the importance of particular views is irrelevant to the value of personal autonomy because even seemingly unimportant ones are included by this concept.

Eweida, the first applicant in the eponymous landmark judgment, for instance, insisted on wearing a crucifix visibly over her uniform in observance of what she considered to be her Christian duty. In the eyes of the national authorities, the importance of Eweida's claim was put into question since she was unable to point to other Christians within the workforce facing similar

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<sup>358</sup> Carlos Santiago Nino, *The Ethics of Human Rights*, Oxford University Press, 1991, 145.

<sup>359</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press, 1988, 374.

<sup>360</sup> *ibid*

<sup>361</sup> Thomas Nagel, 'Personal Rights and Public Space', *Philosophy and Public Affairs* 24(2) (1995) 83, 107.

<sup>362</sup> *ibid* 95.

difficulties. It is important to note that the national authorities' emphasis on this point stemmed from the applicant's claim of indirect discrimination, which calls for a finding of unfavourable treatment of people in a similar position, something which should not be relevant to a claim under Article 9 ECHR. An appropriate understanding on the part of the authorities of the duty of neutrality and the value of personal autonomy would have easily overcome this apparent difficulty: although Eweida identified as a Christian, her understanding of the importance affecting certain religious practices stemming from this system of belief legitimately differed from the views of other individuals who also identify as Christians. In other words, the importance of a particular belief, even among others who apparently identify with the same worldview, is entirely subjective. This point is crucially relevant, as well, with regard to the different dress codes chosen by women who identify as Muslims. The question over the importance of the hijab or the niqab for these individuals cannot be established by the authorities without overstepping the bounds of the duty of neutrality, nor can it be ascertained by looking at the practices of other individuals identifying with the same denomination without constraining the autonomy of the individuals who claim a belief is important to them.

#### 4.4 Cohesion

The final criterion of cohesion is flawed in a similar manner. The only conceptual approximation to this requirement can be found in a brief passage in the case of *X v. the Federal Republic of Germany* decided by the European Commission of Human Rights.<sup>363</sup> In this case, the applicant claimed that the State's refusal to allow his ashes to be scattered on his land after his death, in order to avoid being buried among Christian symbols violated his right to freedom of thought, conscience and religion. The Commission held that: "The desired action has certainly a strong personal motivation. However, the

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<sup>363</sup> *X v. the Federal Republic of Germany*, App. no. 8741/79.

Commission does not find that it is a manifestation of any belief in the sense that some coherent view on fundamental problems can be seen as being expressed thereby”.<sup>364</sup> The House of Lords of the United Kingdom, for its part, in a case concerning the permissibility of using corporal punishment in state schools, has established that “[t]he belief must also be coherent in the sense of being intelligible and capable of being understood”.<sup>365</sup> Building on these two formulations, one may say that cohesion implies a requirement to embed one’s views within a more abstract philosophical position and to be able, in turn, to express their connection intelligibly.

This criterion leads to a distortion of the value of personal autonomy because it “is not to be identified with the ideal of giving one’s life a unity”.<sup>366</sup> An autonomous life is perfectly consistent with a life made up of “diverse and heterogeneous pursuits”.<sup>367</sup> A person can, and most probably will, slightly adjust or radically modify his ethical perceptions in accordance with his experiences, his personal reflections, his interactions with others and the influence of the cultural environment that surrounds him. The ethical persona of every individual, therefore, has the potential of being in a state of constant flux. This is true of every individual, including those who espouse what may be considered to be extreme forms of religious identity, because, as George Letsas notes: “It would be disrespectful of the rational agency of believers to assume that their religious convictions are unshakable, not subject to change”.<sup>368</sup> In fact, the right to change one’s religion or beliefs is expressly enshrined in Article 9 ECHR. In other words, “a person who frequently changes his tastes can be as autonomous as one who never shakes off his adolescent preferences”.<sup>369</sup> The fact that the personal autonomy of individuals is exercised

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<sup>364</sup> *X v. the Federal Republic of Germany*, App. no. 8741/79.

<sup>365</sup> *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others*, [2005] UKHL 15.

<sup>366</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press, 1988, 370.

<sup>367</sup> *ibid* 371.

<sup>368</sup> George Letsas, ‘Is There a Right Not to Be Offended in One’s Religious Beliefs?’, *Law, State and Religion in the New Europe: Debates and Dilemmas*, Cambridge University Press, 2012, 257.

<sup>369</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press, 1988, 371.

in this way makes it clear that, at least some, particular inclinations will not necessarily be supported by any profound rationality like the one required by the criterion of cohesion.

In fact, this requirement conceals a quasi-perfectionist account of the pursuit of the good because it is meant to evaluate an individual's rational adherence to his own conception of the good. In this sense, while it is true that individuals will be more likely "to succeed in fulfilling [their] intentions if [their] beliefs" are cohesive, the possibility of making mistakes in this regard is an important aspect of the value of personal autonomy.<sup>370</sup> An individual's beliefs originate from different sources. Sometimes these myriad beliefs are in conflict with one another. It is not clear, however, why this fact should be seen as detracting from the protection of a fundamental right. While it is certainly desirable for others to point out to the flaws in our reasoning, authorities should not deprive any individual from the benefit of the right to freedom of thought, conscience and religion when their claims are deemed to lack coherence.

## 5. Conclusion

The first feature of the dominant approach is in tension with the liberal conception of the right to freedom of religion or belief because the subjective ethos of the latter does not allow for the evaluation of ethical salience that is proposed in theory and applied in practice. All of the criteria proposed in this regard present this same flaw. A determination regarding the ethical salience of a belief or practice for a particular claimant is not available even if one assumes the legitimacy of state-sponsored judgements of ethical salience and even if one reduces the scope of the right in question to socially-established beliefs and practices. Proxies do not serve as an adequate standard because they fail to justify a decision in the case of any claimant in particular. If the only alternative to an objective evaluation is subjective, it is difficult to conceive of

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<sup>370</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press, 1988, 371.

a way in which courts could perform this task in a non-arbitrary manner. Any effort to assess the content of a claimant's beliefs, however insignificant it may seem, involves a determination of a belief's legitimacy on the part of the authority. In this sense, it seems that we are still bereft of an answer to the question: "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"<sup>371</sup> that is at the same time compatible with the liberal conception of this right.

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<sup>371</sup> *Employment Division v. Smith*, (1990) 494 U.S. 872, 887.

#### **Chapter 4.** The *evidentiary* difficulty of the dominant approach

In this chapter, I address the difficulties relating to the second feature of the dominant approach, ie the practice of submitting claimants to a test of sincerity. I explain that the limitations regarding the judicial inquiry that judges have endorsed in order to observe the subjective character of the liberal conception of the right to freedom of religion or belief render them bereft of the evidentiary instruments that courts usually rely on when faced with a decision regarding the mental state of an individual. According to the SCOTUS, courts must refrain from assessing the verity of religious views, lest they “enter a forbidden domain”.<sup>372</sup> The ECtHR precludes “any power on the State’s part to assess the legitimacy of religious beliefs”.<sup>373</sup> The SCC, for its part, maintains that “The State is in no position to be, nor should it become, the arbiter of religious dogma”.<sup>374</sup> In this regard, the main purpose of this chapter is not to offer an exhaustive account of the epistemic limitations that follow from the aforementioned commitments to keep away from the substantive merits of the beliefs expressed by claimants but, rather, to emphasize the way in which these limitations affect a judge’s ability to perform a task that is common fare in other types of proceedings. In other words, the argument contained in this chapter will highlight the unique difficulties of the task faced by judges when trying to justify a decision regarding a claimant’s mental state in cases concerning the right to freedom of religion or belief. I suggest that this argument will have succeeded if the reader is persuaded that, contrary to the

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<sup>372</sup> *United States v Ballard*, (1944) 322 U.S. 78, 87. Both the SCOTUS and the academic literature refer to the self-imposed limitations over religious claims the ‘religious question doctrine’. Anna Su summarises it in the following terms: “In several formulations, the doctrine prohibits judicial involvement in the resolution of religious questions or practice, including first-order metaphysical issues as well as second-order empirical questions about the beliefs of individual adherents or religious groups.” in ‘Judging Religious Sincerity’, *Oxford Journal of Law and Religion* 5(1) (2016) 28, 29. For a contribution contesting this doctrine see Jared A. Goldstein, ‘Is There a ‘Religious Question’ Doctrine? Judicial Authority to Examine Religious Practices and Beliefs’, *Catholic University Law Review* 54 (2005) 497.

<sup>373</sup> *Refah Partisi (the Welfare Party) and others v Turkey*, App. no. 41340/98 et al, 13 February 2003, [91].

<sup>374</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 553 and [49].

opinion that several authors have recently expressed,<sup>375</sup> this judicial task is quite distinct from the one that also calls on judges to determine a witness's or defendant's sincerity in criminal or civil procedures.

As I explained in Chapter 1, the reason for the hands-off treatment that is unique to this kind of litigation is due to the respect that the liberal conception shows to individual integrity. The SCOTUS has stated that the Free Exercise Clause of the First Amendment of the Constitution protects “the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state”.<sup>376</sup> For the ECtHR, Article 9 of the European Convention on Human Rights is “in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life”.<sup>377</sup> The ECtHR has also said that “Religious freedom is primarily a matter of individual thought and conscience”.<sup>378</sup> Finally, the SCC has held that, in essence, section 2(a) of the Canadian Charter of Rights and Freedoms protects “the right to entertain such religious beliefs as a person chooses” and, furthermore, that it is “the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be”.<sup>379</sup>

The above passages, to restate, reflect a *subjective* understanding of religious freedom which acknowledges the attendant *hands-off* inquiry that judges must commit to when faced with claims of this nature. This picture, nevertheless, is complemented by the second feature of the dominant approach which submits applicants' religious claims to a *sincerity* test before

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<sup>375</sup> See eg “The analysis should proceed as any other factual determination of a party's mental state, with one caveat: the Constitution prohibits courts from inferring *insincerity* from a religious belief's *inaccuracy* or *implausibility*” in Nathan S. Chapman, ‘Adjudicating Religious Sincerity’, (2017) *Washington Law Review* 92 1185-1254, 1191; “[t]he test is no more difficult or dangerous than similarly subjective tests, such as questions of intent or mental state, which courts apply every day” in Kevin Vallier and Michael Weber, “In Defense of the Sincerity Test”, *Religious Exemptions*, Kevin Vallier and Michael Weber (eds.), Oxford University Press, 2018, 247 ; “There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity” in Ben Adams and Cynthia Barmore, ‘Questioning Sincerity: The Role of the Courts after Hobby Lobby’ (2014) *Stanford Law Review Online* 59-66, 59-60.

<sup>376</sup> *School District of Abington Township v Schempp*, (1963) 374 U.S. 203, 222.

<sup>377</sup> *Kokkinakis v Greece*, App. no. 14307/88, 25 May 1993, [31].

<sup>378</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [80].

<sup>379</sup> *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295, 336-37 and 351.

the right to freedom of religion can be ‘triggered’. In other words, the applicability of this right to a particular case is made conditional upon a judicial finding to the effect that the applicant sincerely holds the religious beliefs that she asserts. In this chapter, I argue that assessing the sincerity of claimants is extremely complicated because, if judges observe the constraints of the hands-off inquiry, their ability to uncover insincere claims is reduced significantly as compared to other judicial procedures. A subjective understanding of religious freedom, therefore, makes it almost impossible for a court to reach a conclusion regarding an applicant’s (in)sincerity.

This conclusion does not only contest habitual judicial practice but also flouts the academic consensus. In fact, paradoxically, as I observed in Chapter 2, both the judgments and the literature seem to view the sincerity test as a corollary of the subjective conception of religious freedom. Most recently, Cécile Laborde has advocated for what she calls a “*thick sincerity*” test, which she explicitly deems to be “in line with the subjective conception of religious freedom”.<sup>380</sup> Anna Su is a rare example of someone who has raised concerns over this test, but she stops short of calling out its logical incongruity<sup>381</sup>. At one point, Su seems to realise that the sincerity test is incompatible with a hands-off attitude “vis-à-vis the normative content of religion”,<sup>382</sup> but she nevertheless concludes that judges must continue to assess sincerity “with a full view of its potential risks and consequences”.<sup>383</sup>

In contrast, I will explain why this endeavour comes close to being a quintessential case of wanting to have one’s cake and eating it too: the hands-off inquiry deprives the courts of most of the evidentiary tools that make a finding of sincerity possible and, conversely, using additional tools turns the inquiry into a hands-on one. If this is so, courts must own up to their extremely limited ability to detect false positives and to the fact that negative results can

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<sup>380</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 2017, 205-206.

<sup>381</sup> Anna Su, ‘Judging Religious Sincerity’, *Oxford Journal of Law and Religion* 5(1) (2016) 28.

<sup>382</sup> Anna Su, ‘Judging Religious Sincerity’, *Oxford Journal of Law and Religion* 5(1) (2016) 28, 43.

<sup>383</sup> *ibid* 48.

only be justified on an extremely thin basis. The scarcity of the justificatory means required to reach a decision in this regard is extremely problematic given the natural tendency of judges —and humans in general— to find support for their decision in something other than the evidence before them, such as their own experiences, familiarities, or likes and dislikes. The more evidence that a decision-maker can point to when trying to justify a decision, the less that they will be inclined to rely on these cognitive biases. However, the drastically limited evidence that a judge can point to when reaching a finding of sincerity or insincerity pulls in the opposite direction, making it more likely for these decision-makers to rely on these illegitimate grounds in order to make sense of their decision. The importance of this conclusion is that, since the sincerity test is nearly incapable of performing the function that judges assign to it, under a subjective conception of religious freedom, a judicial determination concerning an applicant's 'sincerity' will be based on, or at least contaminated by, an *objective* one —that is, on a conception that is not fundamentally preoccupied by the ethical integrity of individuals.<sup>384</sup>

For the purposes of clarity, I will develop the argument by reference to the landmark decision of the SCC in *Syndicat Northcrest v Amselem*, which I made ample reference to in Chapter 2. This case exhibits several noteworthy features which make it a compelling case study. The majority judgment offers a remarkably clear and comprehensive account of the subjective conception of religious freedom. It also offers explicit guidance regarding the issues that are beyond the reach of courts in a hands-off inquiry. The parameters of the sincerity test are also laid out by the SCC with some precision. Moreover, the applicants in *Amselem* formulated their claims by appeal to a common practice of a mainstream religious denomination, making it a paradigmatic case of religious freedom. This collection of attributes, which are hard to come by in any single judgment, make it possible to state my case within the four corners

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<sup>384</sup> For a comprehensive endorsement of a conception of this kind see Avigail Eisenberg, *Reasons of Identity. A Normative Guide to the Political and Legal Assessment of Identity Claims*, Oxford University Press, 2009.

of the decision, so to speak. Moreover, in order to avoid the risk of giving the false impression that I am ‘cherry-picking’ this case or that it does not represent any wide-reaching jurisprudential issue, I intend to direct the reader’s attention to other pertinent examples at every point in the argument. To be clear, therefore, far from being an outlier, *Amselem* is unique only in terms of the ideal account that it gives of the adjudicatory model under scrutiny.

To recapitulate, my interest here is to clearly identify the epistemic difficulties of the second feature of the dominant approach by: first, identifying the bounds of the hands-off inquiry that are set by the subjective conception of the right to freedom of religion or belief and; second, explaining the limited usefulness of the epistemic resources that remain on the table if the hands-off inquiry is respected. This argumentative strategy reveals the full normative force of the subjective conception of religious freedom.

#### 1. A prophylactic (re)statement of the facts in *Amselem*

Claimants *A*, *F*, and *K* were divided co-owners of residential units comprising individual balconies. Claimant *A*, a new resident at the time of the events, set up a structure in his balcony, which he claimed to have done following his beliefs. The syndicate of co-ownership subsequently ordered claimant *A* to remove this structure in accordance with the by-laws of the apartment complex which prohibited decorations, alterations, and constructions to be placed in the balconies of the units. All of the claimants had signed the declaration of co-ownership containing said by-laws. Shortly afterwards, claimant *F* also placed a structure in his balcony, likewise claiming to have done so owing to his beliefs. Although by this time, claimants *F* and *K* had been residing in their respective units for several years, they had never before performed this action. Instead, in the past, they had used the structures that their family and friends had set up in their own homes. The following year, claimant *A* sought permission to once again set up a structure in his balcony, but the syndicate refused his request citing the aforementioned prohibition.

The syndicate, nevertheless, proposed to allow the claimants and other residents of the apartment complex to place a communal structure in the gardens instead. The claimants expressed their dissatisfaction with this alternative and explained why this option “would not only cause extreme hardship with their religious observance, but would also be contrary to their personal religious beliefs which, they claimed, called for ‘their own [structure], each on his own balcony’”.<sup>385</sup> They then proceeded to place structures in their own balconies notwithstanding the prohibition. The syndicate, for its part, was eventually granted a permanent injunction prohibiting the claimants from setting up structures in their balconies and permitting the syndicate to demolish them, if necessary. The claimants alleged that the syndicate’s actions infringed their freedom of religion. In a split decision, the majority of the SCC ruled that there was no doubt that the applicants sincerely held the religious beliefs that they claimed and found that their right to freedom of religion had been infringed.

This account of the facts differs from the one offered by the court, for whom the applicants are “all Orthodox Jews” and the structures in the balconies are “succahs” which they set up “for the purposes of fulfilling a biblically mandated obligation during the Jewish religious festival of Succot”.<sup>386</sup> The court also gives a detailed description of a succah’s physical features, as well as of several apposite commandments of the Jewish faith. I consider the court’s rendition of the facts to be problematic for reasons which will become fully apparent in due course but, basically, because it assigns a meaning to the applicant’s actions which, if taken into account in its reasoning regarding their sincerity, goes against the terms of the inquiry championed by the court itself. At this point, however, it is enough to indicate this concern as the reason for deviating from the seemingly innocuous official narrative.

## 2. *Subjective* religious freedom: a restatement

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<sup>385</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 552 and [14].

<sup>386</sup> *ibid* [4]-[5].

Ronald Dworkin acutely observed that, for legal purposes, “It makes a considerable practical difference what counts as a religion”.<sup>387</sup> This explains why discussions about religious freedom usually begin by grappling with the difficult task of demarcating the religious from the non-religious. While most commentators are satisfied by situating their analysis within a broad and vague domain, others argue that any pretence of impartiality on this point is doomed from the start. Fortunately, for the limited purposes of this analysis, it is possible to bypass this thorny debate because the claims at issue in *Amselem* are grounded in Judaism, a creed whose religious character is uncontroversial from a sociological and historical perspective. Although this is inconclusive as to its religious character from a legal standpoint, the conventional identification of Judaism as an archetypal instance of a religion in those domains makes claims which appeal to it strong candidates for protection under the right to freedom of religion.

In simple terms, to the extent that anything is a religion for the law, I take it for granted that Judaism fits the bill. Having fixed this starting point, in this section I present the subjective conception of religious freedom, in line with the SCC’s understanding of it. I then offer an account of the distinction between a subjective and an objective conception of religious freedom with the aid of a simple formal notation.

For the SCC, “religion is about freely and deeply held *personal convictions or beliefs* connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment”.<sup>388</sup> The conception of religion sanctioned by the court is unambiguous in its acknowledgement of *personal beliefs* as the discrete interest which the right to freedom of religion protects.<sup>389</sup> While this interest does not exhaust the role of religion in the law more generally, it does fully occupy the field where this individual right is

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<sup>387</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 106.

<sup>388</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, [39]. Emphasis added.

<sup>389</sup> I take the term ‘belief’ to be synonymous with the term ‘convictions’.

concerned.<sup>390</sup> Therefore, although religion is capable of embracing a series of other values —associational, institutional, or cultural, to name but a few—, the interest which is uniquely protected by the right to freedom of religion is a person’s ability to comply with the moral code arising from her freely held religious commitments, as was established in Chapter 1.

Furthermore, to the extent that a person’s religious beliefs make up that person’s identity, it is trivially true that the right to freedom of religion protects a person’s religious identity. But, importantly, this means that this right only protects a person’s religious identity when what is at stake are that person’s beliefs, not when her religious identity arises from another source, such as her culture.<sup>391</sup> Examples of the latter dimension of religious identity are commonplace: from the person who fills out ‘Muslim’ in a census but does not hold any tenet of that faith, to the person who values Christmas but only as an opportunity to be with her family.<sup>392</sup> Because public discourse is saturated with appeals to religion, the bulk of which are not concerned with the ethical outlook of individuals, it is important to be precise about the scope which is specifically relevant for the right to religious freedom.<sup>393</sup> From this, it follows that what is normatively important from the vantage point of religious freedom is a person’s beliefs, notwithstanding their merit from a moral, dogmatic, or any other point of view.<sup>394</sup> In the SCC’s words, “It is the religious or spiritual essence of an action [...] that attracts protection [...] [t]he focus of the inquiry is not on what

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<sup>390</sup> Cécile Laborde advocates for this ‘disaggregation’ of religion, by which she means that “different parts of the law should capture different dimensions of religion for the protection of different normative values”. Cécile Laborde, ‘Religion in the Law: The Disaggregation Approach’, *Law and Philosophy* 34 (2015) 581, 594.

<sup>391</sup> For an interesting discussion about the complexity of religious identity see Rajeev Bhargava, ‘Religious and Secular Identities’, *What Is Political Theory and Why Do We Need It?*, Oxford University Press, 2012, 261.

<sup>392</sup> This is not to say that these interests are not protected by other rights, only that they are not under the right to freedom of religion or belief.

<sup>393</sup> An excellent account of this phenomenon in Europe can be found in Ronan McCrea, *Religion and the Public Order of the European Union*, Oxford University Press, 2010, chapter 2.

<sup>394</sup> Recall Maclure and Taylor’s description of this value as follows: “The special legal status of religious beliefs is derived from the role they play in people’s moral lives rather than from an assessment of their intrinsic validity”. Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, Jane Marie Todd (trans.), Harvard University Press, 2011, 81.

others view the claimant's religious obligations as being, but what the claimant views these personal religious 'obligations' to be".<sup>395</sup>

That religion is about personal beliefs and that what matters is the individual's own interpretation of her religious commitments, to summarise the SCC's position in *Amselem*, is of crucial importance for the distinction between an *objective* and a *subjective* conception of religious freedom. Religious freedom acquires an objective quality when its protection is made dependent on the merits of the beliefs asserted by an applicant. The particular benchmarks employed by courts to assess those merits vary from jurisdiction to jurisdiction, with the Indian 'essential practices' test being one of the most notable examples.<sup>396</sup> Subjective religious freedom, on the contrary, is exclusively concerned with the *mental state* of the applicant –that is, with the beliefs that 'exist' in an applicant's mind.<sup>397</sup>

A formal representation of this distinction can be made in the form of a propositional attitude reporting sentence. All claims alleging a violation of the right to freedom of religion can be translated into simple relational sentences of the form  $aRp$ , where  $a$  represents an agent,  $R$  represents the type of relation in which  $a$  stands to  $p$ , and  $p$  represents a proposition. For present purposes, the agent  $a$  is the applicant; the propositional attitude verb expressing the relation that exists between the applicant and the proposition  $p$  will always be the verb 'believes'; and the proposition  $p$ , couched in a *that*-clause, will reflect the content of the religious claim. Applicant  $A$ 's claim in *Amselem*, for example, is contained in the following sentence of the form  $aRp$ : 'A believes that his religion requires him to build a succah in his own balcony'. Analogous

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<sup>395</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 553.

<sup>396</sup> A full account of this practice can be found in Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*, Oxford University Press, 2010 describing it as follows at 41: "The most striking aspect of the essential practices doctrine is the attempt by the Court to fashion religion in the way a modernist state would like it to be, rather than accept religion as represented by its practitioners".

<sup>397</sup> I take it for granted, as the SCC does, that a person's beliefs are susceptible to a finding of fact. I do not, therefore, consider the position which is sceptical about this kind of facts.

propositional attitude reports can, of course, be made for applicants *F* and *K*, simply by substituting them for *A*.

With this formal notation in mind, the distinction between an objective and a subjective approach can be restated by noticing that different portions of the propositional attitude report in the form  $aRp$  determine the scope of protection of the right to religious freedom according to each conception. An objective conception focuses on the religious claim couched in  $p$ , and its purpose is to determine whether its content meets the threshold set up by the court in order to receive the protection of the right to religious freedom. As mentioned above, the criterion which triggers this right in India is the 'essential' character of the religious claim at issue. In *Jagadishwaranand v Police Commissioner, Calcutta*, for example, the Supreme Court held that a ban on the performance of the *tandava* dance –which involves a public procession with lethal weapons and human skulls– did not engage the right to freedom of religion of the applicants because it was not an essential practice of Ananda Marga.<sup>398</sup> In order to reach this conclusion, the court did not have to concern itself with the applicants' assertion that this dance was part of their religion. The 'essential practice' test is just one salient example of an objective conception of religious freedom. The key takeaway from the Indian experience is that religious freedom is made conditional upon an evaluation of  $p$ , thereby putting it on the objective side of the issue.

Although it has signalled its commitment to a subjective conception of religious freedom, in the past, the ECtHR has unwittingly submitted religious claims to an objective evaluation. In *Valsamis v Greece*, for example, the ECtHR was asked to determine whether a pupil's right to freedom of religion had been violated by the school authorities who suspended her for failing to participate in a patriotic parade which she believed to be in conflict with her religious beliefs.<sup>399</sup> The ECtHR held that the authorities had not breached the right because "it can discern nothing, either in the purpose of the parade or in

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<sup>398</sup> *Jagadishwaranand v Police Commissioner, Calcutta*, AIR 1984 SC 51.

<sup>399</sup> *Valsamis v Greece*, App. no. 21787/93, 8 December 1996.

the arrangements for it, which could offend the applicants' pacifist convictions."<sup>400</sup> Here, the ECtHR substituted its own interpretation of the religious claim at issue for the one asserted by the applicant: in other words, it second-guessed the merits of  $p$ . From a subjective standpoint, this sort of reasoning is unacceptable, since what matters from this perspective is that the applicant herself interprets her religious obligations as requiring her to abstain from participating in the parade, regardless of whether her interpretation of her religion was correct or not.

If objective religious freedom's focus is on  $p$ , subjective religious freedom is exclusively concerned with the agent's relation to the proposition. A subjective assessment, therefore, is exclusively concerned with the truth-value of the relational sentence, which will be true, if and only if, the agent  $a$  stands in relation  $R$  to the proposition  $p$ .<sup>401</sup> A subjective analysis, in other words, is exhausted by the inquiry concerning the presence of a belief  $p$  in  $a$ . Importantly, this subjective inquiry must remain agnostic about the merits of  $p$ . One of the most remarkable examples of this subjective attitude is found in the case of *Thomas v Review Board of Indiana*.<sup>402</sup> Thomas, the applicant, was an employee at a foundry which produced steel for industrial use. When the foundry closed, he was transferred to another department which made turrets for military tanks. Since working in this department would have compromised his religious beliefs which prevented him from participating in the production of weapons, he decided to quit. He was subsequently denied unemployment benefits by the state because he had terminated his employment voluntarily and without good cause. The SCOTUS ruled in favour of Thomas, holding that the state's decision to deny him unemployment benefits violated his free exercise right.

What makes this case stand out as a notable instance of a subjective understanding of religious freedom is the fact that the SCOTUS did not yield

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<sup>400</sup> *ibid* [31].

<sup>401</sup> This definition is drawn from Kenneth Taylor, *Truth and Meaning*, Blackwell, 1998, 182.

<sup>402</sup> *Thomas v Review Board of Indiana*, (1981) 450 U.S. 707.

to the temptation of questioning the merits of Thomas' religious claims even though the change in his employment was minimal, from an objective standpoint. Thomas was transferred from a department which produced steel to another department which used that same steel to produce tank turrets. He did not have any religious qualms with his former employment, but he refused to perform the latter, notwithstanding the fact that he was perfectly aware that some of the steel which he produced was eventually transformed into armament. It was the move further along the same production line to which he objected. Moreover, at least one of Thomas' colleagues, who was also transferred and who identified with the same faith as Thomas, did not share his objection to the new position. Instead of taking the route of the ECtHR in *Valsamis*, the SCOTUS affirmed its fidelity to a subjective understanding of religious freedom by stating that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection",<sup>403</sup> and complemented this by saying: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one".<sup>404</sup>

*Valsamis* and *Thomas* clearly illustrate the importance of the objective/subjective distinction in light of the disparate outcomes that follow from the judicial adoption of one or the other of these conceptions of religious freedom. What these cases show, moreover, is that an inquiry into the correctness of  $p$  is completely separate from one directed at ascertaining the truth-value of  $aRp$ .<sup>405</sup> If we apply this finding to *Amselem*, we can say that a

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<sup>403</sup> *Thomas v Review Board of Indiana*, (1981) 450 U.S. 707, 714.

<sup>404</sup> *ibid* 716.

<sup>405</sup> This idea is magisterially summed up by Eric Heinze, who explains the distinction between a 'transparent' and an 'obscure' context by way of two simple examples. A transparent concept, is exemplified in the sentence 'The fact is that the cup is red'. This proposition is transparent because it can be broken down into two different sentences: 'The fact is that  $x$ ' and 'The cup is red' and where the truth-value of the original sentence can be ascertained by the truth-value of 'The cup is red' where this sentence stands for  $x$  in the sentence 'The fact is that  $x$ '. By contrast, when dealing with an obscure context, this is not possible. Again, following the example given by Heinze, if one were to break down the sentence 'Fatima believes that the cup is red' into two sentences such that 'Fatima believes that  $x$ ' and 'The cup is red', "the fact that the cup is red implies nothing about what colour Fatima believes it to be". Eric Heinze,

determination regarding whether or not *A*, *F*, and *K*'s faith in fact imposes an obligation on its members to set up a succah on their own balconies for their exclusive use is distinct from any conclusion regarding the truth or falsity of the statement '[*A*, *F*, or *K*] believes that his religion requires him to build a succah in his own balcony'. The first of these questions is moot when the right to freedom of religion is understood subjectively. Judicial respect for the individual's ethical persona, according to this conception of religious freedom, requires the court to stay within the limits of the latter inquiry. Precisely what this limitation entails will be considered in the next section.

### 3. The *hands-off* inquiry

Although the boundaries of the judicial inquiry which is compatible with a subjective conception of religious freedom can be fully surmised from the account offered in the previous section, another virtue of *Amselem* is that the SCC goes to great lengths in order to spell them out in detail. This explicit recognition of the confines which judges must observe is valuable because it singles out those matters which cannot be present in the judicial reasoning leading to a decision about the merits of a claim under the right to freedom of religion. In other words, these are the issues from which the courts must keep their *hands off*. In this section, I relay the features of the inquiry outlined by the SCC.

First, the SCC asserts that the religious claim of an individual may attract the protection of the right to freedom of religion, "*irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials*".<sup>406</sup> This is in direct contradiction with the Indian position where, as it will be recalled, the fate of an individual's claim hinges on whether the belief in question is an 'essential'

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*The Logic of Liberal Rights: A Study in the Formal Analysis of Legal Discourse*, Routledge, 2003, 45-46.

<sup>406</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 553, [46] and [54]. Emphasis added.

dogma of the religion to which it attaches. For the SCC, on the contrary, the 'official' character of a religious belief is of no relevance and, therefore, an individual's claim is not to be affected, for better or for worse, for exhibiting or lacking orthodoxy. Furthermore, because the opinion that others hold of an applicant's religious beliefs, notwithstanding their expertise, is of no relevance to the inquiry, the SCC also makes it clear that "it is inappropriate to require expert opinions".<sup>407</sup>

It was in observance of this constraint that I decided to offer an account of the facts in *Amselem* that differs from the court's. In this case, the applicants' beliefs regarding succahs do seem to overlap to some extent with the practices of other individuals who also identify as Orthodox Jews, as well as with the views of those who they recognise as religious authorities. That this is so makes the SCC's 'description' of the facts seem harmless. However, it is important to remember that the orthodox character of the applicants' claims should not, in any way, be seen as a strength from a legal point of view. The applicants' claim in *Amselem* should not have fared differently had their beliefs been heterodox or had they been refuted by an 'expert'. The subjective conception of religious freedom, in other words, recognises no authority other than the applicant's own conscience.

The second feature of this hands-off inquiry, according to the SCC, is that "a claimant need not show some sort of objective religious obligation", nor does the observance of the religious precept at issue need to be "mandatory or perceived-as-mandatory".<sup>408</sup> What this means is that a religious claim admits of deontological modalities beyond 'obligatory'. In other words, a religious belief can be couched in non-obligatory terms and still receive the protection of the right to religious freedom. A case in point of this 'permissive' scope is the decision of the ECtHR in *S.A.S. v France*, in which the applicant argued that the law banning facial concealment in public violated her freedom of

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<sup>407</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 554.

<sup>408</sup> *ibid* 553 and [47].

religion.<sup>409</sup> The applicant in this case represented her religious interest in wearing a *burqa* or *niqab*, not in terms of any mandatory doctrine of her Muslim faith, but rather as a choice that she made depending on her “spiritual feelings”.<sup>410</sup> The same can be said about the claim of the named applicant in *Eweida and others v the United Kingdom*, who argued for her right to wear a crucifix over her work uniform.<sup>411</sup> Although the domestic court and the government rehearsed the argument that the applicant’s claim should fail because the belief at issue was not a mandatory precept of the Christian faith, the ECtHR ruled in her favour.<sup>412</sup>

In light of these guiding principles, in *Amselem*, the SCC was very critical of the inquiry that the inferior courts had performed. The court found that the trial judge erred in deciding against the applicants because “he chose between two competing rabbinical authorities on a question of Jewish law” and because “he seems to have based his findings with respect to freedom of religion solely on what *he* perceived to be the objective obligatory requirements of Judaism”.<sup>413</sup> The SCC also emphasised that the distinction between an obligation and a mere custom, for the purposes of determining the scope of protection of religious freedom, was “dubious, unwarranted and unduly restrictive”.<sup>414</sup>

The precise features of the hands-off inquiry considered in this section are a corollary of the subjective conception of religious freedom set forth in the previous one. While the court’s enunciation of the boundaries of the judicial inquiry under this understanding of freedom of religion is valuable as a means of avoiding any doubt about a courts’ proper role, the formal representation of religious claims in the form *aRp* makes the itemisation of the limitations given in this section conceptually superfluous. What makes the hands-off features singled out by the SCC impermissible from a subjective perspective in every

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<sup>409</sup> *S.A.S. v France*, App. no. 43835/11, 1 July 2014.

<sup>410</sup> *ibid* [12].

<sup>411</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013.

<sup>412</sup> *ibid* [14] and [58].

<sup>413</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 554 and [65].

<sup>414</sup> *ibid* 554 and [67].

case is that, in one way or another, they all entail an evaluation of  $p$ . In this sense, recall that any assessment of  $p$  transforms a judicial inquiry into an objective one. Recall also that what distinguishes a subjective inquiry is its singular focus on the truth-value of  $aRp$ , that is, on whether the agent  $a$  stands in relation  $R$  to the proposition  $p$ .

#### 4. *Sincerity*: an introduction

If subjective religious freedom is meant to protect an individual's ethical integrity, it is intuitively appealing to reserve this entitlement *only* to those instances in which the applicant *actually* holds the religious beliefs that she claims to hold. Courts which have been persuaded by this idea have, thereby, instituted a *sincerity* test in order to filter out sincere from insincere claims. The sincerity test is the first hurdle that every applicant's claim must overcome in order to fall within the scope of the right to freedom of religion.

In short, what characterises the judicial practice under scrutiny is that, instead of taking for granted that a claimant's claim that her religious freedom has been compromised is true, the sincerity test calls the verity of every such claim into question. In terms of the formal representation which I have relied on thus far, the sincerity test seeks to actually ascertain the truth-value of the  $aRp$  at issue in every case. To restate, an  $aRp$  will be true if agent  $a$  stands in relation  $R$  to the proposition  $p$ , and false if agent  $a$  does not stand in relation  $R$  to the proposition  $p$ . That the  $aRp$  is true is equivalent to saying that the applicant is sincere. A false  $aRp$ , on the contrary, means that the applicant is insincere.

Two further observations about the concept of sincerity are in order at this point. First, the SCC clarifies that only those claims which assert a belief in *good faith*—as opposed to those which are *fictional*, *capricious*, or which are made as an *artifice*—are considered to be sincere.<sup>415</sup> The SCC's explicit

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<sup>415</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, [52]. Emphasis added.

acknowledgement that capricious and artificial claims are not sincere, although conceptually superfluous, is important because it evidences the court's interest in limiting the protection of the right to freedom of religion only to those claims in which the ethical integrity of an individual is at stake. Furthermore, it also attests to the nuances that the sincerity test is supposed to pick out. When an applicant does not really hold the beliefs which she claims in any meaningful sense –capriciousness– or when she contests a law or state action for some ulterior motive –artificialness–, her ethical integrity is not compromised.

Second, although a negative test result –that is, a finding of insincerity– means that the applicant is lying, it is important not to conflate a lie with a false statement.<sup>416</sup> The difference between a lie and a false statement tracks the distinction between the subjective and the objective conception of religious freedom. Both a lie and the subjective conception are only concerned with the truth-value of  $aRp$  –that is, on whether the applicant believes what she claims to believe. The only difference between them is that whereas the subjective conception takes this to be the interest underlying the right to freedom of religion, the sincerity test actually tries to figure out whether this is true in the case of a particular applicant. A false statement, on the other hand, like the objective inquiry, is concerned with the merits of  $p$ . Since lies are distinct from false statements, any given  $aRp$  can express one of four possibilities: 1) a sincere truth; 2) a sincere falsehood; 3) an insincere truth; and 4) an insincere falsehood. Claims of the type 1) and 2) should be equally successful for the purposes of the sincerity test performed in the context of a subjective

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<sup>416</sup> In one of his famous essays, Michel de Montaigne understood the difference between lies and false statements as follows: “to tell an untruth is to tell a thing that is false, but that we ourselves believe to be true [while] to lie [...] is to tell a thing which we know in our conscience to be untrue [...]”. Michel de Montaigne, ‘Chapter IX. Of Liars’, *The Essays* available at <http://www.gutenberg.org/files/3600/3600-h/3600-h.htm> (last accessed in September 2019). More recently, Seana Shiffrin has offered a pristine characterisation of lying which is worth quoting at length: “An intentional assertion by A to B of a proposition P such that 1. A does not believe P, and 2. A is aware that A does not believe P, and 3. A intentionally presents P in a manner or context that objectively manifests A's intention that B is to take and treat P as an accurate representation of A's belief”. Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality*, Princeton University Press, 2014, 12.

understanding of religious freedom. The sincerity test must, therefore, be able to distinguish between a sincere and an insincere claim, notwithstanding the truth or falsehood of the proposition it contains.

## 5. The sincerity *test*

It is not uncommon for courts to be presented with cases which require them to assess an individual's mental state. The fact that judges regularly engage in analyses of this sort, I think, explains why courts and scholars have not questioned their ability to do so in cases where religious freedom is at stake. I suggest, on the contrary, that the hands-off inquiry which applies to claims of religious freedom following a subjective conception, excludes most of the relevant evidence which makes judicial determinations about what a person knows or believes possible in those cases. In this section, I defend this thesis by reference to the claims of applicants *A*, *F*, and *K* in *Amselem*. In order to demonstrate that courts are hard-pressed to identify insincere claims and, therefore, that any finding of insincerity is difficult to justify from the perspective of a hands-off inquiry, I will stipulate that the claims of *A*, *F*, and *K* were insincere—that is, that they did not really believe that they should build succahs in their own balconies in order to fulfil their religious commitments.

The issue that is presented to judges by the sincerity enquiry is one of epistemic vulnerability.<sup>417</sup> While this issue is one of philosophical relevance beyond the confines of courtrooms, it is useful to make clear what is at stake at bottom in this social practice. At its most basic level, a claimant's testimony regarding her beliefs—as well as the testimony given by others on that same matter—is intended as a source of knowledge for a judicial decision. However, given that the testimony rendered by these parties has the potential of being untruthful, either because the witnesses are wrong about the facts or because

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<sup>417</sup> Jonathan Adler, "Epistemological Problems of Testimony", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.), accessible at <https://plato.stanford.edu/archives/win2017/entries/testimony-episprob/> (last accessed February 2020).

they willingly misrepresent their state of mind, it is necessary to determine the level of reliability that should be accorded to these sources of knowledge. Now, the context in which a testimony is rendered for legal purposes drastically reduces the potential sources of error that may arise from the many uses of language. In the court room, testimony is always to be understood as an assertion, meaning that “the thought expressed is true, or that the truth-value referred to is truth”.<sup>418</sup> Comedic, figurative, or other purposes of the testimony are to be discarded from the start. In other words, when a claimant asserts the proposition “I believe X”, it should only be understood literally as a report of the mental state of the person making the assertion.

In deciding whether to trust the claimant’s assertion or not, the judge can take on different attitudes. At one end of the spectrum, the judge could choose to trust the claimant —ie take her at her word— completely while, at the other, she could decide to distrust her completely. According to the first possibility, the judge accords the claimant’s *aRp* a truth-value of truth while, following the second possibility, she would accord the claimant’s *aRp* a truth-value of false. These two *pro tanto* possibilities, however, would seem to be misguided: more plausibly, judges would start their inquiry in some intermediate position and move towards a finding of truth —ie sincerity— or false —ie insincerity— in light of the evidence presented to either corroborate or refute the assertion *aRp*. I suggest, however, that the appropriate starting point is not somewhere along the middle of these two poles, which would entail an attitude of scepticism. Rather, I think judges should adopt an attitude that is closer to the truth pole for the reason that claimants, under the subjective conception of religious freedom, are understood to be making an assertion about a belief system that they have complete authority over, making them something akin to ‘experts’ delivering testimony over their area of expertise. This entails the adoption of a defeasible presumption of truth in favour of the claimant’s

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<sup>418</sup> *ibid* citing Dummett 1981, 298.

assertion, meaning that the onus is on the state to disprove this presumption.<sup>419</sup>

That this starting point is morally superior to one which is either sceptic or tends towards falsity is made evident by the very limited evidence that a claimant can and should have to present to corroborate her assertion under the subjective conception of religious freedom. Unlike facts which exist in the external world, evidence for the content of a person's mind cannot be established directly.<sup>420</sup> In *The Principles of Judicial Proof*, John H. Wigmore offered a succinct and straightforward account of the means that judges can rely on in order to reach a conclusion regarding, in his words, "the presence in the mind of an impression as to a given fact".<sup>421</sup> This is precisely what the sincerity test requires of judges: to conclude whether an applicant's asserted beliefs are actually present in his mind. In what follows, I offer an account of the sources of evidence that judges usually rely on in order to demonstrate why each of them cannot serve this purpose given the limitations imposed by the subjective conception of religious freedom.

Wigmore explains that a person's knowledge or belief can be evidenced by: 1) external circumstances; and/or 2) her conduct or behaviour.<sup>422</sup> First, then, evidence of a person's beliefs can come about as a result of some *external circumstance*. In this case, judges are able to draw an inference regarding the probability that a belief exists from some occurrence or state of affairs. Wigmore further subdivides these external circumstances into four different categories: "(1) The *direct exposure* of the fact [...]; (2) The *express* making of a *communication* to him; (3) The *reputation* in the community on the subject [...]; (4) The *quality of the occurrence*, as leading either to actual

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<sup>419</sup> *ibid*

<sup>420</sup> That is "evidence which, if believed, resolves a matter in issue". Charles T. McCormick, *McCormick on Evidence*, 5th ed, John W. Strong et al (eds), 1999, 278.

<sup>421</sup> John Henry Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*, Little, Brown, and Company, 1913, 96.

<sup>422</sup> Wigmore adds a third evidentiary mode: "her prior or subsequent state of mind" which I don't consider given its obvious inapplicability in this discussion in *ibid*.

perception by his senses, or to express communication".<sup>423</sup> A judicial determination regarding an individual's beliefs arising from external circumstances must proceed by, first, considering whether the person was at all capable of experiencing the external circumstance and, if so, subsequently determining what the probability is that the person actually formed a belief based on his experience of that external circumstance.<sup>424</sup>

This first source of evidence seems to be of little to no assistance for a judicial inquiry of the kind at issue. That religious beliefs are formed through contact with the external world is self-evident. But the complex nature of the experiences that shape a person's religious beliefs is such that it is not possible to draw inferences of the sort that judges are capable of evaluating rationally. The applicants in *Amselem*, for instance, assert a belief which can hardly be traced back to any specific occurrence. On the contrary, it is the sort of belief that results from a lifetime of diverse experiences: interpretation of religious texts, discussions with others, family tradition, self-reflection, etc. Notwithstanding this complexity, suppose that a judge was to require applicants *A*, *F*, and *K* to pinpoint the precise source of their beliefs. If they were to answer that the belief arises from their interpretation of a scriptural passage, the judicial inquiry reaches a dead end because a determination regarding the evidentiary value of an assertion of this sort can only result from an assessment of the merits of the applicants' interpretation of *their* religion. In other words, if a court questions or second-guesses what an applicant offers as evidence for her belief, it makes the same mistake that the ECtHR committed in *Valsamis*, discussed above, where it held, against the applicant's claim, that a patriotic parade did not contradict her beliefs.

In other words, asking applicants to explain why they believe what they claim to believe is of no benefit since the courts must then abstain from evaluating the merits of their answer. This is not to say that there is no right

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<sup>423</sup> John Henry Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*, Little, Brown, and Company, 1913, 96. 97.

<sup>424</sup> *ibid* 96.

answer when it comes to the tenets of a particular religion from a theological standpoint: whether Judaism calls for individual rather than communal succahs may have an objectively correct answer from that perspective. But remember that, even if the applicants in *Amselem* were mistaken about their faith, this would only mean that their statements were false, but not that they were insincere. This is the consequence of understanding religion subjectively. If, as the SCC itself acknowledged, the opinions of others regarding a person's religiosity shouldn't matter for a subjective conception of religion, it is hard to see why a court's opinion should fare any differently. Laborde sums up the extent of the phenomenological character of a subjective conception in the following words: "Individuals might be mistaken about what is demanded of them; they might come up with wildly eccentric or idiosyncratic beliefs and practices; they might press highly heterodox interpretations of their religion, and so forth".<sup>425</sup>

This same conclusion also applies to the SCC's contention that an applicant's sincerity can be based on "the credibility of a claimant's testimony".<sup>426</sup> It is important to note in this regard that, unlike other testimonial assertions, the basis for an applicant's testimony will, in every case, be her *personal knowledge* of her own state of mind.<sup>427</sup> Furthermore, and to restate, the credibility of her testimony cannot be impacted, for better or for worse, by any objective inquiry regarding the merits of the proposition *p* that is contained in her claim.<sup>428</sup> To do otherwise would mean to engage in an inquiry of an objective character. Moreover, given that no third-party testimony, expert or otherwise, can be offered to either strengthen or weaken the authority of the applicant's claim, it is only her testimony which is of relevance for the purpose of inferring her belief from external circumstances. In view of the lack of evidentiary value of an applicant's own testimony when it comes to singling out

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<sup>425</sup> Cécile Laborde, *Liberalism's Religion*, Harvard University Press, 2017, 205.

<sup>426</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 553 and [53].

<sup>427</sup> For a full account of kinds of testimony see Terence Anderson et al, *Analysis of Evidence*, 2nd ed, Cambridge University Press, 2005, 65-66.

<sup>428</sup> On this point see Terence Anderson et al, *Analysis of Evidence*, 2nd ed, Cambridge University Press, 2005, 66-67.

insincere claims, external circumstances are, therefore, of no use for this inquiry. At best, an assessment of credibility must be limited to physical or linguistic cues, the impact of which must be minimal, but a matter that I will touch upon below.

The second source of evidence for a person's mental state mentioned by Wigmore is that person's actions. An individual's *conduct or behaviour*, including her *speech acts*, for Wigmore, "illustrates and points back to the state of mind producing it".<sup>429</sup> In this same vein, the SCC suggests that a person's sincerity can be based on "an analysis of whether the alleged belief is consistent with his or her other current religious practices".<sup>430</sup> Whether two actions are 'consistent' with each other seems to rely on a previous determination regarding the relationships that exist among the several moral commitments that make up a person's religious identity. That religion implies a constellation of commitments, so to speak, follows from its comprehensive character, in a Rawlsian sense.<sup>431</sup> In other words, religion is not about single-issue beliefs or one-off practices. Nevertheless, the legitimacy of the particular network of propositions that make up an individual's religious worldview cannot be questioned just because it doesn't reproduce some pre-ordained, orthodox mould.

To illustrate this point, consider the hypothetical case of a person who asserts her right to wear a crucifix at work as a sign of her commitment to her Catholic faith. Suppose that she readily acknowledges the following concurrent beliefs: that she is free to engage in as many sexual relations as she deems fulfilling; that it is her duty not to bear children unless she is convinced that she is capable of discharging all of her maternal responsibilities; that she is free to abort if faced with an unwanted pregnancy; and that she is free to marry a person of either sex. In observance of these beliefs, alongside the wearing of a crucifix, she sometimes engages in sexual relations with different partners,

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<sup>429</sup> John Henry Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*, Little, Brown, and Company, 1913, 97.

<sup>430</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 553, [53] and [68].

<sup>431</sup> John Rawls, *Political Liberalism*, Columbia University Press, 2005, 212.

uses contraceptives, and is married to a woman. It is hard to think of an example that departs more from a stereotypical portrayal of the average Catholic person. And yet, faced with an example as marginal as this one, the courts cannot use any 'standard' cluster of propositions in order to assess her sincerity.

In *Eweida*, the ECtHR described the beliefs of two Christian applicants as "orthodox" because they espoused the view that marriages and sexual relationships are unions between persons of the opposite sex.<sup>432</sup> From a subjective perspective, labelling these beliefs as such is not insignificant if the court then proceeds to accord normative weight to these claims on the basis of their alleged orthodoxy. Whatever the value of tagging beliefs in this manner may be for theological, sociological, or other purposes, it should be of no assistance to a judicial inquiry. If heterodoxy is a permissible trait of religious freedom, it cannot be held against the applicant when her sincerity is under scrutiny. There is nothing necessarily oxymoronic about a Muslim drinking alcohol, a Jew eating pork, or a Catholic dabbling in astrology or black magic. And if these common monikers only create unnecessary confusion, the applicant can always legitimately distance herself from it by simply stating: "I'm just not that kind of Catholic and I have a right to be the kind of Catholic I am".

The impossibility of picking out an insincere claim on the basis of the beliefs that the applicant holds concurrently is only compounded by the fact that the protection of the right to religious freedom, as noted above, covers non-mandatory beliefs as well. For the applicants in *Amselem*, this means that they could justify their claim simply by saying something along these lines: "I don't believe that my religion *requires* me to build a succah for my own personal use. I believe a communal succah serves just as well in order to discharge my religious *obligations*. Although I don't believe that I'm obliged to build a personal succah, I do believe that doing so enhances my spiritual wellbeing". It is difficult to see what evidentiary value for the purposes of

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<sup>432</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013, [102] and [108].

determining these applicants' sincerity, if any, a judge could draw from a statement of this sort, while at the same time refraining from deriving it from the heterodox or apparently trivial nature of their claim. This is precisely the point that Winnifred Fallers Sullivan makes when considering the practice of decorating family members' graves that the applicants in the case she examines considered to be a crucially important part of their religious conceptions.<sup>433</sup>

It is important to understand, therefore, that when an applicant identifies as a 'Muslim', a 'Jew', or a devotee of any other mainstream religious denomination, she uses this label as a shorthand for her own comprehensive conception of the good. But exactly how much the ethical make-up of an individual actually aligns with these creeds, from some objective standpoint, should not be used as a basis for questioning whether their integrity is really at stake. To do so would be to depart from a subjective conception of religious freedom. To remain faithful to this conception, on the other hand, means that analysing the concurrent beliefs and practices of applicants for consistency is of no probative value as far as sincerity is concerned. Short of a blatant contradiction in word or deed, there is no basis for concluding that an applicant is insincere. Even in this situation, the applicant can attribute the actions that contradict his claims to the weakness of his will, rather than to his lack of sincerity.

This conclusion also extends to past beliefs and practices, about which the SCC says that it is "inappropriate for courts *rigorously* to study and focus on the past practices of claimants".<sup>434</sup> The rationale for this rule, according to the court, is "the vacillating nature of religious belief".<sup>435</sup> Although the SCC is right to acknowledge the complexity of the religious phenomenon and of the ethical fluidity that characterises the religious experience in contemporary societies, I submit that a more cogent reason for refraining from assessing an

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<sup>433</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, Princeton University Press, 2005.

<sup>434</sup> *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 554, [53] and [68]. Emphasis added.

<sup>435</sup> *ibid.* Emphasis added.

individual's erstwhile religious beliefs, in addition to what has already been said in the preceding paragraphs about concurrent ones, is that it seems to conflict with a person's right to change them. This right is explicitly acknowledged in most of the legal formulations of this right —though not in the United States or Canada— as well as by domestic and international bodies charged with their interpretation.<sup>436</sup> At issue here is whether it makes sense to say that someone has a right to change one's religion, while at the same time 'penalising' that individual for exercising it. I will not attempt to answer this question here because it is unnecessary to do so for present purposes.

In *Amselem*, the SCC concluded that there was no doubt about the applicants' sincerity. The SCC offered this conclusion without giving any explanation as to how it was able to reach it. In this section, on the contrary, I have demonstrated that the hands-off inquiry which is presupposed by a subjective conception of religious freedom makes such a finding impossible. I began this analysis by stipulating that the applicants in *Amselem* were insincere in order to find out whether it was possible to uncover them as such. After carefully considering the different sources of evidence which could potentially be used to prove this conclusion, including those mentioned by the SCC, it is possible to see how each of them is rendered ineffective under a subjective conception of religious freedom. Their value is, of course, undisputed if the limitations of the hands-off inquiry are lifted. But in doing so, religious freedom becomes objective. Respect for the ethical integrity of individuals, therefore, requires that courts desist from assessing applicants' sincerity.

Recently, authors who have engaged in arguments concerning the plausibility of the sincerity test have pointed to some potential sources of evidence. In order to complement what has been said above I will proceed by trying to point out the flaws in their suggestions. Kevin Vallier and Michael

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<sup>436</sup> Examples of this acknowledgement can be found in the text of Article 9 of the European Convention on Human Rights as well as in Article 12 of the American Convention on Human Rights.

Weber have recently offered a neat taxonomy of evidentiary sources whose use they consider legitimate in this context.<sup>437</sup> In particular, they point to several possible criteria, namely: the inconsistent or unclear description of the beliefs avowed by the claimant; a claimant's inconsistent past behaviour; the existence of ulterior motives; and the claimant's demeanour when giving testimony.

Regarding the evidentiary value of an inconsistent or unclear description of beliefs by the claimant, I think there are several drawbacks to perceiving this as a reason for refuting or discrediting their sincerity. In *The Authority of Law*, Raz pointed out that requiring a person to express their deeply held beliefs "encourages self-doubt, selfdeception, and in general undesirable forms of introspection".<sup>438</sup> While the lack of clarity or inconsistency may be interpreted as evidence of deception, it could equally point to a claimant's desire to express her deeply held convictions in a manner which she is not used to, or to an attempt to "get" her beliefs right, much like the writer who tosses out several drafts before being able to flesh out her idea in a manner which is acceptable to her. It would hardly seem appropriate to question a person's commitment to an idea based on the number of unclear and inconsistent drafts that preceded the final version. Moreover, it is difficult to think of a manner of applying this kind of inconsistency that doesn't involve moving into the realm of objective evaluation. Vallier and Weber, for instance, give the example of a prisoner who "used five different names to refer to his religion".<sup>439</sup> As stated above, this evidence of inconsistency can always be refuted by noting that these might just mean that the claimant is struggling to place her belief within a broader belief-system but that should not by itself impinge on the sincerity with which she holds the belief itself. Moreover, a claimant's effort to place her belief within a broader belief-system may be a perfectly reasonable response

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<sup>437</sup> Kevin Vallier and Michael Weber, "In Defense of the Sincerity Test", *Religious Exemptions*, Kevin Vallier and Michael Weber (eds.), Oxford University Press, 2018.

<sup>438</sup> Joseph Raz, *The Authority of Law. Essays on Law and Morality*, Clarendon Press-Oxford University Press, 1979, 287.

<sup>439</sup> Kevin Vallier and Michael Weber, "In Defense of the Sincerity Test", *Religious Exemptions*, Kevin Vallier and Michael Weber (eds.), Oxford University Press, 2018, 251.

to the judicial and academic consensus regarding the existence of a *terra firma*—as explained in Chapter 3— when one is able to successfully place one’s beliefs within some mainstream religious denomination.

Moreover, regarding the inconsistency of beliefs, it is important to note that the subjective conception of religious freedom does not allow judges to justify a decision regarding the sincerity of a belief B1 on the claimant’s holding or observing of a belief B2. In this regard, consider a person who claims to be a Muslim and who believes she must refrain from eating pork but not from drinking alcohol. The sincerity of her belief regarding pork cannot be refuted—or corroborated— by her belief regarding the intake of alcohol. This is because, following the subjective conception of religious freedom, she is free to deviate from theological or sociological conceptions regarding what is entailed by identifying as Muslim. This in turn, has enormous consequences over the use of corroborating evidence and, more specifically, over the decision-maker’s appeal to “prior plausibility”.<sup>440</sup> In a criminal process, for example, when two witnesses give contradicting testimony, a judge can use his knowledge about the beliefs of people in that given situation to give weight to one testimony over the other. In this setting, however, appealing to prior plausibility would necessarily entail preferring some objective criteria over the one expressed by the claimant. This is also why an approach that applies a Bayesian strategy to the valuation of testimony is also to be excluded.<sup>441</sup> When a person offers a report about simple facts in the external world, such as what she saw at a given moment in time, it makes perfect sense to evaluate an inconsistent or unclear report negatively. But it is more difficult to see why that should be the appropriate upshot given the aforementioned difficulties.

As far as the second criteria suggested by Vallier and Weber is concerned, namely, the existence of inconsistent past behaviour, this can also

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<sup>440</sup> Jonathan Adler, "Epistemological Problems of Testimony", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.), accessible at <https://plato.stanford.edu/archives/win2017/entries/testimony-episprob/> (last accessed February 2020).

<sup>441</sup> Alvin I. Goldman, *Knowledge in a Social World*, Oxford University Press, 1999.

easily be neutralised in one of two ways. First, the claimant who has been found to be acting in a manner that patently contradicts her asserted belief can always introduce a caveat or clarification to her original assertion. So, if a claimant asserts that she believes that she shouldn't eat meat but there is evidence which shows that she has eaten meat in the past, she can retort by saying that her belief is only applicable in those circumstances in which she "feels" an obligation to behave in that manner. This is precisely the way in which the claimant in *S.A.S. v France* expressed her belief in wearing a full-face veil.<sup>442</sup> Moreover, an all or nothing approach to a person's beliefs as a means of evaluating sincerity seems to require a thick substantive commitment to integrity that does not seem to be entailed by the subjective conception of religious freedom. A person's sincere belief that she should visit her parents every week can coexist with the fact that she fails to do so as often as she thinks she should.

The negative evaluation of behaviour that is inconsistent with professed beliefs also draws this discussion nearer to deeper philosophical waters, such as those having to do with the notion of *akrasia*, which G.A. Cohen defines as "the question whether people may truly believe in principles on which they do not act".<sup>443</sup> For Cohen, despite taking note of the philosophical disputes generated by some prominent answers to these questions, it is "consistent" to believe something and yet have no intension of acting in accordance with that belief.<sup>444</sup> A person, for instance, may acknowledge that eating meat is morally wrong because of its negative effects over animal welfare and yet not make the decision to commit to a non-animal diet. Reasons for acting in this manner are manifold: Cohen, for his part, points to succumbing to temptation,<sup>445</sup> but other possible reasons for doing so are easy to imagine. In the Catholic tradition, the whole concept of confessing to a priest in order to ask forgiveness

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<sup>442</sup> *S.A.S. v France*, App. no. 43835/11, 01 July 2014.

<sup>443</sup> G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich?*, Harvard University Press, 2000 available at <https://www.giffordlectures.org/books/if-youre-egalitarian-how-come-youre-so-rich/10-political-philosophy-and-personal-behavior> (last accessed February 2020).

<sup>444</sup> *ibid*

<sup>445</sup> *ibid*

for one's sins is based on the acknowledgment that people are susceptible to acting in a manner that contradicts their beliefs. While I do not adopt a definite position on this complex philosophical issue, it seems that those who put a person's sincerity into question on this account need to engage more fully with this debate before committing to that position.

Moreover, another reason for questioning the relevance of inconsistent behaviour is that the right to freedom of religion or belief includes the derived right to change one's religion or belief. If taken seriously, the exercise of what one has a right to do cannot be taken as evidence against one's sincerity, much like exercising the right to stay silent in order not to incriminate oneself cannot be used as inference of one's guilt. In addition, suggesting that a sudden or constant change in beliefs could be used in order to evaluate a person's sincerity would necessarily rely on an objective criterion regarding acceptable kinds of "change" in one's beliefs. In this same vein, as a last resort against the charge of having acted inconsistently with one's alleged beliefs, a claimant could always point to some sudden revelation as a means by which to negate the value of that evidence. Once again, contradicting this assertion would require judges to delve into the complexities of belief-formation, especially with regards to the plausibility of divine revelation or epiphanies. So, much like the first criterion suggested by Vallier and Weber, this second possibility is mired with difficulties that make it clear why its use in this context does not align with its use in other judicial procedures.

Vallier and Weber move on to mention the possibility of acknowledging motivations as a means of assessing a claimant's sincerity. I understand them to mean by this that a judge should look to the benefits that a claimant will draw from a finding in her favour. I suggest, to the contrary, that this should only benefit but never negatively affect the claimant for the reason that it is perfectly natural and legitimate for a claimant to seek a benefit from the exercise of her right. After all, according to the influential interest theory, it is precisely in order to protect a person's interest that rights are instituted. So it would be conceptually suspect to use what is a fundamental feature rights against a

person who seeks to protect them. Of course, when a person is willing to incur great harm in order to abide by her beliefs, this is favourable evidence of her sincerity. When a Jehovah's Witness, for example, refuses to allow medical professionals to perform a blood transfusion in order to save her child's life, the fact that she is willing to put her child's life at risk might be seen favourably with regards to her commitment to her beliefs. But the opposite is not true, ie just because a person is not in a position to lose something valuable does not entail that she is not sincere. A person who believes she should not work on Saturdays will certainly derive a benefit from exercising her right to freedom of religion or belief in order to absent herself from work on those days. But to use this fact as a reason for suspecting her sincerity seems to be misguided from the point of view of the institution of rights. That incentives might, in other contexts, be evidence for or against a testimony given before a court of law is perfectly reasonable: the testimony of a person who will receive some benefit if she testifies against someone else might be considered less trustworthy than the testimony of someone who will not gain any advantage from doing so. But in that scenario, the individuals giving testimony are not seeking to exercise a right. That difference is of fundamental importance. Once again, then, this third criterion rubs up against a difficulty that is simply not present in other contexts.

Finally, Vallier and Webber mention a person's demeanour as a possible criterion for evaluating a claimant's sincerity. Here, however, I am in full agreement with their proposal. The use of a person's demeanour while giving testimony does not necessarily entail the use of an objective threshold. However, given that this is the only noncontroversial evidentiary tool at the judges' disposal, it is difficult to imagine a case where it would prove sufficient to overturn the presumption in the claimant's favour, ie the starting point that I advocated for above. Short of the most extreme instances of flippancy as evidenced by a person's body language, resort to a person's demeanour is likely to be of only minimal usefulness. So, even conceding the legitimacy of this kind of evidence, it is important to carefully consider to what extent it should be relied upon or, rather, what weight it should be afforded.

In examining the myriad evidentiary resources mentioned above and considering the reasons given for suggesting that judges stay away from them, lest they violate the hands-off commitment entailed by the subjective conception of religious freedom, with the exception of the claimant's demeanour, it is important to bring this chapter to a close by pointing to the risk of relying on judicial biases in this area of the law. Carolyn Evans rightly points out that there is always a looming uneasiness regarding the adjudication of "a concept as complex as religious freedom" because of the paramount concern "that those charged with applying it will simply draw on their own experiences or notions of 'common sense'", which will result in them favouring beliefs that they find "familiar or comfortable" and punishing or side-lining those which are "foreign or strange" to them.<sup>446</sup> In this regard, it is important to take notice of the notion of "alief", which Tamar Szabó Gendler defines as a cognitive state wherein a person's beliefs do not match with "belief-appropriate behaviours".<sup>447</sup> Gendler gives several prosaic examples, such as reluctance to eat soup from a brand-new bedpan or hesitation to eat fudge shaped as dog faeces. In these cases, people *believe* that the bed-pan is sterile and that the fudge is not faeces. And yet, in all these cases the belief in question is complemented by the presence of a "*belief discordant-alief*".<sup>448</sup> Basically, what this means is that interacting with things in the external world "activates a different set of affective, cognitive, and behavioural association-patterns" that influence our decision-making *despite* our beliefs.<sup>449</sup> So while it is perfectly possible for a judge to believe that she should not, under any circumstances, resort to an objective evaluation of a claimant's beliefs in order to reach a decision regarding her sincerity, her alief regarding a particular belief might affect her judgment nevertheless. An alief of this sort might tell her that "not eating pork" is something that has religious significance while "attending a Star

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<sup>446</sup> Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, 2001, 18.

<sup>447</sup> Tamar Szabó Gendler, "Alief and Belief", *The Journal of Philosophy*, Vol. 105, No. 10, Epistemic Norms. Part Two (Oct., 2008), 634-663.

<sup>448</sup> *ibid* 641.

<sup>449</sup> *ibid* 640.

Wars premier” is not. Of course, the presence of aliefs in a judge’s mind is liable to pervade all of her decisions. However, their relevance is felt particularly strongly in this context given the extremely thin evidentiary resources that they can point to in order to justify their decisions. In these circumstances, the susceptibility of reaching a decision based on one’s aliefs is much greater. In other words, the risk that a judge will be less suspicious of a person’s sincerity when what is asserted is a belief commonly associated with a Christian faith but more suspicious regarding another with Pastafarian underpinnings is particularly strong.

## 6. Conclusion

The right to freedom of religion or belief, to quote the ECtHR, is “one of the foundations of a ‘democratic society’”.<sup>450</sup> As such, it is a benefit that ought to be distributed equally among citizens. By identifying the ethical integrity of individuals as the grounds—or interest—of the right to freedom of religion or belief, courts have zeroed in on the most egalitarian of values. Respect for the moral agency of individuals entails viewing persons as, in Rawls’ words, “self-authenticating sources of valid claims”.<sup>451</sup> Assessing applicants’ sincerity, however, presents the latent risk of denying individuals this moral power. Moreover, it inadvertently replaces the normative value protected by the right to freedom of religion by something other than respect for the individual’s ethical independence.

Courts, no doubt, are impervious of these consequences. The appeal of relying on sincerity in order to allocate the protection of the right to freedom of religion is easy to understand. If protecting the ethical integrity of individuals is what this right is about, it makes perfect sense to want to limit its application to cases where this value is actually at stake. However, if what passes for an assessment of sincerity is in fact an evaluation of the individual’s religious

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<sup>450</sup> *Kokkinakis v Greece*, App. no. 14307/88, 25 May 1993, [31].

<sup>451</sup> John Rawls, *Political Liberalism*, exp. ed., Columbia University Press, 2005, 32.

conception of the good, it is of the utmost importance to resist this intuitively attractive exercise. In this chapter, I have shown that, in order for a sincerity test to have any bite, it must rely on some objective criteria, against a subjective understanding of religious freedom.

**Part III.** Beyond the dominant approach: proposals for an alternative  
adjudicative strategy

In Part II, I assessed the dominant approach to the adjudication of the right to freedom of religion or belief against the liberal conception of this right, as defined in Part I. The critical scrutiny of the dominant approach that I carried out in Chapters 3 and 4, based on the reconstruction that I offered of it in Chapter 2, demonstrated that this judicial treatment of the right in question is not compatible with its liberal conception. Having established the shortcomings of the dominant approach, in Part III, I outline an alternative strategy for the adjudication of the right to freedom of religion or belief that is compatible with the liberal conception of this right. In Chapter 5, I begin this task by arguing for an approach that does not require claimants to back up their claims either by pointing to a particular belief or by demonstrating any particular motivation. I argue that judges should proceed with the analysis of the merits of every claim alleging a violation of the right to freedom of religion or belief based solely on the claimant's assertion that something violates her right. Notably, I explain why this proposal rules out the granting of exemptions to successful claimants. Then, in Chapter 6, I turn to the scope of the right in question. I maintain that the only way of capturing the breadth of ethical commitments that a liberal outlook seeks to safeguard is by interpreting this right as a right to liberty. In addition, I make the case for the preferability of a reason-blocking strategy, as opposed to a balancing one, as a means of preventing a biased assessment of the merits of a case.

## **Chapter 5.** The *universality* of the right to freedom of religion or belief

In this chapter, I suggest that the liberal conception of the right to freedom of religion or belief stands at odds with an exemptions-based regime because this conception renders inoperative all potential criteria for the rational assignment of such a benefit, as I demonstrated in Part II. In fact, the appeal of the dominant approach can be explained by the *de minimis* character of the criteria it employs for justifying the allotment of this individualised remedy. Nevertheless, as the conclusions of the preceding chapters demonstrate, even this minimally intrusive exercise does not comply with the categorical hands-off nature of the liberal conception of this right. If judges cannot even take notice of the ethical salience and subjective motivations underlying a claim, then all rational means for justifying the granting of an exemption in favour of a particular individual are lost.

Absent the means of sorting claims alleging that some generally applicable norm violates the right to freedom of religion or belief between those that should be granted this exceptional remedy from those that shouldn't, the judicial assessment of any claim can only rely on general, non-discrete considerations. In simple terms, because the liberal conception bars judges from taking into account any facts which are peculiar to the claimant, the facts which they are able to consider will not serve to justify a decision exclusively in the claimant's benefit. In these circumstances, therefore, the appropriate remedy for the finding of a violation of the right to freedom of religion or belief should be one that reflects the general character of the facts used to reach that conclusion. In other words, it calls for a general remedy such as the invalidation of the norm of general applicability at issue, as is commonly the case with other fundamental rights.

The endorsement of a general remedy, however, does not entail a commitment to any specific form of judicial review. Different jurisdictions will grant judges different powers of review of legislative action: from the power to strike down a statute to the power of interpreting a statute in a way that is

consistent with individual rights.<sup>452</sup> Regardless of the authority granted to judges in any particular jurisdiction, compliance with the model of adjudication I propose only requires that judges not single out the claimant for some benefit if they find that the law at issue violates her right to freedom of religion or belief. For the sake of simplicity, in what follows, I will assume that judges have, at least, the power to issue a declaration of incompatibility akin to section 4 of the United Kingdom's Human Rights Act. Also, I take for granted that the claimants I refer to satisfy the conditions for bringing suit: in some jurisdictions, it will suffice for the law to exist, while in others it will be necessary to demonstrate their status as victims. I do not believe that these specificities make any difference for the proposal I am endorsing here.

To illustrate the import of the judicial approach I endorse, suppose that a person claims that a law that bans the covering of one's face in public violates her right to freedom of religion or belief.<sup>453</sup> If one follows the dominant approach, both the claimant's avowed beliefs and her motivations are of the utmost importance because her claim must satisfy the requisite ethical salience and be sincere in order to fall within the scope of the right to which she attaches her claim. Therefore, according to this approach, it makes a crucial difference whether she wishes to cover her face in public in order to comply with some religious obligation or merely because she would prefer not to show her face to others when she is not wearing any make-up, as well as whether the justification she offers is sincere. Given that the judicial appraisal of this hypothetical case under the dominant approach takes into account facts that are particular to the claimant, it makes perfect sense for the benefits of a

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<sup>452</sup> On this point see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge University Press, 2012, especially chapter 2. Even in systems of strong judicial review there is a debate over exactly what happens when a judge rules that a law violates a right, see eg Jeremy Waldron, 'The Core of the Case Against Judicial Review', *Yale Law Journal*, 115(6) (2006) 1346, 1355: "A form of even stronger judicial review would empower the courts to actually strike a piece of legislation out of the statute-book altogether. Some European courts have this authority. It appears that American courts do not, but the real effect of their authority is not much short of it."

<sup>453</sup> Such as the laws that have been passed in many European countries and which formed the basis of the ECtHR's case in *S.A.S. v France*, App. no. 43835/11, 1 July 2014.

favourable finding to accrue only to her. In other words, if a law's violation of a person's right to freedom of religion or belief is contingent on the beliefs of that particular individual, there are no grounds for extending this finding beyond the individual regarding whose beliefs the law is in conflict. The reasonable upshot in this scenario is for the legal ban on face-covering to continue to apply to everyone other than the claimant.

However, the fittingness of this solution depends on a judicial assessment of the ethical salience of the beliefs of a sincere claimant, which I have demonstrated to be at odds with the liberal conception of the right to freedom of religion or belief. Therefore, if the judge is unable to determine whether the claimant wishes to cover her face in order to comply with an ethical obligation or merely to fulfil an aesthetic preference, the judicial assessment of this claim must be limited to ascertaining the conformity of the restriction — ie the action of face-covering— with the right at issue. Given that the resolution of the case will not depend on any facts particular to the claimant, there is no justification for granting her an exemption from the law while at the same time upholding its validity for everyone else. On the contrary, because the judge will only evaluate the conduct regulated by the law —without taking note of the myriad motivations that may be adduced for engaging in it—, a finding of a violation of the right to freedom of religion or belief can only justify the general invalidation of the law. If, on the contrary, the judge determines that the law does not violate this right, then the law's general validity should remain unaffected. In either case, what is important to note is that the judicial finding regarding the (in)compatibility of the ban on face-covering with the right to freedom of religion or belief will have a universal effect —that is, it will determine the (in)compatibility of the law for every subject of the jurisdiction where that law exists.

This scheme for the adjudication of the right to freedom of religion or belief departs from the proposals that notable liberal scholars of religious freedom have recently advanced. Although Eisgruber and Sager, for instance, recognise that “there are reasons to be wary of the claim that the Free Exercise

Clause should be read to give religiously motivated persons a presumptive right to disobey they law”,<sup>454</sup> their programme of “equal liberty” nevertheless endorses accommodations for successful claimants on the condition that “they function as proxies for the requirement of equal treatment”.<sup>455</sup> To explain their position, they offer a hypothetical involving two women, both by the name of Ms. Campbell, who live in the same area, and who wish to open soup kitchens to feed the homeless contrary to the zoning regulations.<sup>456</sup> The only difference between these two women is the “spiritual foundations of their beliefs”: while one is motivated by a religious demand the other wishes to reduce human suffering.<sup>457</sup> Eisgruber and Sager rightly observe that treating these two women differently, by allowing only the religiously motivated Ms. Campbell to open the soup kitchen would be “unjust on its face, and ... at odds with the essence of religious freedom in that it imposes a test of religious orthodoxy as a condition of constitutional entitlement”.<sup>458</sup> A solution in line with the principle of equal liberty, in their view, would require either the accommodation of both Ms. Campbells’ soup kitchens or the applicability of the zoning regulations to both.<sup>459</sup>

Although Eisgruber and Sager’s principle of equal liberty acknowledges that the right to freedom of religion or belief calls for equal treatment across claims of myriad ethical sources, by taking into account the beliefs underlying both Ms. Campbells’ claims, they still rely on an exemptions-based regime as an adequate solution. This means that, even if both Ms. Campbells are exempted from the zoning regulations, the other residents of their area will continue to be barred from operating their own soup kitchens should they also wish to do so. The problem with proposals such as Eisgruber and Sager’s which, in line with the liberal ethos, do not single out religious beliefs but,

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<sup>454</sup> Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution*, Harvard University Press, 2007, 11.

<sup>455</sup> *ibid* 14.

<sup>456</sup> *ibid* 11-13.

<sup>457</sup> *ibid* 11.

<sup>458</sup> *ibid*

<sup>459</sup> *ibid* 13.

rather, argue for the expansion of the right to freedom of religion or belief in order to cover other ethically salient actions, has been the subject of chapters 3 and 4. In essence, the issue is that schemes which take the underlying motivations or the sincerity of particular claims into account for the purposes of determining the applicability of the right in question are not workable under the liberal conception of this right. The principle of equal liberty, understood as a requirement to treat claims of equivalent ethical salience equally, cannot be complied with because judges are unable to assess said salience or sincerity in the first place.

Perhaps counterintuitively, therefore, I argue that equal liberty requires judges to determine the accordancy of a given law—which prohibits the operation of a soup kitchen or the covering of one’s face in public, for instance—with the right to freedom of religion or belief, without having regard for the ethical motivations of any particular individual who wishes to engage in the relevant conduct. Instead, judges should scrutinise the government’s reasons for enacting the law that an individual claims to violate her right.

I interpret this principle to mean that, faced with the inability of distinguishing between sincere and ethically salient claims from those that are not, judges should proceed on the assumption that all claims fulfil these conditions. This proposal emulates the ethical outlook of John Adams, who is quoted as saying: "To believe all men honest is folly. To believe none is something worse". In view of the judicial propensity to favour orthodox but insincere claims and to disadvantage unconventional but sincere claims, judges should prefer running the risk of protecting trivial and insincere claimants rather than of inflicting harm on them by arbitrarily contesting their sincerity or the ethical salience of their beliefs.

In this chapter, I make the case for the adjudicative model I endorse by contrasting its virtues with the shortcomings of the dominant approach across several conceptually relevant matters. First, I elaborate the distinction between universal and special rights in section 1. I emphasise the importance of acknowledging the universal character of the right to freedom of religion or

belief and explain why the dominant approach conceives it, instead, as a special one. Then, I supplement this finding by explaining the relevance of the universal character of the core legal right to freedom of religion or belief for its derived rights in section 2. I subsequently consider the peculiar conception of the relationship between rights and interests that accounts for the dominant approach's preference for an exemption-based adjudicative strategy in section 3. Finally, I advance the case for extending the right not to disclose one's beliefs to the judicial setting in section 4.

#### 1. The *universal* character of the right to freedom of religion or belief

In this section, I demonstrate that the uncoupling of the adjudication of the right to freedom of religion or belief from the motivations or sincerity of any given claimant ensures judicial compliance with a critical aspect of the substance — ie “the content and parameters”—<sup>460</sup> of this right: namely, its *universal* character. The dominant approach, on the contrary, does not pay due regard to this feature of the right.

Universal rights, as their name suggests, are entitlements that are bestowed upon everyone who is subject to a legal order recognising them. They are to be contrasted with rights which are only conferred upon some subset of legal subjects. Dworkin aptly terms rights of the latter kind *special*.<sup>461</sup> The universal quality of a right refers to what Hans Kelsen called the personal sphere of validity of a norm.<sup>462</sup> Given that legal norms regulate human behaviour, the personal element of the norm focuses on “the *individual* who

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<sup>460</sup> Stephen Gardbaum, ‘The Structure and Scope of Constitutional Rights’, *Comparative Constitutional Law*, Tom Ginsburg and Rosalind Dixon (eds.), Edward Elgar Publishing, 2011, 387.

<sup>461</sup> Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977, footnote 1 at 94. This is not to be confused with H.L.A. Hart’s distinction between ‘general’ and ‘special’ rights in ‘Are There Any Natural Rights?’, *Theories of Rights*, Jeremy Waldron (ed.), Oxford University Press, 1984, 83-88.

<sup>462</sup> Hans Kelsen, *Pure Theory of Law*, Max Knight (trans.), University of California Press, 1970, 14. For Kelsen a norm means ‘that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way’. in *ibid* 4.

ought to behave in a certain way”, while the material sphere of validity or element of the norm is concerned with “the *manner* in which he ought to behave”.<sup>463</sup> Timothy Endicott makes a similar distinction between the two “modes of generality [...] in the scope of a law”.<sup>464</sup> For Endicott, “laws are general (1) as to the type of conduct required or prohibited or regulated, and (2) as to the persons to whom they apply”.<sup>465</sup> It is important to emphasise the binary makeup of the substance of rights from the outset because this section focuses only on the personal facet. Because the material element of the right is irrelevant to the argument I develop in this section, the fact that the “definitional scope” or “internal limits” of the right to freedom of religion or belief do not neatly overlap across jurisdictions is of no consequence.<sup>466</sup>

Like many other fundamental rights contained in international treaties and constitutional texts around the world, a defining characteristic of the substance of the right to freedom of religion or belief is that it is normally enshrined in the following terms: ‘*Everyone* has the right to *x*’, where *x* represents the material element of the right and which every legal instrument substitutes by some collection of the changeable terms mentioned in Chapter 1 —eg religion, belief, conscience, thought, etc. A notable exception to this common formula is the Free Exercise Clause of the United States’ Constitution which forbids Congress from prohibiting the free exercise of religion. Despite its unusual formulation, it is not disputed that its personal element is indistinct from other texts recognising an equivalent right: that is, that everyone has it.

Noting the universal character of the right to freedom of religion or belief in different jurisdictions involves the affirmation of a *pure* legal right-statement, to use Joseph Raz’s terminology, meaning that its “truth can be established by

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<sup>463</sup> Hans Kelsen, *Pure Theory of Law*, Max Knight (trans.), University of California Press, 1970, 14. Kelsen uses the word ‘ought’ in a broad sense which includes ‘may’ and ‘can’ in *ibid*, 5.

<sup>464</sup> Timothy Endicott, ‘The Generality of Law’, *Reading HLA Hart’s ‘The Concept of Law’*, Luís Duarte d’Almeida et al (eds.), Hart Publishing, 2013, 3.

<sup>465</sup> *ibid*

<sup>466</sup> Stephen Gardbaum, ‘The Structure and Scope of Constitutional Rights’, *Comparative Constitutional Law*, Tom Ginsburg and Rosalind Dixon (eds.), Edward Elgar Publishing, 2011, 388.

reference to the existence of certain laws alone”.<sup>467</sup> The truth of a statement of this sort, therefore, only requires presupposing the existence of a legal system that recognises said right. An example of a true statement of this sort is ‘The European Convention of Human Rights recognises that everyone has a right to freedom of religion or belief’, because the truth of this statement relies solely on the presupposition that the European regional human rights system exists. Unlike pure statements, however, the truth of *applied* legal right-statements “can only be established by facts which include facts other than the existence of law”.<sup>468</sup> This means that in order to construct a true statement about the legal position of any particular person, merely presupposing the existence of a legal system is not enough.

Carl Wellman explains the difference between the truth-values capable of being contained by these two kinds of statements in terms of the following propositional forms: a true pure right-statement expresses that ‘There is a right to *Y*’, while ‘*X* has a right to *Y*’ expresses a true applied right-statement.<sup>469</sup> In this sense, the true affirmation of the existence of the right under consideration in a given jurisdiction can be represented by the pure statement ‘There is a right to *freedom of religion or belief*’. However, the mere legal recognition of the right to freedom of religion or belief does not serve to establish the truth of an applied statement such as ‘*Sarah* has a right to *freedom of religion or belief*’. The reason for this is that, in accordance with Raz’s abovementioned definition, the truth of this potential instantiation of this type of proposition depends on the actuality of certain facts about Sarah other than the existence of a legal system.

In other words, in order to affirm applied statements, it is imperative to know which facts other than the existence of the law are required in order to establish their truth. Although it is possible to think of many facts about persons—their gender, age, physical appearance, civil status, or their avowed beliefs

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<sup>467</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed., Oxford University Press, 1995, 266.

<sup>468</sup> *ibid*

<sup>469</sup> Carl Wellman, *Real Rights*, Oxford University Press, 1995, 27.

and motivations, to name just a few—<sup>470</sup> most of them would intuitively not be proposed as apposite candidates for the purposes of determining whether somebody can be said to have a right to freedom of religion or belief. This means that, out of the universe of facts that can be cited about persons, only some will have a bearing in this inquiry. What is needed, in Gidon Gottlieb's words, "is the articulation of criteria which direct the selection of facts material to the application of rules; their selection, that is, from the vast storehouse of available facts".<sup>471</sup> Wellman calls the facts that make it through this selective process *investitive* because they are "facts that vest some legal position in some party under the law".<sup>472</sup> In turn, the material or investitive quality of a fact to the application of a particular law is determined by the *protasis* of the rule in question. Frederick Schauer explains that the *protasis* of a rule—or its *factual predicate*, as he calls it—specifies its scope by dictating the fact-finding inquiry leading to "a descriptive statement the truth of which is both a necessary and a sufficient condition for the applicability of the rule".<sup>473</sup>

By recasting the right to freedom of religion or belief in terms which reveal its rule-based structure, its factual predicate controlling the necessary and sufficient material or investitive facts required for its application becomes apparent. This can be done by using a conditional proposition of the sort 'If *x* then *Y*', where *x* represents the factual predicate and *Y* represents—again following Schauer—the *consequent*, "prescribing what is to happen when the conditions specified in the factual predicate obtain".<sup>474</sup> The consequent, in the case at hand, stands for a true applied statement concerning the right in

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<sup>470</sup> The word 'avowed' is used advisedly in this sentence. Whether or not Sarah is telling the truth about her likes or fears is not a matter of concern at this time. As Gidon Gottlieb rightly observes, "Giving birth to the facts is one thing, and dealing with them once they are established is another." Gidon Gottlieb, *The Logic of Choice: An Investigation of the Concepts of Rule and Rationality*, George Allen and Unwin Ltd, 1968, 53. This chapter deals exclusively with established facts not with the proofs necessary for their establishment.

<sup>471</sup> Gidon Gottlieb, *The Logic of Choice: An Investigation of the Concepts of Rule and Rationality*, George Allen and Unwin Ltd, 1968, 50.

<sup>472</sup> Carl Wellman, *Real Rights*, Oxford University Press, 1995, 14.

<sup>473</sup> Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford University Press, 1991, 23.

<sup>474</sup> *ibid*

question. Using the example offered above, such a conditional proposition can be instantiated as follows: ‘If Sarah satisfies the necessary and sufficient facts for the applicability of the right to freedom of religion or belief then Sarah has a right to freedom of religion or belief’.

Set out in this way, the question now becomes: what facts about Sarah are necessary and sufficient to make her a bearer of the right to freedom of religion or belief? The answer to this question is given by the universal character of this right: the only necessary and sufficient fact for establishing the truth of an applied statement regarding this right in the case of any individual is whether that individual is, in fact, subject to a jurisdiction which recognises it. In other words, Sarah’s being a legal subject of a jurisdiction which recognises the right to freedom of religion or belief is the only necessary and sufficient fact for establishing the truth of the proposition that she has a right to freedom of religion or belief. This, of course, as advised above, is a finding that only considers the personal element of the right, not its material one. Consideration of the material scope of this right —ie of the actions or refusals to act that are relevant for this right— will be a matter for a later section. Moreover, the truth of this applied statement should be understood to mean that Sarah has a *prima facie* right, not an all-things-considered entitlement.

Although Wellman claims that “being subject to some given legal system is the only factual ground that is logically necessary for the possession of any legal right under that system”,<sup>475</sup> this assertion is only true in the case of universal rights. It is not, however, accurate regarding special rights because other facts about persons are also necessary before it can be sufficiently established that someone in particular possesses them. Consider, for instance, Article 6 of the Convention on the Rights of the Child which states that “every child has an inherent right to life”. The right enshrined in this article is special because it is an entitlement bestowed only upon a subsection of the

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<sup>475</sup> Carl Wellman, *Real Rights*, Oxford University Press, 1995, 29.

population: namely, children. Individuals who are subject to a jurisdiction recognising this right but who are not children, as defined by Article 1 of that international instrument, fail to meet all of the necessary and sufficient facts for bearing said right. Therefore, in order to bear the inherent right to life under this legal instrument it is not enough to be the subject of a signatory party to this convention. In addition, one must also belong to the subsection of the population on which this right is bestowed. In other words, although one may confidently assert that Sarah has a right to freedom of religion or belief based solely on the fact that she is subject to some jurisdiction which recognises that right, it is not possible to assert her status as a right-bearer in the case of the inherent right to life without first finding out her age.

What the previous paragraph evidences is that another way of marking out the distinction between special and universal rights is by defining the former as rights which require some additional factual grounds other than being subject to some given legal system for their possession. A corollary of this conclusion is that requiring any additional facts for the possession of a universal right transforms said right into a special one. This follows logically because requiring any additional facts inevitably leads to a situation of under-inclusivity because not all persons satisfying the necessary and sufficient fact of being a subject of a legal system will be able to satisfy those additional facts as well. Therefore, not respecting the sufficiency condition applicable to universal rights dissolves the distinction between these two categories, since any universal right would be transformed into a special one by virtue of requiring additional facts for their possession. This observation, it must be stressed, is true regardless of the facts which might be conjured up as requisites for the enjoyment of an otherwise universal right.

To recapitulate the findings of this section, a truthful assertion regarding the existence of the right to freedom of religion or belief in a given jurisdiction is distinct from a truthful assertion regarding the possession of said right by a legal subject of that jurisdiction because the former is ascertained solely from the existence of the legal system while the latter requires the affirmation of

some other necessary and sufficient facts about said legal subject. However, because universal rights such as the right to freedom of religion or belief are defined as rights which are possessed by everyone in a given jurisdiction, it turns out that the only necessary and sufficient fact for their possession is being subject to a legal system which recognises them. The requirement of any additional facts for their possession turns them into special rights since not all legal subjects will be able to satisfy this new threshold. Therefore, in order to maintain the conceptual distinction between these two kinds of rights, it is necessary in the case of universal rights, to limit the sufficient fact required for their possession to being a subject of the legal system.

In light of the foregoing analysis, it is clear that an adjudicative methodology, such as the one that I propose, which does not require the verification of additional facts on the part of the claimant, is the only strategy capable of remaining faithful to the universal character of the right. The dominant approach, on the contrary, fails to acknowledge it by interpreting the term 'everyone' to mean 'everyone who sincerely holds an ethically salient belief regarding *x*', where *x* is any action—or refusal to act—which falls within the scope of the right in question. In committing to this interpretation of the personal element of the right, the dominant approach fails to respect the necessary and sufficient condition for establishing the truth of an applied right-statement in the case of a universal right—ie being subject to a legal system recognising a right in universal terms. Instead, by adding other factual requirements, the dominant approach conceives of the right to freedom of religion or belief as a special right: one that is only bestowed on the subset of subjects of the legal system that hold sincere, ethical salient beliefs about *x*, whatever *x* may be deemed to cover.

This finding is distinct from any other considerations regarding the advisability, normative or pragmatic, of conceiving of the right to freedom of religion or belief as a special right rather than as a universal one. However, when coupled with the conclusions of the previous chapters, this conceptually suspect finding also appears futile. In other words, if the personal element of

the right to freedom of religion or belief is altered to include only persons who are sincere in their ethically salient beliefs, but a judicial assessment of ethical salience and sincerity is unavailable under a liberal conception of this right, then this limitation serves no rational purpose. What this section demonstrates, then, is that in order to uphold the universal character of the right under consideration, judges must abstain from demanding that claimants fulfil any additional factual conditions. The dominant approach, by not conceding that being a subject of a legal system is all that is necessary and sufficient for having the right to freedom of religion or belief, fails this condition and thereby transforms it into a special right.

## 2. The relevance of the universality of the right to freedom of religion or belief for its derivative rights

In the previous section, I established the advantage of a judicial treatment that does not require applicants to disclose their beliefs or to prove their sincerity over one that does in terms of the respect that it shows for the universal character of the right to freedom of religion or belief. In this section, I complement this finding in order to anticipate the likely objection that it is inconclusive regarding the appropriate treatment of claims concerning more specific rights. In other words, this section aims to provide an answer to the following questions: does the conclusion that Sarah has a right to freedom of religion or belief based on her being a legal subject to a jurisdiction which recognises this right logically entail that she also has a right to wear a crucifix and/or a veil —assuming that these two conducts are deemed to fall within the scope of the right to freedom of religion in that given jurisdiction—? Or is it possible, on the contrary, to agree with the first conclusion —ie that Sarah has a right to freedom of religion or belief— without committing to the second — that Sarah's having a right to freedom of religion logically entails her also having the right to engage in any of the conducts falling within the scope of said right—?

Whether it makes sense to say that Sarah has a right to freedom of religion or belief but not a right to wear a crucifix or a veil, or only a right to wear one but not the other, hinges on the nature of the relationship between *core* rights and *derivative* rights.<sup>476</sup> Derivative rights, as their name suggests, depend for their justification either on a core right or on another derivative right of a higher order.<sup>477</sup> Core rights, for their part, are defined by Raz in negative terms as “non-derivative rights”.<sup>478</sup> The question whether the right to freedom of religion or belief is a core right or a derivative right —derived, for instance, from a core right to personal liberty—, notwithstanding its general relevance, is only pertinent for a discussion regarding rights which are deemed to be higher than it on the justificatory chain. However, its precise nature is irrelevant regarding rights which derive from it. Because the right to freedom of religion or belief is a self-standing legal right which is explicitly recognised in the aforementioned legal instruments and upon which claimants base their allegations concerning specific conducts, it is not necessary at this moment to offer a defence of the right to freedom of religion or belief as either a core or a derivative right. This is explained by the fact that, even conceding that it is a derivative right, the issue of interest is how its universal character affects the personal element of rights which derive from it —as opposed to rights from which it may be argued to derive.

Returning to this section’s opening questions, the rights at issue are expressed in the following sentences:

- (1) Sarah has a right to freedom of religion or belief.
- (2a) Sarah has a right to wear a crucifix.
- (2b) Sarah has a right to wear a veil.

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<sup>476</sup> Joseph Raz, *The Morality of Freedom*, Clarendon Press-Oxford University Press, 1986, 168-70.

<sup>477</sup> *ibid* 168.

<sup>478</sup> *ibid*

These sentences presuppose a derivative relationship between them. (1) represents either a core or a derivative right from which (2a) and (2b) derive. One can also explain this relationship in terms of justification: (1) justifies (2a) and (2b). The truth of (1) was demonstrated in the previous section. The issue now is whether the truth of (1) implies the truth of (2a) and (2b), where the concept of implication is applied strictly because the conclusion follows from the stated premise and not from other unspecified premises or from some broader context.<sup>479</sup> While the material element of the right expressed in each sentence varies from one to the next —(2a) refers to wearing a crucifix while (2b) to wearing a veil—, the point of this exercise is to determine what the truth of the personal element of (1) should mean for the personal element of (2a) and (2b).

I suggest that the correct answer to this question is that the truth of the personal element of (1) implies the truth of the personal element of the other sentences —ie because it is true that Sarah has a right to freedom of religion or belief, it must also be true that she has a right to all the rights that derive from it. The reason for this is twofold: the absence of any persuasive reasons for concluding that rights that derive from universal rights can take on a special character and the way in which the interest protected by the right of the highest-order relates to its derivative rights.

In the first place, it is crucial to note that not acknowledging that the truth of the personal element of (1) implies the truth of the personal element of the other sentences requires making an argument against Sarah's status as a right-bearer, even though she is a legal subject of the jurisdiction that recognises all of these rights, which —recalling the findings of the previous section— can only be premised on the introduction of additional facts for her having these rights. In other words, it means transforming the derivative rights into special rights. This is an unavoidable conclusion: if the fact that *everyone*

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<sup>479</sup> The distinction between this kind of implication and the looser notion of implicature is used by Eric Heinze, *The Logic of Liberal Rights: A Study in the Formal Analysis of Legal Discourse*, Routledge, 2003, 112.

has a right to freedom of religion or belief is what justifies Sarah's having this right, then Sarah's not having the other rights must be justified on the implicit premise that *not everyone* has them. On the contrary, recognising the implication simply requires maintaining the universal character of the right constant: *everyone* has a right to freedom of religion and belief and *everyone* has the rights that derive from it as well.

The only case that can be made for avoiding the foregoing conclusion is that the rights contained in (2a) and (2b) —or in any one of them specifically, the truth of which one holds not to be implied by (1)— do not, in fact, derive from (1) but from some other right altogether or even that they are non-derivative —ie core— rights. In other words, that the right to wear a crucifix or the right to wear a veil do not derive from the right to freedom of religion or belief. While a perfectly plausible proposition, this argument can only succeed at the cost of decoupling these rights from the right to freedom of religion or belief altogether. This would, therefore, avoid engaging with the analysis of the legitimacy of the practice of claiming the protection of the right to freedom of religion or belief in order to engage in conducts such as wearing a particular religious dress and of the subsequent judicial verdict pointing explicitly to that same right. This argument, in short, avoids the discussion altogether. The problem with not conceding the necessity of the implied relationship between (1) and (2a)-(2b) while at the same time recognising the derivative relationship that exists between them is that the implicit transformation of the rights contained in the sentences which one holds not to be implied by (1) from a universal to a special right is an inescapable prerequisite for reaching that conclusion. In other words, if one acknowledges the derivative relationship between the rights contained in sentences (1), (2a) and (2b) but does not acknowledge that the universal character of (1) implies the universal character of the others, it must be because the personal element of (2a) and (2b) has somehow been limited and, therefore, transformed into a special right.

Notice, however, that this is precisely what the dominant approach does: while it would be unusual for a court to deny the truth of (1), it would not venture

affirming (2a) and (2b) without first inquiring into additional facts about Sarah —ie the ethical salience of her avowed beliefs regarding the conducts protected by the rights contained in those sentences, as well as the sincerity of her motivations for wanting to engage in said conducts. Furthermore, the ability of a claimant to satisfy the dominant approach's thresholds in order for a judge to affirm *both* (2a) and (2b) would be highly improbable. Most likely, only one or the other of these two statements would be affirmed to the exclusion of the other. In other words, it would be unlikely for a court to recognise Sarah's right to wear both a crucifix and a veil.

The dominant approach, therefore, tacitly —and perhaps, even inadvertently— rejects the universal character of these derived rights by introducing additional facts to limit their personal scope. What this makes clear is that, restating the finding of the previous section, the dominant approach's treatment of these derived rights seems to reflect an understanding of their personal element that is best described in the following terms: '*Claimants with ethical salient and sincere beliefs about x have a right to x but not to y and z*', where *x*, *y* and *z* all derive from the same right, as opposed to '*Everyone has a right to x, y and z*' because everyone bears the right from which *x*, *y* and *z* derive. Disregarding the distinction between universal and special rights raises conceptual problems which the dominant approach cannot overcome because —as I established in the previous chapters—, notwithstanding the possible merits of the rationales for this transformation, the liberal conception of the right to freedom of religion or belief incapacitates judges from assessing the very facts —ethical salience and sincerity— that it relies on for delimiting the personal scope of these rights.

A second argument in favour of the implication which maintains the personal element of (1), (2a) and (2b) constant has to do with the relationship that exists between the interest that justifies the right from which other rights derive. According to the interest-theory of rights, following the canonical formulation of this theory offered by Raz, to say that someone has a right is to say that "an aspect of [someone's] well-being ([someone's] interest) is a

sufficient reason for holding some other person(s) to be under a duty”.<sup>480</sup> In discussing the relationship between core and derivative rights, Raz explains that: “A right is based on the interest which figures essentially in the justification of the statement that the right exists. The interest relates directly to the core right and indirectly to its derivatives”.<sup>481</sup> If this is true, then the legal right to freedom of religion or belief, which stands at the top of the justificatory chain in this example, protects an interest that lawmakers around the world have deemed appropriate to acknowledge in universal terms. In other words, the interest which justifies (2a) and (2b) is the same interest that justifies (1).

Therefore, to conclude that a subject of the legal system recognising those rights does not satisfy the necessary and sufficient facts for having any one of them implies denying that the person has the interest that serves to justify them all. In other words, it is conceptually inconsistent to affirm that everyone has the interest which justifies the right to freedom of religion or belief but not the interest which justifies any of its derivative rights. To suggest that a derivative right protects an interest which is distinct from the interest protected by the right from which it derives, therefore, requires breaking the justificatory chain linking those rights. As was argued above, this solution misses the point of the argument because it decouples the right to freedom of religion or belief from the conducts from which its protection is sought before the courts.

This conceptual inconvenience, however, is overcome by an adjudicative model that avoids any entanglement with facts about claimants that call into question their suitability as right-bearers in the case on any derivative right. The scheme I propose accomplishes this by proceeding on the assumption that a claimant has the right to engage in any conduct—or to refuse from engaging in it—protected by a derivative right of the right to freedom of religion or belief by virtue of being a subject of a legal system recognising that derivative right. Therefore, if Sarah lives in a jurisdiction where both the right

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<sup>480</sup> Joseph Raz, *The Morality of Freedom*, Clarendon Press-Oxford University Press, 1986, 166.

<sup>481</sup> *ibid* 169.

to wear a crucifix and the right to wear a veil have been interpreted to derive from the right to freedom of religion or belief and she claims that both of those rights are violated by some action on the part of the state, judges should not question her status as a right-bearer regarding any of them. Instead, they should look for a manner of disposing of her claim that takes for granted that she does bear those rights by virtue of their universal character.

I conclude this section by offering a summary of its findings. The fact that the right to freedom of religion or belief is a universal right has consequences for the personal sphere of the derivative rights that derive from this right. Acknowledging a divergent personal element among the rights which stand in this derivative relationship implies transforming the derivative rights into special rights. Moreover, in the case of the dominant approach, this transformation is unsuccessful because the additional facts which make these rights special cannot be ascertained by judges in light of the conclusions of the previous chapters. Moreover, another conceptual concern arises from differentiating the personal element of rights standing in a derivative relationship because, given that they are all justified by the same interest, excluding some persons from the enjoyment of any of the rights implies denying the existence of the interest in question.

### 3. The relationship between rights and interests

The dominant approach's altering of the character of the personal sphere of the right to freedom of religion or belief, and of its derivative rights, can be explained in terms of a peculiar understanding of the relationship that exists between the interests that justify a right and the right itself. Namely, the intuitively attractive idea that a person can only have a right to something when she actually has the interest that underlies that right. Or, conversely, that a person cannot have a right to something if a present interest in that something does not exist. This explains why the dominant approach conditions the acknowledgement of a right to wear a crucifix in the case of a particular

individual —to retrieve an example from the previous section— on that individual having a sincere and ethically salient belief —ie a genuine interest— in engaging in that action. In the absence of this condition, the dominant approach does not acknowledge that the individual in question has that right. This section will expose the misguidedness of this understanding of the relationship that exists between rights and interests by pointing to several notable defences of this theory of rights. This will also serve to establish the unexceptional nature of the proposal I endorse.

As I stated previously, following Raz, rights are grounded in interests that are taken to be sufficiently important for imposing duties on others. It is the well-being of the right-bearer which justifies holding another person to be under a duty, thereby constraining her freedom.<sup>482</sup> Not every interest will have this import: in order to establish a duty, the interest in question must be of sufficient importance to justify the interference with another person's freedom that is entailed by holding that someone has a right. But does this conception of rights condition the ascription of rights only to those individuals that actually have the relevant interest? Or is it still possible to be a right-bearer in its absence? Moreover, can having a right be against one's interests?

Proponents of the interest-theory of rights have consistently answered these questions in a manner that contrasts with the dominant approach's understanding of the relationship between rights and interests. Raz, for instance, acknowledges the possibility that in a particular case the interest of an individual might not align with her having a right and explains this by saying that "rights are vested in right-holders because they possess certain general characteristics [...] Their rights serve their interests as persons with those characteristics, but they may be against their interests overall."<sup>483</sup> The

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<sup>482</sup> Joseph Raz, *The Morality of Freedom*, Clarendon Press-Oxford University Press, 1986, 180. ("To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person. The specific role of rights in practical thinking is, therefore, the grounding of duties in the interests of other beings.")

<sup>483</sup> *ibid*

possibility of there being cases of incongruity between rights and interests and the irrelevance of this situation for a person's status as a right-bearer is also allowed by Neil MacCormick who defended the idea that "anyone's having a right to x would be absurd unless it were presupposed that x is normally a good for humans, at any rate for the people who qualify as having the 'right' in question".<sup>484</sup> In Matthew Kramer's view, the interest theory stands by the following proposition: "Necessary though insufficient for the holding of a legal right by X is that the duty correlative to the right, when actual, normatively protects some aspect of X's situation that on balance is typically beneficial for a being like X (namely, a human individual or a collectivity or a nonhuman animal)."<sup>485</sup> Jeremy Waldron, for his part, believes that the answer to this problem has to do with "the relation between the *general* theories of human interests and accounts of the particular interests that particular people have in particular circumstances".<sup>486</sup> He further argues that:

Although right-based arguments focus on the interests of individuals considered one by one, these need not be interests which are peculiar to particular individuals; they may be interests which each individual is thought to have in common with every other. (This will always be so in the case of the so-called human rights.) Often, theories of rights will focus on interests which, on the whole, all individuals have, and they will give a general explanation of why this interest is so important for each individual who has it as to justify holding others to be under a duty to serve it. But, in the nature of things, the universalism of this approach cannot be watertight.<sup>487</sup>

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<sup>484</sup> Neil MacCormick, 'Rights in Legislation', *Law, Morality, and Society: Essays in Honour of H.L.A. Hart*, P.M.S. Hacker and Joseph Raz (eds.), Oxford University Press, 1977, 204.

<sup>485</sup> Matthew H. Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights', 123 (2013) *Ethics* 245. A previous definition of the interest theory offered by the same author can be found in Matthew H. Kramer, 'Rights in Legal and Political Philosophy', *The Oxford Handbook of Law and Politics*, Gregory A. Caldeira et al (eds.), Oxford University Press, 2008.

<sup>486</sup> Jeremy Waldron, *The Right to Private Property*, Oxford University Press, 1988, 90.

<sup>487</sup> *ibid*

Therefore, when faced with an example of an individual who has a right to engage in a particular conduct while, at the same time, failing to have an interest in which the right is grounded, interest theorists respond by appealing to the general interests that right-holders of that kind are normally thought to have. When an individual deviates from this characteristic, the interest theory simply treats it as an anomaly that fails to refute the general presumption regarding the interests that are thought to be shared by all individuals. In other words, because the interest protected by the right to freedom of religion or belief is one which humans generally, normally, typically, or commonly have, the right to freedom of religion or belief is bestowed in favour of *everyone*, regardless of the position in which any individual in particular stands in relation to that interest.

This theoretical support for the possibility of holding that someone has a right even though she lacks the relevant interest is also commonly, albeit implicitly, favoured in the resolution of everyday legal controversies. Consider a case concerning the right to property. Suppose that Sarah owns more than enough coats to satisfy her interest in keeping warm during a harsh winter and that, therefore, the effects on her well-being from losing one of those coats is negligible. John, on the other hand is in danger of perishing from hypothermia due to his lack of any winter attire. In this circumstance, can John be said to have a duty to refrain from taking one of Sarah's coats in order to satisfy his need for warmth? Or does Sarah's right to property over each and every one of her coats subsist despite the fact that her interest would be unaffected by John's taking one of them? If the existence of an interest is required in order to conclude that Sarah has a right over all of her coats —and that, therefore, John has a duty not to take one of them—, then, given the circumstances, it would be morally inappropriate to claim that Sarah has a right to all of her coats because no interest of her is served —ie her well-being is not improved or worsened— by her having all her coats.<sup>488</sup> However, if Sarah were to argue

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<sup>488</sup> This argument is advanced by Eric Mack, 'In Defense of the Jurisdiction Theory of Rights', 4 (2000) *The Journal of Ethics* 71, 85. ("If one 'juxtapose[s] the presumption with its rebuttal

before a court that John violated her legal right to property by taking one of her coats, it would be surprising for a judge to respond to her claim by denying that she had a right over the stolen coat because her interest was not really affected by John's action. More likely, the judge would acknowledge her right over the coat notwithstanding her particular circumstances. This entirely ordinary outcome seems to be consistent with the theoretical positions cited above.

A persuasive explanation for this understanding of rights might be found in Schauer's description of rule-making as an exercise in generalisation. The generalisation contained in the factual predicate of any rule, he says, makes them "applicable to *all* of something".<sup>489</sup> The interest theory generalises as to the sort of interests that individuals of a particular class have. This generalisation, Schauer calls, the *justification* of the rule.<sup>490</sup> The interest theorists, for their part, see the interests as the grounds justifying the existence of duties. With this parallel in mind, Schauer distinguishes between two different modes of decision-making with the core difference between them consisting in the extent of the adherence to the rule by the decision-maker.<sup>491</sup> Under the particularistic model, on the one hand, when a decision-maker encounters a situation falling under a pre-existing rule, she treats the rule "as if it arose in conversation", meaning that she is able to modify it "when and as it is unfaithful to the rule's underlying justifications".<sup>492</sup> This is the model of decision-making that best characterises the dominant approach's concern with the actual existence of an interest in the case of every particular individual. The second mode of decision-making, which Schauer calls "rule-based", doesn't allow for this because in this case, the decision-maker treats the rule as being entrenched, which means that "prescribing (although not necessarily

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in a particular case,' one should as an Interest theorist *not* say, 'that an individual has a right to something which is not in his interest to have.' Rather, one should say that this individual does not have a right that most individuals have.")

<sup>489</sup> Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford University Press, 1991, 24.

<sup>490</sup> *ibid* 26.

<sup>491</sup> *ibid* 51. ("When the applicable rule does not produce the correct (as measured by the rule's justification) result, the two decision-making modes diverge.")

<sup>492</sup> *ibid* 52.

conclusively) the decision to be made even in cases in which the resultant decision is not one that would have been reached by direct application of the rule's justification".<sup>493</sup> Under this model, the decision-maker is not free to regard the rule as a mere indicator —ie as a rule of thumb—. Instead the decision-maker applies the rule to a case covered by it independently of any countervailing reasons which may exist given the justification of the rule. Similarly, Joseph Raz believes that norms are exclusionary reasons, by which he means that a decision-maker excludes reasons which may be relevant to the situation at hand.<sup>494</sup> Although Schauer does not fully agree with Raz's characterisation of exclusionary reasons, for the purposes of this analysis, the reason for this is of no consequence.<sup>495</sup>

Raz further explains that the difference between rights and the interests that ground them —or the difference between rules and their justification for Schauer— consists in the level of thought at which they operate. Raz states that “rights belong to the ground level of practical thought in which we use simple-to-apply rules, whereas the interests protected by the rights are referred to at the more fundamental level of thought at which the justification of the ground-level rules are established”.<sup>496</sup> When legislators reach a decision regarding the appropriateness of recognising a right based on their evaluation of a justification or on the interests that they believe are shared by the individuals covered by the rule that they plan to enact, they enshrine their decision in a rule which a court is then able to apply to cases falling under the scope of said rule. Once a general right to a particular object is ascribed by virtue of the normative evaluation undertaken by the legislator, following Waldron, “what is defended or contested when a general right is in dispute is

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<sup>493</sup> Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford University Press, 1991, 52.

<sup>494</sup> Joseph Raz, *Practical Reason and Norms*, Hutchinson, 1975, 142.

<sup>495</sup> The reasons for this disagreement appear in Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford University Press, 1991, 88-93.

<sup>496</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed., Oxford University Press, 1995, 48.

the claim that choice within a certain range is not to be interfered with”.<sup>497</sup> Or in HLA Hart’s words, a right-holder claiming that his right has been infringed “is concerned to resist or object to some interference by another person as having no justification”.<sup>498</sup> In other words, a right-holder does not have to offer reasons or explain why certain actions which are supposed to be protected by her right should in light of her present interests be in fact protected by her right, even when it is morally wrong for her to claim her right.<sup>499</sup>

That judges follow this second mode of decision making when it comes to other civil and political rights can be evidenced by giving an example concerning the right to privacy. Consider the judgment in the case of *Lawrence v. Texas*, where the SCOTUS held that homosexual relations between consenting adults are protected by the right to liberty and privacy under the Due Process Clause of the Fourteenth Amendment of the Constitution.<sup>500</sup> The case involved two individuals who were arrested after the police entered the residence of one of them and found them engaging in a sexual act.<sup>501</sup> The majority opinion of the SCOTUS described the case as involving “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives”.<sup>502</sup> The judgment of the SCOTUS takes for granted that these individuals have the interest protected by the right. It is assumed that their well-being is enhanced by their constitutional right. It makes no difference, in the court’s eyes, whether they were in a committed relationship or merely

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<sup>497</sup> Jeremy Waldron, ‘A Right to Do Wrong’, 92 (1981) *Ethics* 21, 34.

<sup>498</sup> H.L.A. Hart, ‘Are There Any Natural Rights?’, *Theories of Rights*, Jeremy Waldron (ed.), Oxford University Press, 1984, 84.

<sup>499</sup> For this position see eg Jeremy Waldron, ‘A Right to Do Wrong’, 92 (1981) *Ethics* 21.

<sup>500</sup> *Lawrence v. Texas*, (2003) 539 U.S. 558.

<sup>501</sup> *ibid* 562-63. However, Dale Carpenter has stated that the claimants did not, in fact, engage in the sexual conduct prohibited by the law but, rather, pled no contest in order to allow their case to make it through the court system. Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas*, W.W. Norton and Company, 2013. The fact that the SCOTUS did not pay much attention to the apparent inconsistencies of the factual circumstances of the case can be seen as further evidence of the lack of attention that appellate courts usually pay to the facts of the cases which they adjudicate and of the *sub generis* approach to the right to freedom of religion or belief where these judicial bodies do try to establish the claimant’s sincerity.

<sup>502</sup> *Lawrence v. Texas*, (2003) 539 U.S. 558, 578.

engaging in a one-off sexual encounter, or whether they actually had an interest which justified the state's duty not to interfere with their actions.

Examples of this sort abound in the case-law of the courts concerning other civil and political rights. They all point in the same direction: judges take for granted that the individuals claiming a violation of their rights have the interest which grounds the right. They do not see it as necessary—or indeed permitted—to question whether the claimant in fact has said interest—ie whether their well-being is served by the right. In fact, according to Waldron, what is characteristic of appellate courts' approach to the disputes that they must solve is that “almost all trace of the original flesh-and-blood right-holders has vanished, and argument such as it is revolves around the abstract issue of the right in dispute”.<sup>503</sup> Moreover, he explains:

Plaintiffs or petitioners are selected by advocacy groups precisely in order to embody the abstract characteristics that the groups want to emphasize as part of a general public policy argument. The particular idiosyncrasies of the individual litigants have usually dropped out of sight by the time the U.S. Supreme Court addresses the issue, and the Court almost always addresses the issue in general terms.<sup>504</sup>

However, when it comes to the right to freedom of religion or belief, the dominant approach takes a claimant's actual interest to be pivotal for the application of the right to her case. Judges, therefore, require the claimant to justify their interest in exercising their right because, contrary to the norm, they do not presume that the claimant satisfies the justification of the right. In other words, claimants must justify their interest, notwithstanding the fact that the legislator has bestowed a right on them that presupposes it. In making the bestowment of the right to freedom of religion or belief—or, perhaps more precisely, of the derivative right at issue in a particular claim—conditional upon

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<sup>503</sup> Jeremy Waldron, 'The Core of the Case Against Judicial Review', *Yale Law Journal*, 115(6) (2006) 1346, 1379.

<sup>504</sup> *ibid* 1379-80.

the actuality of an interest capable of justifying it, the dominant approach departs from the common understanding of the relationship that must exist between rights and interests.

While the main failure of this approach is the fact that judges are unable to determine, under a liberal conception of the right, whether the requisite interest is present in the case of any particular claimant, the findings of this section also evidence its marginality from a conceptual point of view. Arguing in favour of a judicial treatment of the right to freedom of religion or belief that takes for granted that the claimants have the interests that they contend to have, on the contrary, is perfectly consistent with the most notable conceptions of the interest-theory of rights, as well as with the ordinary practice of the courts.

Moreover, despite the prominence of the dominant approach, in the past judges have decided some notable cases by using an adjudicative strategy that follows the mainstream understanding of the relationship between rights and interests. What these cases demonstrate is that reliance on the dominant approach for the adjudication of the right to freedom of religion or belief is not inevitable or, even, preferable. Perhaps, the two most celebrated examples of this alternative approach, where the courts respected the universal character of this right by resisting the temptation to require additional facts of the claimants and, therefore, assumed that they had the interest protected by it are *Torcaso v. Watkins*<sup>505</sup> decided by the SCOTUS and *Buscarini v. San Marino* decided by the ECtHR.<sup>506</sup> Both of these cases called on the courts to evaluate a legal requirement to take a religious oath before assuming public office. In the first case, the appellant alleged that the “declaration of belief in the existence of God” required by the Maryland Constitution in order for him to take on the commission of Notary Public, to which he had been appointed by the Governor, violated his rights under the First Amendment.<sup>507</sup> The SCOTUS

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<sup>505</sup> *Torcaso v. Watkins*, (1961) 367 U.S. 488.

<sup>506</sup> *Buscarini v. San Marino*, App. no. 24645/94, 18 February 1999.

<sup>507</sup> *Torcaso v. Watkins*, (1961) 367 U.S. 488, 489.

sided with the claimant, concluding that “This Maryland religious test for public office unconstitutionally invades the appellant’s freedom of belief and religion”.<sup>508</sup>

The case of the ECtHR, for its part, concerned two elected parliamentarians who had suggested amending the oath of office required by law to be taken “without making reference to any religious text”.<sup>509</sup> However, they were required to take the religious oath, which they did, but “complaining that their right to freedom of religion and conscience had been infringed”.<sup>510</sup> The ECHR agreed with the applicants, acknowledging the infringement on their Article 9 right, and —without concluding on the legitimacy of the aims of the law—<sup>511</sup> stating that the requirement —which “was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion”—<sup>512</sup> could not be understood to be necessary in a democratic society —as required by the qualifications of the right—,<sup>513</sup> ultimately concluding that the applicants’ rights had been violated.

What is particularly interesting about these two cases is that they were decided unanimously and appear to enjoy broad support among the academic community even though they clearly do not comply with the dominant approach. What is conspicuously absent from these cases is any overt reference to, or indeed, even the slightest hint of argumentative relevance being accorded to, the applicant’s beliefs. The beliefs of the claimant in *Torcaso* or of the applicants in *Buscarini* are of no consequence to the courts’ decisions, contrary to what happens in cases adjudicated according to the dominant approach, where the beliefs of the party advancing a claim concerning this right are at the forefront of the courts’ rulings. The

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<sup>508</sup> *Torcaso v. Watkins*, (1961) 367 U.S. 488, 496.

<sup>509</sup> *Buscarini v. San Marino*, App. no. 24645/94, 18 February 1999, [8].

<sup>510</sup> *ibid* [13]. The law was subsequently amended to allow for newly elected members of the General Grand Council to opt between the traditional oath and one in which references to the Gospel are substituted by the words “on my honour”. in *ibid* [14].

<sup>511</sup> *Buscarini v. San Marino*, App. no. 24645/94, 18 February 1999, [38].

<sup>512</sup> *ibid* [39].

<sup>513</sup> *ibid* [40].

consequence of this way of proceeding it that the universal character of the right remains untouched because it is assumed —by not requiring additional facts relating to the claimants’ particular interests— that everyone has an interest in not being forced to swear a religious oath as a condition for occupying a public office.

That courts have demonstrated their willingness and ability to adjudicate certain cases under this right without concern for an individual’s beliefs evidences the mistaken presupposition underlying Heiner Bielefeldt’s —the former United Nations Special Rapporteur on freedom of religion or belief— contention that “no one can earnestly speak about believers without considering their beliefs and vice versa.”<sup>514</sup> The problem with this assertion is that it is based on the false premise that the right to freedom of religion or belief protects *believers*, as defined by their “religious or belief-related traditions, practices, and identities”, when, in fact, it protects *persons* assumed to have the capacity to develop those beliefs.<sup>515</sup> It is precisely the fact that the right is bestowed on *every* person and not only on verified believers that render consideration of their particular beliefs unjustified.

Finally, what these two cases also demonstrate is the misguidedness of adopting an exemption-based regime when the right to freedom of religion or belief is properly conceived as a universal right. If the particular interests of the claimants in *Torcaso* and *Buscarini* are of no consequence for the courts’ findings because it is assumed that they have the underlying interest simply by virtue of their personhood, then it is difficult to see why a remedy which favours only them, and not the rest of those contained in the personal element of the right, is to be preferred to a remedy which —accounting for the institutional particularities of judicial review in different jurisdictions— condemns the law’s violation of the right to freedom of religion or belief.

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<sup>514</sup> Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, *Freedom of Religion or Belief. An International Law Commentary*, Oxford University Press, 2016, 11

<sup>515</sup> *ibid*

What this section makes clear is that the dominant approach represents a departure from the common understanding of the relationship that exists between rights and interests. The unorthodox nature of this contested approach sharply contrasts with the adjudicative strategy I endorse, which plainly aligns with the most authoritative accounts of the interest-theory of rights. In addition to the theoretical coherence of this model, I referred to two landmark judgments in which it was successfully applied. *Torcaso* and *Buscarini* are excellent examples of the viability of adjudicating the right to freedom of religion without paying regard to the motivations of claimants.

#### 4. The right not to reveal one's religion or beliefs

In this final section, I briefly consider the propriety of not requiring claimants to account for their beliefs in terms of the right not to disclose one's beliefs. Although this right does not enjoy pride of place in the literature or the case law, some references to it may be found in General Comment No. 22 of the United Nation's Human Rights Committee<sup>516</sup> as well as in the ECtHR's case of *Sinan Isik v Turkey*.<sup>517</sup>

According to General Comment No. 22, the right not to be "compelled to reveal his thoughts or adherence to a religion or belief" is grounded in articles 17 and 18.2 of the International Covenant on Civil and Political Rights. Article 17 recognises the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence, while Article 18.2 prohibits any form of coercion leading to the impairment of the freedom to have or adopt a religion or belief. In the case of *Isik*, which concerned a Turkish law requiring all citizens to carry an identity card including an indication of the person's religion, the ECtHR held that the right to manifest one's religion, in its negative

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<sup>516</sup> United Nation's Human Rights Committee, *General Comment No. 22. The Right to Freedom of Thought, Conscience, and Religion (Article 18)*, CCPR/C/21/Rev.1/Add.4 available at <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2022.pdf> (last accessed in September 2019).

<sup>517</sup> *Sinan Isik v Turkey*, App. no. 21924/05, 2 February 2010.

aspect, meant not only that one should not be obliged to disclose one's religion or beliefs, but also not to be obliged to act in such a way that makes it possible to conclude that one holds—or does not hold—such beliefs. In Canada, the acknowledgment of this right takes on a more conditional form, as expressed in the case of *Big M Drug Mart*, in which the SCC held that “government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose”.<sup>518</sup>

Of course, the core concern underlying this right is that state officials will use this information in order to assign burdens and benefits with the deliberate intention of rewarding or punishing. This would be an obvious means of coercing a person to change their religion or beliefs. It would, therefore, be far-fetched to conclude that this is the sort of behaviour that courts are engaging in when following the dominant approach. Nevertheless, although this judicial behaviour does not neatly fit the paradigmatic case of coercion, the problems with the dominant approach that I have expressed do not altogether exempt judges from a related concern: that is, if judges cannot make a legitimate use of the information required of claimants, then there is no upside in asking them to communicate their beliefs. In the best case scenario, this information will have no bearing on the case but, there is always a risk that it will be used in the claimant's detriment. So even though judges might not wish to intentionally use the information for any sectarian purposes, it opens them up for suspicion that they might.

On possible retort to this concern is that judges are not violating this right because the claimant has chosen to waive it by taking their claim before the court. In other words, it is a cost that the claimant is willing to accept in order to enforce her right. This answer, I think, fails because it does not take seriously the importance of judicial redress of rights violations: if the judicial protection of fundamental rights calls for forsaking precisely the interest that one is seeking to protect, then it does not pay due regard to the importance of

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<sup>518</sup> *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295, 123.

the institution of rights. Of course, some information about the claimant's beliefs will inevitably ensue from the very fact that she has decided to object to some government action. However, the fact that this minimal disclosure is necessary in order for the court to address a controversy does not justify the necessity of any further inquiries about a claimant's precise beliefs. The fact that the claimants in *Torcaso* and *Buscarini* decided to object to the requirement of taking religious oaths in order to occupy a public office inevitably tells us *something* about their beliefs, but this fact does not entail giving up any *precise* information about what those beliefs are.

There are other reasons to be wary of allowing judges to inquire into a claimant's beliefs as a condition for adjudicating a particular controversy. Some claimants might feel that disclosing their beliefs will open them up to ridicule or other undesirable scrutiny. They might, therefore, have a legitimate interest in not saying precisely why they object to some governmental action. Also, inquiring into a claimant's beliefs might also give place to excessive introspection leading to self-doubt.<sup>519</sup> Some objections might not be founded on fully-formed, coherent belief systems but, rather, on intuitions which are hard to explain, especially before a court. Surely, this kind of emotional harm should be avoided unless there is some justification for it. I have, however, demonstrated that far from being necessary, it is pernicious and futile.

Therefore, while I do argue that the dominant approach squarely violates the right not to disclose one's religion or belief, I do consider it appropriate to extend the spirit of this protection to the judicial setting. As evidenced by the cases of *Torcaso* and *Buscarini*, judges are perfectly able to reach a satisfactory conclusion in a case concerning the right to freedom of religion or belief without inquiring into the beliefs of a claimant. Moreover, under a liberal conception of this right, in line with the conclusions of the previous chapters, judges will be unable to make any use of the information that the claimants

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<sup>519</sup> See Joseph Raz, *The Authority of Law. Essays on Law and Morality*, Clarendon Press-Oxford University Press, 1979, chapter 15. A Right to Dissent? II.

provide them. In short, these reflections clearly favour the adjudicative model that does not require claimants to reveal their beliefs.

## 5. Conclusion

In this chapter, I considered the possibility of adopting an adjudicative scheme that does not require claimants to justify either the merits of their beliefs and practices, or their motivations. I argued that, in fact, such a proposal best reflects the universal character of the right to freedom of religion or belief. Given that this right is universal, it is a necessary and sufficient fact for holding that someone has that right for that individual to be subject of a jurisdiction recognizing that right. Requiring additional facts in order to come to this conclusion, as the dominant approach does, has the unintended consequence of transforming it into a special right.

Moreover, the universal character of the right must also be respected in the case of the rights that derive from it. In other words, while the particularity of the conduct under consideration in any given case may increase, the personal element of the rights does not shrink in this same manner. If, therefore, everyone has a right to freedom of religion or belief then everyone has a right to all of the myriad actions that fall within its scope.

I explained that this approach best aligns with the theoretical relation that exists between rights and the interests that ground them. It is not normally the case that claimants must justify their interest in order to benefit from a right. Instead, it is commonly presupposed that individuals have the interests that ground their rights. The dominant approach, I argue, departs from this understanding by requiring claimants to attest their interest before they can claim a violation of their rights. However, I point to cases concerning the right to freedom of religion or belief where this fringe understanding is not applied and which, on the contrary, reflect the mainstream doctrine in order to show that taking the path favoured by the dominant approach is by no means inevitable.

I closed this chapter by suggesting that judges should understand the right of claimants not to disclose their beliefs to apply to the judicial forum as well. I consider this to be the best way of safeguarding the impartiality of the judicial enterprise since there is no upside to knowing what those beliefs are and, to the contrary, a huge potential for misuse should they become aware of them.

**Chapter 6.** The *generality* of the right to freedom of religion or belief

*Then I certainly ought not to shrink from going through with the argument so long as I have reason to think that you, Thrasymachus, are speaking your real mind; for I do believe that you are now in earnest and are not amusing yourself at our expense.*

*I may be in earnest or not, but what is that to you? —to refute the argument is your business.*

*Very true, I said; that is what I have to do [...]*

Plato, *The Republic*<sup>520</sup>

In the opening book of Plato's *The Republic*, Socrates heads a dialogue on the meaning of justice. After discrediting Cephalus' insinuation that justice means speaking the truth and paying one's debts, as well as Polemarchus' suggestion that it consists in doing good to one's friends and evil to one's enemies, he turns to consider Thrasymachus' polemic contention that justice is the interest of the stronger. However, when Thrasymachus further asserts that injustice is wise and virtuous, Socrates halts the discussion, leading to the exchange reproduced in the epigraph of this chapter. In contrast with his unconditional examination of the other proposals, Socrates now states his willingness to proceed with the argument only if Thrasymachus reassures him that he sincerely believes what he says. Thrasymachus retorts that his earnestness is beside the point and presses Socrates to engage solely with the merits of his claim. Upon reflection, Socrates concedes that is what is incumbent on him.

This platonic conversation resembles this project's consideration of the appropriate judicial disposition towards claims concerning the right to freedom of religion or belief according to its liberal conception. In an earlier chapter — Chapter 3—, I questioned the tenability of the feature of the dominant approach which, emulating Socrates' first instinct, seeks to establish the pertinence of this right regarding a particular claim on some criteria of ethical

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<sup>520</sup> Plato, *The Republic*, Book I, Allan Bloom (ed.), Basic Books, 1968.

salience. Then, in line with Thrasymachus, in Chapter 4 I challenged the legitimacy of the dominant approach's conditioning of the assessment of the merits of a claim on the claimant's sincerity. This scrutiny of the two features that —as I explained in Chapter 2— characterise the dominant approach provided a thorough account of the drawbacks of this adjudicative strategy. In the previous chapter —Chapter 5—, in line with Thrasymachus' position and Socrates response, I stated the case for a judicial treatment of the right in question that pays no regard to either the ethical salience or the subjective motivations underlying a claim.

In this final chapter, I conclude this analysis by considering the scope of the right to freedom of religion or belief. I, therefore, turn from considering the personal element of this right to its material element, which I defined in the previous chapter as the behaviours or conducts that may be deemed to be protected by it. Should judges, or Socrates, impose *prima facie* limits on the behaviours that can qualify as candidates for receiving the protection of this right, or the definitions of justice? Or should they engage with every claim brought before them, or definition proposed to them? If the former, how should they draw this boundary? If the latter, what argumentative methodology should judges employ in order to determine whether the right has been violated all-things-considered or whether the interference is legitimate?

I respond the first of these questions by arguing that the interpretation of the scope of this right that best fits its liberal conception is one which conceives of it as a comprehensive right to liberty. This proposal converges with Dworkin's understanding of the right to freedom of religion or belief as a right to ethical independence.<sup>521</sup> It is important to notice, however, that although the adjudicative model I defend coincides with Dworkin's in this regard, the reasons for advocating in its favour are different: while Dworkin's support for this conclusion stems from his normative stance against state-sponsored judgments of ethical salience, mine results from the institutional shortcomings

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<sup>521</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013.

identified in chapters 3 and 4. In other words, contrary to Dworkin, I do not wish to contest the state's legitimacy in making judgments of ethical salience across the board. Instead, I base this conclusion on the judicial incapacity of identifying ethical salience in the case of any particular claimant alleging the violation of her right to freedom of religion or belief. My defence of this model, therefore, rests on the fact that it is the most robust *judicial* defence of this right which is compatible with its liberal conception. In short, this means that any claim couched in terms of this right should be conceived as an exercise of a *prima facie* right to freedom of religion or belief.

I then illustrate this proposal by pointing to the adjudicative practice of several jurisdictions with regard to the right to the free development of the personality. I trace its origins in contemporary comparative constitutional law to the German Basic Law of 1948 and subsequently consider the case of Colombia and Mexico, two jurisdictions in which this right has become fundamentally important to the resolution of cases, the subject matter of which, strongly resembles that which usually features in cases concerning religious freedom in the jurisdictions that I have referred to throughout this dissertation: from dress codes in schools and prisons to the use of prohibited substances.

I follow this up by suggesting, in answer to the second question, that a reason-blocking analysis of the merits of these *prima facie* rights, leading to a finding of either a violation or a justified interference, is the best tool for reaching an unbiased conclusion. This is because this proposal does not call for any judicial evaluation of normative weight regarding the conduct at issue in a particular case. Instead, the solution of the case will turn mainly on the (il)legitimacy of the reasons adduced for the regulation which the claimant deems to be in violation of her right. Nevertheless, again in contrast with Dworkin, I do not propose that the state satisfies this test merely by pointing to a permissible normative reason. Instead, I argue that judges must refrain from relying on any kind of balancing but not from employing the other tools they regularly apply in other right-based disputes, namely, the other stages of the proportionality analysis commonly employed by courts around the world.

## 1. The right to freedom of religion or belief as a right to liberty

Is it possible for the state to limit the scope of the right to freedom of religion or belief and still comply with its commitment to equal treatment? In other words, should the state rule out certain beliefs as being incapable of acquiring the requisite ethical significance for a particular individual to attract the protection of this right? The answer to these questions has profound implications for what Charles Taylor identifies as the essence of secularism: ie “the (correct) response of the democratic state to diversity”.<sup>522</sup> To stipulate *ex ante* that certain beliefs are to be located beyond the scope of a right which is underlied by an interest in protecting the ethical outlook of every individual means disqualifying the conducts arising from those beliefs from the range of legitimate diversity in a liberal polity.

In the specific situation under analysis, in light of the findings of the previous chapters —specifically Chapter 3—, I suggest that it is not possible for judges to constrain the scope of the right in any manner because it would require them to contradict a claimant stating that *X* —whatever that *X* may be— is ethically salient for her, a task which I demonstrated could not be undertaken without going against the liberal conception’s commitment to ethical neutrality. Note that this does not involve a commitment to allow or endorse, in the last instance, each and every action which some individual may consider to be ethically salient. It only asks whether a judge should rule them out without engaging in any sort of analysis of their merits. There may, of course, be clear-cut cases with no possibilities of success under any kind of scrutiny: these will most likely involve claims that entail the violation of the rights of others, thereby running afoul of the principle of equal liberty.

It could, of course, be possible to eliminate this type of beliefs from the scope of the right, but I think it strengthens the conceptual coherence of this

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<sup>522</sup> Charles Taylor, ‘Why We Need a Radical Redefinition of Secularism’, *The Power of Religion in the Public Sphere*, Columbia University Press, 2011, 36.

proposal to delay their disqualification to a later stage of their adjudication. This is because even if certain beliefs clearly fall afoul of the principle of equal liberty, it is possible for some individuals to accord them the requisite ethical salience in order to attract the right's protection. However, nothing of practical importance turns on this point: if one prefers not to include actions which harm third-party rights under the protection of this right, even if motivated by ethically salient beliefs, then such claims will simply fail at different points in the analysis. This alternative is taken up by the Declaration of the Rights of Man of 1789, which states in its Article 4 that "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights."<sup>523</sup> This is also the way in which H.L.A. Hart understood the "equal right of all men to be free":

in the absence of certain special conditions which are consistent with the right being an equal right, any adult human being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (2) is at liberty to do (i.e. is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other persons.<sup>524</sup>

While the interpretation of the right to freedom of religion or belief as a right to liberty that I favour is perfectly in line with the right enshrined in the Declaration and stipulated by Hart, I think it is conceptually preferable—and more faithful to the subjectivity that characterises the liberal conception—to acknowledge the possibility that some individuals may accord ethical salience to despicable beliefs. This way of proceeding plainly acknowledges the principle of authenticity, which according to Dworkin, means that "each person

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<sup>523</sup> Laborde also follows this path by distinguishing between morally ambivalent and morally abhorrent beliefs. Cécile Laborde, *Liberalism's Religion*, Harvard University Press, 209.

<sup>524</sup> H.L.A. Hart, 'Are There Any Natural Rights?', *Theories of Rights*, Jeremy Waldron (ed.), 1984, 77.

has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses”.<sup>525</sup> The proposal I endorse, therefore, does not stipulate the inner forum of any individual out of existence: instead, it recognizes its existence and distinguishes it from the distinct question of whether the state should allow us to behave in accordance with our ethically salient beliefs or whether, on the contrary, it may legitimately stop us from doing so.<sup>526</sup> In other words, I distinguish the value that a person assigns to her ethical judgments from the resolution of the practical conflict that may arise between those judgments and the rights of others, in order to clarify “who may legitimately exercise power over others, to what ends, and under what conditions”.<sup>527</sup>

Notice, however, that in proposing to interpret the right to freedom of religion or belief as a right to general liberty, I am not —to use Laborde’s preferred term— “dissolving” religion into a “maximally inclusive category that comprises preferences, commitments, identities, beliefs, worldviews, and so forth”, which she rightly charges Dworkin of doing when proposing that we understand this right as a general right to ethical independence.<sup>528</sup> The claimants that I have in mind always argue that the law or policy which they contest compromises something that they consider to be ethically salient, not merely an obstacle to the realisation of their preferences. And it is precisely because judges have no means of refuting this alleged ethical salience that they have no option but to take said claim at face value. But if this is a perennial difficulty regarding all claims appealing to the right to freedom of religion or belief, then it is akin to a right to general liberty in the sense that all possible

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<sup>525</sup> Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press-Harvard University Press, 2011, 203-04.

<sup>526</sup> Lorenzo Zucca, ‘Law v. religion’, *Law, State and Religion in the New Europe: Debates and Dilemmas*, Lorenzo Zucca and Camil Ungureanu (eds.), Cambridge University Press, 2012, 137-38.

<sup>527</sup> Mark Lilla, *The Stillborn God: Politics, Religion, and the Modern West*, Vintage Books, 2008, 21.

<sup>528</sup> Cécile Laborde, *Liberalism’s Religion*, Harvard University Press, 44.

actions motivated by ethically salient beliefs —as defined by the claimant— are to be considered to fall within its scope.

A forceful critique against the interpretation of the right to freedom of religion as a right to liberty, which by definition entails that any claim will be considered a *prima facie* right capable of being defeated by considerations extraneous to it, to quote Grégoire Webber, is that “It endorses an overzealous definition of rights, which results in rights-claims to everything thereby prompting almost all legislation (and State action more generally) to conflict with some right”.<sup>529</sup> While I understand Webber’s concern, I suggest that his normative criticism would not apply in my case for the very reasons offered in the previous paragraph: the conception of a right to liberty I endorse does not open up the right for the protection of every humanly possible action, only to those which an individual claims to be ethically salient. Of course, although not in contradiction in normative terms, in practice, the effects of my proposal are indistinguishable from the ones which Webber seeks to avoid because all state action will, in fact, be open to contestation in a judicial setting. But I consider this to be an inevitable consequence of staying true to the liberal conception of the right to freedom of religion or belief.

Another criticism to this proposal might be that it makes the right to freedom of religion or belief redundant because whatever it protects will likely already be protected under the scope of another right.<sup>530</sup> The relevance of this observation will vary from one jurisdiction to the other depending on the specific interpretation of the other constitutional rights deemed to be candidates for causing this redundancy. The strongest case of redundancy, however, will most likely exist in those jurisdictions that acknowledge a general right to liberty. Nevertheless, far from considering this a disadvantage, the fact that courts in certain jurisdictions have had the opportunity of interpreting such

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<sup>529</sup> Grégoire Webber, *The Negotiable Constitution. On the Limitation of Rights*, Cambridge University Press, 2009, 88.

<sup>530</sup> See Mark Tushnet, ‘The Redundant Free Exercise Clause’, *Loyola University Chicago Law Journal* 33 (2001-2002) 71.

a right evidences the plausibility of interpreting the right to freedom of religion or belief in this manner. In the next section, I turn to consider the experience of some notable examples in this regard.

## 2. Comparison with the right to the free development of the personality in Germany, Colombia, and Mexico

### 2.1 Germany

The breadth of the scope of the right to freedom of religion or belief that I defend resembles the one protected by the right to the free development of the personality in several jurisdictions. In the comparative literature, perhaps the most popular instantiation of this right figures in Article 2.1 of the Basic Law of the Federal Republic of Germany, which states that “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law”. In the landmark case of *Elfes*,<sup>531</sup> the Constitutional Court of Germany had to decide whether this section of the Basic Law recognized a freedom to leave the country following the government’s denial of a passport to an elected member of parliament on the basis of his critical views toward military defense and German reunification. In order to resolve this issue, the court had first to determine whether the right set out in Article 2.1 of the constitutional text “includes freedom of action in the widest sense possible” or, whether, on the contrary, it is “limited to the protection of a minimum amount of this right to freedom of action without which an individual would be unable to develop himself as a spiritual-moral person”.<sup>532</sup> In the end, the majority held that it “protects every possible kind of human conduct which is not protected by

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<sup>531</sup> *Elfes*, 6 BVerfGE 32 (1957) English translation available at <https://germanlawarchive.iuscomp.org/?p=9> (last accessed in September 2019).

<sup>532</sup> *ibid*

special fundamental rights”.<sup>533</sup> It reached this conclusion by observing that limiting the scope of the right only to those actions with heightened moral relevance would render the right futile because “it is inconceivable how development within this core area could offend the moral code, the rights of others, or even the constitutional order of a free democracy”.<sup>534</sup> It is hard to understand what exactly the court meant by the previous passage but, perhaps, one possible explanation is that equates what it calls the “spiritual-moral person” with the *forum internum* of an individual, —ie with those aspects of her personality that don’t call for some form of external manifestation.<sup>535</sup>

Therefore, in order to endow it with more practical relevance, the court opted for its broader construction, as “a separate, individual basic right that guarantees a person’s general right to freedom of action”.<sup>536</sup> In other words, while the specific and concrete rights enumerated throughout the constitutional text are understood “to protect man’s self-determination in certain areas of life that were historically subject to encroachment by public authority”,<sup>537</sup> the right to the free development of the personality essentially serves as a tool for making the protection against public authorities comprehensive. This guarantees that “laws must not violate a person’s dignity, which represents the highest value of the Basic Law; nor may they restrict a person’s spiritual, political, or economic freedom in a way that would erode the essence of [personhood]”.<sup>538</sup> This interpretation of this right clearly makes the German

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<sup>533</sup> Dieter Grimm, *Constitutionalism: Past, Present, and Future*, Oxford University Press, 2016, 173. An exhaustive explanation of the case and its relevance for German constitutional law can be found in Edward J. Eberle, ‘Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview’, *Liverpool Law Review* (2012) 212.

<sup>534</sup> *Elfes*, 6 BVerfGE 32 (1957) English translation available at <https://germanlawarchive.iuscomp.org/?p=9> (last accessed in September 2019).

<sup>535</sup> See Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford University Press, 2001.

<sup>536</sup> *Elfes*, 6 BVerfGE 32 (1957) English translation available at <https://germanlawarchive.iuscomp.org/?p=9> (last accessed in September 2019).

<sup>537</sup> In Grimm’s words, “areas which have traditionally been the object of governmental oppression”. Dieter Grimm, *Constitutionalism: Past, Present, and Future*, Oxford University Press, 2016, 172.

<sup>538</sup> *Elfes*, 6 BVerfGE 32 (1957) English translation available at <https://germanlawarchive.iuscomp.org/?p=9> (last accessed in September 2019).

constitutional text a rights-based constitution through and through,<sup>539</sup> since it opens the possibility of subjecting any governmental action—including action by the legislature—to judicial scrutiny aimed at protecting the rights of individuals.

This ruling, of course, was controversial, with notable figures such as Dieter Grimm—a judge of the constitutional court who did not agree with the majority—suggesting that not all actions are worthy of constitutional protection and that the right should have been interpreted as protecting only those actions with a relevance similar in value to those protected by other constitutional rights. Grimm’s concern seems to be picked up by Kai Möller who, in describing the phenomenon of “rights inflation”—ie the idea that “Constitutional rights are no longer seen as only protecting certain particularly important interests” and, instead, offer “increasing protection to relatively trivial interests as (prima facie) rights”—specifically refers to the Constitutional Court’s jurisprudence regarding this right.<sup>540</sup> In fact, the concern over the trivialization of constitutional rights-protection appears to be well-earned—from an objective perspective—by the Court’s case law, with its other two most notable judgments concerning the right to the free development of the personality having to do with the right to feed pigeons in the park<sup>541</sup> and the right to ride horses in the woods.<sup>542</sup> In the latter case, the court reasserted that the scope of this right extends to “every form of human action, regardless of the weight that should be assigned to it in the development of the personality”.<sup>543</sup>

The normative difficulty concerning the risk of trivializing fundamental rights, however, does not apply to my preferred interpretation of the scope of

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<sup>539</sup> This opinion is found in Bruce Ackerman, *We The People I. Foundations*, Belknap Press-Harvard University Press, 1991, 15.

<sup>540</sup> Kai Möller, *The Global Model of Constitutional Rights*, Oxford University Press, 2012, 3-4.

<sup>541</sup> *Feeding Pigeons*, 54 BVerfGE 143 (1980). A critical consideration of this case can also be found in András Sajó, ‘Abuse of Fundamental Rights or the Difficulties of Purposiveness’, *Abuse: The Dark Side of Fundamental Rights*, András Sajó (ed.), Eleven International Publishing, 2006, 50.

<sup>542</sup> *Horse Riding*, 80 BVerfGE 137 (1980).

<sup>543</sup> *Horse Riding*, 80 BVerfGE 137 (1980), 152.

the right to freedom of religion or belief as one with a comparable scope to the one recognized by the Constitutional Court of Germany concerning the right to the free development of the personality. This is because, it will be recalled, my reason for widening the scope of the right to freedom of religion or belief to its maximum capacity is not that all human actions should fall under its protection, regardless of their ethical weight. On the contrary, I constrain the protection of the right only to ethically salient actions. It is only because I assume that claimants will normally assert that their claims have the requisite ethical salience and that, in the face of such a claim, a judge is forbidden by the liberal conception of the right from refuting said assertion, that for practical purposes I equate it with a right to liberty. Notice however that, under my scheme, should a claimant seek the protection of the right to freedom of religion or belief against a regulation banning the feeding of pigeons in a park or the riding of horses in the woods, while acknowledging that these actions do not carry any ethical significance for her, then the right would not be engaged. This is at odds with the jurisprudence of the Constitutional Court, according to which, the engagement of the right to the free development of the personality does not hinge on either the objective nor the subjective merits of an action.

In short, feeding pigeons in the park or riding horses in the woods —just like any other action— are susceptible of falling within the scope of the right to freedom of religion or belief understood as a right to liberty, if and when a claimant appealing to its protection asserts —or does not argue otherwise— that the action in question is ethically salient for her. It is the non-refutability of the subjective assignment of ethical salience and the likelihood that a claimant will usually characterize her claim in such terms that, in practice, makes the Constitutional Court's jurisprudence and my proposal indistinguishable in terms of the scope of the aforementioned rights.

## 2.2 Colombia

The pioneering efforts of the German court have been taken up by the Constitutional Court of Colombia which, in a comparatively short period of time, has developed an unparalleled jurisprudence regarding the right to the free development of the personality which was enshrined in Article 16 of its constitutional text dating from 1991 and which states that: “Every person has the right to the free development of her personality without further limitations than those imposed by the rights of others and the legal order”.<sup>544</sup> In line with the German court, the Constitutional Court of Colombia has described this right as protecting “liberty *in nuce*” —ie in a nutshell.<sup>545</sup> The Colombian court has understood this right to mean that the legislator may not impose more limitations than those that are in harmony with the spirit of the Constitution.<sup>546</sup> In the court’s view, this right is underlied by the principle of autonomy, which assigns to the individual the duty to give meaning and a path to one’s own existence and which can only be limited to the extent that it conflicts with someone else’s autonomy.<sup>547</sup> In a lengthy passage worth quoting the court lays bare the relevance of the protection afforded by this right in the following manner:

To consider a person as autonomous has inevitable and inexorable consequences, the first and most important of which consists in that all matters that concern only her must only be decided by her. To decide for her is to brutally snatch away her ethical condition, to reduce her to the condition of an object, to reify her, to turn her into a means to ends chosen outside of her. When the state decides to recognise the autonomy of the person, what it has decided, no more and no less, is to confirm the scope that belongs to her as an ethical subject: to

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<sup>544</sup> For an overview of the jurisprudence of the Colombian Constitutional Court in this subject area see Anabella del Moral Ferrer, ‘El libre Desarrollo de la personalidad en la jurisprudencia constitucional colombiana’, *Cuestiones jurídicas* 6(2) (2012) 63.

<sup>545</sup> Sentencia C-221-94.

<sup>546</sup> *ibid*

<sup>547</sup> *ibid* and Sentencia C-239-97. (“the colombian State is founded on the respect for the dignity of the human person; this means that, as supreme value, dignity irradiates the whole of the fundamental rights, which find their maximum expression in the right to freedom of the personality.”) Translation is mine.

let her decide about that which is most radically human, about good and evil, about the meaning of her existence.<sup>548</sup>

It is worth noting that the court uttered these sentences in a politically volatile case in which it held that it was unconstitutional to penalise drug use because contrary to the right to the free development of the personality. What is most striking about the Colombian case law in this regard, however, is the long list of cases whose subject matter mimic those which have been litigated under the right to freedom of religion or belief in the jurisdictions of the North Atlantic that I identified as staples of the dominant approach.

In the educational context, the Colombian court has dealt with a significant number of cases which have allowed it to assess the constitutionality of schools' codes of conduct. In this regard, the court has considered several regulations affecting a student body's personal appearance, from the prohibition of dying one's hair<sup>549</sup> or wearing piercings<sup>550</sup>, to specifications regarding appropriate hair-length for male students.<sup>551</sup> These aesthetic concerns are similar to the one's presented to the Judicial Committee of the House of Lords in the case of *R(Begum) v Governors of Denbigh High School* which dealt with a complaint arising from a school's decision not to allow a student to wear a gown instead of the required school uniform.<sup>552</sup> In the landmark Canadian case of *Multani v Commission scolaire Marguerite-Bourgeoys*, the school code combatted by the claimant prohibited the carrying of weapons, meaning that the student could not bring a dagger to school.<sup>553</sup> These cases, of course, are also relevant to the analysis of the French regulation banning headscarves from schools.<sup>554</sup>

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<sup>548</sup> Sentencia C-221-94

<sup>549</sup> Sentencia T-526-17.

<sup>550</sup> Sentencia T-839-07.

<sup>551</sup> Sentencia SU-641-98.

<sup>552</sup> *R(Begum) v Governors of Denbigh High School*, [2006] UKHL 15.

<sup>553</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256

<sup>554</sup> For a thorough analysis of this regulation see Cécile Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy*, Oxford University Press, 2008.

Beyond the confines of the school environment, conflicts arising from workplace regulations that police the appearance of the workforce have become some of the most recurrent sites of controversy: two of the claimants in the case of *Eweida and others v the United Kingdom*<sup>555</sup> decided by the ECtHR contested the regulations prohibiting them from wearing a necklace with a crucifix over their uniforms, while in the cases of *Achbita v G4S Secure Solutions*<sup>556</sup> and *Bouagnaoui and another v Micropole SA*<sup>557</sup> the Court of Justice of the European Union ruled on the permissibility of a business's decision to ban the use of certain symbols by their employees.

The Colombian court has also considered school regulations that sanction conducts unrelated to the personal appearance of pupils. In this regard, it has ruled that codes which impose sanctions on students who become pregnant are unconstitutional.<sup>558</sup> It reached the same conclusion when it had to decide whether the lack of appropriate sexual education for grade-school students violated their right to the free development of the personality.<sup>559</sup> These cases also have somewhat close parallels in the United States and the United Kingdom: in *West Virginia State Board of Education v Barnette*<sup>560</sup> the SCOTUS struck down the public school system's compulsion of saluting the flag, while in *R(Williamson) v Secretary of State for Education and Employment* the Judicial Committee of the House of Lords of the latter upheld the prohibition of corporal punishment in schools.<sup>561</sup>

Moving on to another significant forum for litigation concerning the right to freedom of religion or belief, the Colombian court has considered inmates' rights not to shave their heads in accordance with prison regulations.<sup>562</sup> This very issue was recently brought before the SCOTUS in the case of *Holt v*

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<sup>555</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013.

<sup>556</sup> *Achbita v G4S Secure Solutions NV* [2017] CJEU C-157/15.

<sup>557</sup> *Bouagnaoui v Micropole SA* [2015] CJEU C-188/15.

<sup>558</sup> Sentencia T-211-95.

<sup>559</sup> Sentencia C-085-16.

<sup>560</sup> *West Virginia State Board of Education v Barnette* (1943)319 U.S. 624.

<sup>561</sup> *R(Williamson) v Secretary of State for Education and Employment*, [2005] UKHL 15.

<sup>562</sup> Sentencia T-499-10.

*Hobbs*, ruling unanimously in favour of a claimant who wished to grow a short beard contrary to prison policy.<sup>563</sup> I have already mentioned two noteworthy cases from the European Court of Human Rights —*Jakobski* and *Szwed*, both against Poland— dealing with prisoners’ right to be given a vegetarian diet.

More generally, the jurisprudence of the Colombian court concerning the right to the free development of the personality extends to the right to solicit in a public place,<sup>564</sup> the legitimacy of the criminalisation of incest<sup>565</sup>, and the right of minors over the age of 14 to submit to aesthetic surgeries without parental consent,<sup>566</sup> to give a sense of the breadth of issues it has been able to adjudicate under the broad scope of this right.

### 2.3 Mexico

While the Colombian experience offers a glimpse into the enormous potential of understanding the right to freedom of religion or belief as a right to liberty based on the variety of the cases it has had the opportunity to decide, the far more recent and modest record of the Mexican Supreme Court of Justice stands out because of the political and legal significance of its rulings concerning the right to the free development of the personality. In contrast with the German and the Colombian constitutional texts, the Mexican Constitution does not recognize this right explicitly. Instead, the Supreme Court has derived it from the concept of dignity appearing in Article 1. According to the Supreme Court, the concept of dignity erects a “preserve” to protect the individual against state intervention.<sup>567</sup> The Mexican court first acknowledged this implied right a decade ago, while deciding a case concerning a transsexual person on behalf of whom the authorities refused to issue a birth certificate

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<sup>563</sup> *Holt v Hobbs*, (2015) 574 U.S. \_\_\_\_.

<sup>564</sup> Sentencia C-040-06.

<sup>565</sup> Sentencia C-241-12. The court, nevertheless, found that it was justified to protect the legal good of the family.

<sup>566</sup> Sentencia C-246-17.

<sup>567</sup> Referring to Ernesto Garzón Valdés, “Algo más acerca del ‘coto vedado’”, *Doxa. Cuadernos de filosofía del derecho* 6 (1989) 209.

which reflected her change of sex.<sup>568</sup> In siding with the applicant, the court held that “the individual, whoever she might be, has a right to choose, freely and autonomously, her own life plan, the way in which she will reach the goals and objectives that, for her, are relevant”.<sup>569</sup> It then expounded this point by stating that this right is “the state’s recognition of every person’s natural faculty to be individually as she wants to be, without coercion, or unjustified controls or hindrances by others [...] [t]hereby it is the human person who decides the sense of her own existence, according to her values, ideas, expectations likes, etc.”.<sup>570</sup> Among the actions that the court mentioned as candidates for receiving the protection of this right in this early case are the decision to enter into marriage or not to do so, to procreate or not to procreate, to decide one’s personal appearance, professional activities, and sexual choices.

It wasn’t, however, until the Mexican court was presented with the opportunity of applying this right to more politically charged and legally consequential issues that the relevance of this right became fully apparent. In a series of cases, the court held that the fault-based divorce scheme which existed in all but one of the civil codes of the federal entities were unconstitutional for conflicting with this right.<sup>571</sup> In the court’s opinion, legal regime which requires an individual to point to a cause before she can request the dissolution of the marital bond violates that person’s right to the free development of the personality: “the sole manifestation of a will of not wanting to continue with the marriage is sufficient” and should not be “subordinated to some explanation”.<sup>572</sup> Because the decision not to continue married affects one’s civil status and a person’s civil status, in turn, is a fundamental in projecting one’s life as a free and autonomous individual, the state cannot condition a person’s ability to get a divorce by asking her to justify her decision.

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<sup>568</sup> Amparo directo 6/2008.

<sup>569</sup> Amparo directo 6/2008.

<sup>570</sup> Amparo directo 6/2008.

<sup>571</sup> Amparo directo en revision 1819/2014.

<sup>572</sup> Amparo directo en revision 1819/2014.

These precedents are binding, rendering most of the state's civil codes effectively unconstitutional.

Contrast this precedent with the European Court of Human Right's decision in *Johnston and others v Ireland*.<sup>573</sup> At issue in that case was the now amended constitutional prohibition of divorce in Ireland.<sup>574</sup> The named claimant argued that the lack of availability of any legal means to dissolve his marriage entailed a violation of the right to freedom of religion or belief because it did not allow him to marry the mother of the child that he had conceived after being separated from his wife, as well as affecting the legal status of said child. In response, the ECtHR bluntly stated that "It is clear that Roy Johnston's freedom to have and manifest his convictions is not in issue. His complaint derives, in essence, from the non-availability of divorce under Irish law, a matter to which, in the ECtHR's view, Article 9 (art. 9) cannot, in its ordinary meaning, be taken to extend".<sup>575</sup> In other words, the right to freedom of religion or belief is not applicable to his claim. Although the ECtHR has made great progress in this regard, widening the scope of the right to include ethically motivated actions beyond the traditionally religious, its continued reliance on the thresholds considered in Chapter 3 —ie *Campbell and Arrowsmith*— opens the door to the arbitrary dismissal of cases, as it did in *Gough v the United Kingdom* —the case of the naked hiker whose complaint the court considered manifestly ill-founded. In these circumstances, there is guarantee that the court's decision in *Johnston* would not be repeated today. However, the interpretation of the right to freedom of religion or belief I propose would eliminate this risk altogether because a judge would simply work on the assumption that a claim alleging that the unavailability of legal means for dissolving a marriage violates said right is ethically salient and, therefore, within its scope.

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<sup>573</sup> *Johnston and others v Ireland*, App. no. 9697/82, 18 December 1986.

<sup>574</sup> The facts of the case are found in *ibid* [10]-[15]. Article 41.3.2o of the Constitution of Ireland established that: "No law shall be enacted providing for the grant of a dissolution of marriage".

<sup>575</sup> *ibid* [63].

But perhaps the Mexican court's most politically sensitive decision concerned the constitutionality of the prohibition of marijuana consumption for recreational purposes.<sup>576</sup> In its decision, the court stated that the right to the free development of the personality protects, prima facie, every adult's decision to engage in those recreational activities which she chooses including the means necessary to materialize those freely chosen life plans. Specifically, it stated that such a choice may legitimately include the use of psychoactive drugs, noting that individuals may wish to engage in this activity for any number of reasons, such as the relief of tension, the intensification of sense perception or the wish to try new spiritual experiences. Additionally, the court stated that this right also covered the planting, growing, harvesting, preparation, possession and transport of the banned substance.

The significance of the subject matter of this ruling for the right to freedom of religion or belief can hardly be understated. In the United States, the cases of *Employment Division v Smith* and *Gonzales v O Centro Espírita Beneficente União do Vegetal*<sup>577</sup>, the SCOTUS was tasked with assessing the constitutionality of equivalent regulations over controlled substances. In the former case, it will be recalled, the claimant's use of peyote for sacramental purposes was the reason for losing his employment as well as for being disqualified from receiving unemployment benefits, while in the latter the claimants contested the threat of criminal prosecution for drinking a sacramental tea as well as the seizure of the tea itself.

What all of these examples, drawn from the jurisprudence of courts in jurisdictions recognising the right to the free development of the personality, show is that interpreting the right to freedom of religion or belief as a right to liberty, such as I propose, does not require apex courts to reach into unchartered territory. Moreover, I have also pointed to instances of overlap in which the right to the free development of the personality has been adduced in cases whose subject matter is most familiar in litigation concerning the right

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<sup>576</sup> Amparo en revision 237/2014.

<sup>577</sup> *Gonzales v O Centro Espírita Beneficente União do Vegetal*, (2006) 46 U.S. 418.

to freedom of religion or belief. However, beyond these findings, the main reason for drawing the comparison between both of these rights is to attest to the advantages—and necessity, following the liberal conception of the right to freedom of religion or belief—of expanding the scope of the right, for practical purposes, so that any conceivable action capable of having ethical salience from the point of view of the claimant be deemed to fall within it.

But arguing in favour of a *prima facie* right to liberty needs to be complemented by a proposal for the adjudication of it leading to an all-things-considered decision about the legal relations that result from a judgment. In the next section, I explain my preference for a reason-blocking strategy and consider how it fits in with the analysis—of proportionality or otherwise—normally used by the courts to decide cases concerning fundamental rights.

### 3. The reason-blocking strategy for the adjudication of the right to freedom of religion or belief

#### 3.1 Objections to balancing

Michael Perry correctly observes that, as societies become more plural, the most fundamental question in need of an answer is: “On the basis of what criterion or criteria [...] ought the legislator or other policymaking official to decide whether to use the law to coerce someone to do something she does not want to do or to refrain from doing something she wants to do?”<sup>578</sup> A major concern of this project is procuring the eradication of judicial bias in cases concerning the right to freedom of religion or belief. Chapter 3 and 4 dealt with the problems created in this regard by the assessment of ethical salience and sincerity. I have tried to eliminate those problems by suggesting that the right in question better conforms to its liberal conception if judges avoid these

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<sup>578</sup> Michael Perry, *Morality, Politics, and Law: A Bicentennial Essay*, Oxford University Press, 1988, 90.

evaluations altogether. However, it would be ill-advised to close these potential avenues of bias only to leave open the side-street of “balancing”.

The notion of balancing will be familiar to anyone acquainted with the proportionality analyses performed by courts around the world. It concerns what is known in the academic literature as “proportionality *stricto sensu*”, which according to Aharon Barak is “the most important of proportionality’s tests”.<sup>579</sup> In simple terms, it is used to determine “the permissibility of a right’s limitation as debated on the ‘battleground of competing interests’”.<sup>580</sup> It is the last stage of the proportionality analysis that calls for the “balancing of the benefits gained by the public and the harm caused to the constitutional right through the use of the means selected by law to obtain the proper purpose.”<sup>581</sup> In other words, it seeks to determine whether the benefit of pursuing some public policy that interferes with an individual’s right can be deemed to justify that interference. If it does, then the interference with the right will be considered legitimate. If not, then this entails a violation of the right.

I take issue with the judicial reliance on a balancing exercise in order to determine whether the interference with the prima facie right to liberty I sketched in the previous sections is legitimate, not because of some conceptual objection, as is usually the case. I, therefore, will not consider the familiar challenge of incommensurability —the claim that the lack of any common criteria or metric to weigh the costs and benefits makes it a conceptually unachievable exercise.<sup>582</sup> Instead, I assume that balancing offers a plausible means of resolving conflicts between rights and state action but, nevertheless, questions its pertinence in light of its complexity and indeterminacy. Balancing is not a “mechanical exercise”: it requires judges to

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<sup>579</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 340.

<sup>580</sup> Grégoire Webber, *The Negotiable Constitution. On the Limitation of Rights*, Cambridge University Press, 2009, 90 quoting T. A. Aleinikoff, ‘Constitutional Law in the Age of Balancing’, 96 (1987) *Yale Law Journal* 943, 946.

<sup>581</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 340.

<sup>582</sup> See eg Grégoire Webber, *The Negotiable Constitution. On the Limitation of Rights*, Cambridge University Press, 2009, 89-97.

engage in complex moral reasoning.<sup>583</sup> In this sense, the risk that judges will overvalue and, therefore, accord greater weight to those conducts which have some ethical relevance for them or with which they are familiar and, on the contrary, prejudice those that don't or with which they are not is patent.

Grégoire Webber inadvertently illustrates this danger giving the example of the aforementioned case of *Amselem*. In that case, the weight assigned to the interest of the claimants to set up a succah in their balconies might have been affected by the fact that this action was “nonobligatory religious precept of the Jewish faith”.<sup>584</sup> This, of course, would be illegitimate given that the mandatory nature of an ethically salient belief should be of no consequence from a liberal perspective. Moreover, it is plausible that the judicial weight assigned to the claimants' interest would have been different had the issue revolved around the setting up of Christmas trees or nativity scenes or even an altar to Obi-Wan Kenobi. But, again, doing so would not be allowed by the liberal conception of the right to freedom of religion or belief. Instead, the weight assigned to any claim under this right should remain constant because it has to be assumed to have complied with the ethically salient requirements from the point of view of the claimant. But it might prove too much to ask of judges that they give equal weight to feeding pigeons in the park as they would to not wishing to serve in the armed forces. Importantly, they might fail to accord equal weight to all claims without even realising it. As I stated before, balancing is a complex exercise which requires judges to justify a decision based on moral considerations that reasonable persons disagree about.

Nor is this risk without precedent in the practice of judicial bodies. Consider the well-known charge against the European Court of Human Rights that its decisions reflect a double-standard between cases dealing with Christian and Muslim claimants.<sup>585</sup> Two cases serve to illustrate this allegedly

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<sup>583</sup> Kai Möller, *The Global Model of Constitutional Rights*, Oxford University Press, 2012, 134.

<sup>584</sup> Grégoire Webber, *The Negotiable Constitution. On the Limitation of Rights*, Cambridge University Press, 2009, 19

<sup>585</sup> See eg Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*', *European Law Journal* 13(3) (2011) 287, 294; Susanna

biased record: *Dahlab v Switzerland*<sup>586</sup> and *Lautsi v Italy*<sup>587</sup>. *Dahlab* concerned a primary school teacher who was banned from wearing a headscarf in the exercise of her professional duties. *Lautsi* related to the state practice of placing crucifixes on the walls of every Italian classroom. In its respective judgments, the court characterised the crucifix as an “essentially passive symbol”,<sup>588</sup> while describing the headscarf as a “powerful external symbol”.<sup>589</sup> By denoting these actions in this manner, it implicitly assigned them a differential weight. If the headscarf is a powerful symbol, then an argument based on the interference with the rights of others —namely, the claimant’s students— is readily available. In this regard, it held that:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>590</sup>

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Mancini ‘The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence’, *Cardozo Law Review* 30 (2008-9) 2629, 2631.

<sup>586</sup> *Dahlab v Switzerland*, App. no. 42393/98, 15 February 2001.

<sup>587</sup> *Lautsi and others v Italy*, App. no. 30814/06, 18 March 2011.

<sup>588</sup> *ibid* [72].

<sup>589</sup> *Dahlab v Switzerland*, App. no. 42393/98, 15 February 2001.

<sup>590</sup> *ibid*

The above passage makes clear the marked effect that a biased assignment of weight can have in a decision. The court starts out by acknowledging that it cannot be certain that a teacher's wearing of a headscarf is capable of causing any detrimental effect on her pupils. However, because it sees the headscarf as a powerful symbol, it sides with the state in order to protect the rights of the children to develop in a neutral environment. Had the court not assigned to the headscarf this significance, opting instead to see it as a minor sign of pluralism, it would have been harder to reach this conclusion and, in the end, rule against the claimant.

Contrast this with the situation in *Lautsi*, where the court describes a generally applicable state mandated rule obliging all schools to hang crucifixes on their classroom walls as something which "cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities".<sup>591</sup> By downplaying the effect that this practice has, it is then able to say that there is no violation of the Article 2 of Protocol 1 to the European Convention, which guarantees the right of parents to bring their children up in accordance with their own beliefs. Moreover, the court stated that the parent-claimant in this case "retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions".<sup>592</sup> Of course, it is hard to understand why parents in Switzerland are unable to do so when their children are presented with an individual display of diversity but parents in Italy are perfectly capable of doing so in the face of a state sponsored practice of uniformity, except by highlighting the unjustified distinction relied on by the court to assess both issues.

By eliminating this locus of discretion, the probability that judges will introduce their biases —willingly or not— to their reasoning will be reduced substantially. While the academic development of the idea of balancing has received sustained attention which has allowed for sophisticated

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<sup>591</sup> *Lautsi and others v Italy*, App. no. 30814/06, 18 March 2011, [72].

<sup>592</sup> *ibid* [75].

understandings of it,<sup>593</sup> this is rarely displayed in real-world judicial opinions, where the possibility of performing argumentatively suspect maneuvers remains the norm. Having expressed the drawback of using balancing to decide claims concerning the right to freedom of religion or belief, I now turn to consider the manner in which judges should adjudicate whether the prima facie interference with a claimant's right is legitimate or in violation of it.

### 3.2 The reason-blocking alternative

The susceptibility of reaching biased decisions through the use of balancing can be remedied by opting instead for a reason-blocking strategy. The notion of reason-blocking is usually understood as a “non-teleological theory that denies that the point of rights is to protect interests of individual well-being” but, rather, “insists that the most fundamental moral right individuals have against the government, from which more specific requirements follow, is the right to be treated with equal respect and concern”.<sup>594</sup> However, I do not think that this characterization, as an alternative to the interest theory of rights, is the only available alternative. Instead, with Raz, I suggest that it is possible to incorporate this reason-blocking notion into the interest camp by stating that individuals have an interest in being treated with equal concern and respect, and that this is a fundamental interest of all human beings and, that, therefore, the state is bound to treat individuals in this manner.<sup>595</sup> This move allows me to remain within the parameters of the interest theory and still benefit from Dworkin's conception of the reason-blocking strategy. Therefore, my reason for appealing to the reason-blocking conception in this chapter is not to look for an alternate theory of justification of the right to freedom of religion or belief

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<sup>593</sup> See eg Kai Möller, *The Global Model of Constitutional Rights*, Oxford University Press, 2012, 134.

<sup>594</sup> George Letsas, 'Rescuing Proportionality', *Philosophical Foundations of Human Rights*, Rowan Cruft et al (eds.), Oxford University Press, 2015, 329.

<sup>595</sup> Joseph Raz, *The Morality of Freedom*, Clarendon Press-Oxford University Press, 1986, 188-89.

but, rather, to introduce a means of adjudicating the conflict between the claimant's interest in an ethically salient action and the regulation affecting it.

In the following subsections, I offer an 'enriched' version of an adjudicative strategy based on a reason-blocking conception of rights but which, in addition, incorporates stages of proportionality analysis which are perfectly compatible with it and which allow judges to approach cases concerning the right to freedom of religion or belief more forcefully than a simple reason-based approach would allow. The order of the subsequent subsections is based on the first three stages of the proportionality analysis in its common theoretical form. In order to illustrate the adjudicative approach I propose, constant reference will be made to notable caselaw from Europe and North America with a view to making clear the practical impact that a strategy such as this one would have relative to the dominant approach.

Before proceeding, it is useful to recall that the purpose of this project is to state the case for the most robust judicial guarantee of the individual right to freedom of religion or belief *which is compatible with the principle of equal liberty*. In this regard, whether the protection that can be accommodated for the right to freedom of religion or belief, as compared to the current adjudicative model, turns out to be too weak or too forceful is not a matter for regret, nor can it be used as an argument against its adoption *from the vantage of this project*. It might well be that there are many other weighty reasons to maintain the current scheme of protection for the right *notwithstanding* what is counselled by an analysis, such as this one, that is circumscribed to the requirements that follow from the principle of equal liberty. This methodological disclaimer is perfectly aligned with philosophical practice and is present in such masterworks as Rawls' *A Theory of Justice*, which albeit being devoted to an analysis of justice as "the first virtue of social institutions",<sup>596</sup> Rawls acknowledges the relevance of other considerations in the following manner:

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<sup>596</sup> John Rawls, *A Theory of Justice*, rev. ed., Belknap Press-Harvard University Press, 1999, 3.

So while the distinctive role of conceptions of justice is to specify basic rights and duties and to determine the appropriate distributive shares, the way in which a conception does this is bound to affect the problems of efficiency, coordination, and stability. We cannot, in general, assess a conception of justice by its distributive role alone, however useful this role may be in identifying the concept of justice. We must take into account its wider connections; for even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things equal, one conception of justice is preferable to another when its broader consequences are more desirable.<sup>597</sup>

In this same vein, then, the adjudicative model I endorse only claims to be one which takes the principle of equal liberty to be of utmost value. However, it does not claim to be the best model all-things-considered: perhaps a more complex analysis of the phenomenon of religion or belief in contemporary liberal societies might reveal that concerns over efficiency, coordination, or stability counsel other judicial approaches to this right. This conclusion might also inform a more sophisticated conception of liberalism in the long run. Here, however, I am committed to a view that follows from the serious observance of some basic tenets of the liberal doctrine, as detailed in Chapter 1.

On a related note, the analysis that I propose below is distinct from the references made above to the jurisprudence related to the right to the free development of the personality. To restate, the purpose of that discussion was to show the existence of an avenue for claims relating to the right to freedom of religion or belief to make their way before courts by showing how claims regarding similar subject matter had been litigated in other jurisdictions by appealing to the right to the free development of the personality. I do not, however, wish to extend that experience to the considerations that are yet to be developed because I have eliminated from the analysis one of the key elements in the jurisprudence relating to the right to the free development of

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<sup>597</sup> John Rawls, *A Theory of Justice*, rev. ed., Belknap Press-Harvard University Press, 1999, 6.

the personality: namely, judicial reliance on strict proportionality. This is especially relevant in the case of the jurisprudence of the Federal Constitutional Court of Germany where, as Dieter Grimm has observed, “the third step [of proportionality analysis, ie strict proportionality or balancing stage] has become the most decisive part of the proportionality test”.<sup>598</sup> However, this alternative is not available for the reasons given in the preceding section. That judges should not make use of balancing in their analysis, however, does not point to the misguidedness of taking note of the jurisprudence regarding the right to the free development of personality because its importance for this analysis was limited to establishing the broad array of prima facie claims that have been considered under this heading. It is precisely in order to complement that analysis that the following subsections become necessary.

### 3.2.1 ‘Simple’ reason-blocking or proper purpose

In a nutshell, following George Letsas, a reason-blocking strategy insists that people “have a right not to be deprived of a liberty or an opportunity on an inegalitarian basis [...]”.<sup>599</sup> More specifically, what this means is that certain facts “do not constitute valid reasons for depriving someone of a liberty or an opportunity or for imposing a risk on him”.<sup>600</sup> What makes this strategy stand out as preferable over the balancing approach is that instead of looking at the content of the claimant, it directs the judges attention towards the justification for the government’s actions. In Dworkin words, it “fixes on the relation between government and citizens: it limits the reasons government may offer for any constraint on a citizen’s freedom at all”.<sup>601</sup>

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<sup>598</sup> Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’, *University of Toronto Law Journal* 57 (2007) 383, 384.

<sup>599</sup> George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, 104.

<sup>600</sup> George Letsas, ‘Rescuing Proportionality’, *Philosophical Foundations of Human Rights*, Rowan Cruft et al (eds.), Oxford University Press, 2015, 329.

<sup>601</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 133.

According to Dworkin, the government “must never restrict freedom just because it assumes that one way for people to live their lives [...] is intrinsically better than another, not because its consequences are better but because people who live that way are better people”.<sup>602</sup> Viewed from this perspective, it is irrelevant for the purposes of adjudicating the compatibility of a law banning the use of peyote with this right, for instance, whether the claimant wishes to consume this drug for ceremonial purposes or simply because she wants to get high.<sup>603</sup> What matters, instead, are the reasons offered by the state to justify the ban: reasons that reflect the imposition of some conception of the good, such as that consuming peyote is morally wrong, will most likely not pass muster, while reasons having to do with the protection of the rights of others most likely will.<sup>604</sup> It is then up to the government to justify its interference with this right, not the responsibility of the claimant to explain why the government’s action occasions said interference. There may be instances where drawing the line may turn out to be more challenging than Dworkin’s definition may seem to indicate: for instance, does state funding of certain cultural activities but not others constitute a legitimate aim or does it send a message that only certain kinds of cultural endeavors are worthy?

This sketches of the reason-blocking conception of rights are remarkably similar to what is called for under the first component or stage of the proportionality analysis: namely, the identification of a proper purpose. The first thing that courts must determine when conducting a proportionality analysis is whether the reason, objective, aim, or purpose of the governmental action is proper. The propriety of the measure is intrinsically related to its legitimacy because, as Barak explains, it consists of a “value-laden component [that] reflects the notion that not every purpose can justify a limitation on a

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<sup>602</sup> *ibid* 130.

<sup>603</sup> Dworkin uses this example because of its similarity with the facts at issue in the *Smith* decision. Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013.

<sup>604</sup> I do not take a definite view of the matter because, unlike Dworkin, I do not propose to offer a finished theory, only some broad parameters.

constitutional right”.<sup>605</sup> Because determining what satisfies this value judgment is “a threshold examination”, what counts as a proper purpose can be more or less restrictive. At its most permissive, for example, the German Court’s jurisprudence understands that a proper purpose is one which is “not prohibited by the Constitution”.<sup>606</sup> On the more restrictive end of the spectrum, one would find the position in the United States where, at present, the Religious Freedom Restoration Act requires the state to offer a “compelling interest”, meaning that religious freedom is granted the highest level of scrutiny. A similar situation exists in Canada, where the famed *Oakes* test requires “an objective ‘of sufficient importance to warrant overriding a constitutionally protected right of freedom,’ or a ‘pressing and substantial’ concern”.<sup>607</sup>

I suggest that the appropriate level of judicial oversight on this point regarding the right to freedom of religion or belief should be an intermediate one, meaning that the range of permissible governmental aims capable of limiting it would have to be extended in the case of the United States and Canada. Keeping to a heightened standard would make state action extremely difficult given that the right to freedom of religion or belief understood as a right to liberty entails subjecting all possible state action to judicial scrutiny. Instead, in order to be considered legitimate, it would be enough for the state action to be permissible in terms of the reason-blocking conception and a broad understanding of proportionality’s proper purpose. In jurisdictions applying some kind of proportionality analysis, this proposal would not have much impact on their practice because it is rare for state action to be found unconstitutional at this stage, except in the most extreme cases of patent unconstitutionality. Proportionality, therefore, usually allows for a wider range

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<sup>605</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 245.

<sup>606</sup> Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’, *University of Toronto Law Journal* 57 (2007) 383, 388.

<sup>607</sup> *ibid* 388.

of justifications to pass muster and it is only until later stages that some of them are filtered out either for not being fit for purpose or for being unnecessary.

The range of reasons for which it is legitimate for government to restrict an individual's liberty, however, is not clear-cut. Barak, for instance, observes that "Of the many values underlying democracy, the most pertinent to the proper purpose component are constitutional rights on the one hand, and the public interest (or the public good) on the other".<sup>608</sup> At present, I do not intend to propose any steadfast criteria for distinguishing between legitimate and illegitimate reasons for state action. Instead, I conceive of the possibilities as a continuum with clear margins and complicated borderline cases. State action that seeks to protect individuals from harm, for example, will be at the centre of legitimate concerns. In this sense, the school board's decision not to allow the carrying of weapons in the Canadian case of *Multani* is unquestionably one which would pass muster.<sup>609</sup> Another example of a clearly permissible reasons for state interference with someone's right to freedom of religion or belief would be the denial of a service to customers in a public accommodation. Cases of this sort, what Reva Siegel and Douglas NeJaime have recently termed, "complicity-based conscience claims",<sup>610</sup> would not be candidates for a finding of a violation because their very conceptual nature contradicts the equal liberty of those third-parties affected by the claimant's beliefs. Regarding the wedding industry, scores of cases have recently been brought to the attention of judicial bodies because providers of goods and services refuse to offer them when they will be destined for homosexual weddings. The most notable case, in this regard, was *Masterpiece Cakeshop v Colorado Civil Rights Commission*, which the Supreme Court of the United States recently decided but without considering its merits.<sup>611</sup>

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<sup>608</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 253.

<sup>609</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256.

<sup>610</sup> Douglas NeJaime and Reva Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics', *Yale Law Journal* 124(7) (2015) 2202.

<sup>611</sup> *Masterpiece Cakeshop v Colorado Civil Rights Commission*, (2018) 584 U.S. \_\_\_\_.

On the opposite end of the spectrum, where one is less likely to place most cases, justifications such as the one offered by the French government in the case of *S.A.S. v France* of the European Court of Human Rights should be absolutely disqualified. In that case, the court heard that the ban on full-face veiling in public had been enacted to protect the “French principle of living together (*le ‘vivre ensemble’*)”.<sup>612</sup> To allow such abstract and imprecise justifications as limitations to the right to freedom of religion or belief would effectively lead to the negation of the right. If a state is unable to identify, within some reasonably precise limits, what exactly it is that a particular regulation is meant to achieve, then its reasons for doing so should not be upheld over the right of the claimant.

In addition, the range of permissible reasons under the reason-blocking conception may also be susceptible to variations depending on the particular context in which the issue arises. In this sense, I do not discount the possibility that certain regulations may be considered permissible in the context of the armed forces but not in school environments. Respect for authority might be a legitimate reason to limit certain actions in both contexts, but its scope might be wider in the former. To find precise limits in this regard exceeds the capabilities of this analysis, but I propose an interpretive approach in line with Dworkin’s, meaning that the answer to this question is “essentially concerned with the question of how [a] practice should be followed and applied”, in order to “work out what the practice requires of us”.<sup>613</sup>

One area which is particularly germane to this more contextual analysis is the workplace. Religious disputes in this scenario are particularly tricky because they involve a potential conflict of rights between those of the employer and those of the employee. Of particular interest is the extent to which a workplace—other than a religious association which is usually regulated in a distinct manner—can be thought of as having an ethos.

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<sup>612</sup> *S.A.S. v France*, App. no. 43835/11, 01 July 2014, [17].

<sup>613</sup> Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights*, 3rd. ed., Sweet and Maxwell, 2008, 145.

Whether a corporation can pursue some kind of ethical objective might have important consequences with regard to the rights of their employees. Here, an obvious case that comes to mind is *Burwell v Hobby Lobby* in which the SCOTUS exempted a closely held for-profit corporation from having to comply with the government's contraceptive mandate.<sup>614</sup> Contrast this with the French Cour de Cassation's decision in the *Baby Loup* case, where it held that the principle of neutrality applied only to the state and could not be claimed by corporations in order to judge the appropriateness of its employees' actions.<sup>615</sup> In effect, what these divergent judgements do is determine the scope of proper purposes for the establishment of regulations in the workplace. If a corporation is deemed to be capable of manifesting certain religious or ethical traits, then some of its actions will have the potential of interfering with the rights of their employees. If, on the other hand, corporations are deemed not to be in a position to manifest their ethos, then the range of legitimate purposes for interfering with their employees' rights becomes more circumscribed. Recently, the Court of Justice of the European Union implicitly allowed the establishment of a corporate ethos when ruling on the permissibility of regulating their own corporate image in non-discriminatory terms, based on a questionable interpretation of Article 16 of the Charter of Fundamental Rights of the European Union which recognises the freedom to conduct a business.<sup>616</sup> Of course, corporations and public institutions can always rely on the prevention of harm as a purpose certain of receiving constitutional protection, but that is a far cry from doing so for more banal purposes, such as a commercial interest. This distinction perfectly captures the situation of the first and second claimant in the *Eweida* case, wherein the first claimant was not allowed to wear a crucifix for the protection of an airline's corporate image

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<sup>614</sup> *Burwell v Hobby Lobby*, (2014) 573 U.S. \_\_\_\_.

<sup>615</sup> Arrêt no 612 du 25 juin 2014 (13-28.369).

<sup>616</sup> See eg *Achbita v G4S Secure Solutions* [2017] CJEU C-157/15 and *Bougnaoui v Micropole SA* [2015] CJEU C-188/15.

while the second was prohibited from doing so on account of the safety of third parties.<sup>617</sup>

Certain public interest concerns will also give judges a hard time when having to determine their legitimacy. Take, for instance, the case of the claimant in *Gough* who was repeatedly arrested for breaching the peace due to his insistence on being naked in public.<sup>618</sup> Cases such as this one do not involve a clear interference with the rights of third parties, and yet, as Barak observes, they may justifiably limit a right in the public interest. The same can be said of a state's educational interest, an issue which was at the centre of the *Yoder* case in the United States: to what extent does the state's interest in education—as distinct from a child's right to education—serve as a proper purpose without turning into a paternalistic measure?<sup>619</sup>

This, however, should not be the end of the judicial inquiry. It would be too low a standard to suggest that the government may legitimately restrict a person's liberty simply by pointing to a permissible reason. It is unclear why Dworkin considers this to be a sufficient analysis.<sup>620</sup> Letsas also states that: "On the reason-blocking theory of rights, the judicial test of proportionality is an inquiry into whether the government offended the status of the applicant as an equal member of his political community whose dignity matters".<sup>621</sup> I disagree: I think that the reason-blocking conception is strengthened by incorporating the other two stages of proportionality analysis, rational connection and necessity.<sup>622</sup> The reason-blocking analysis is only related to the first of the proportionality stages—namely, proposer purpose—. But judicial scrutiny of state action under these other two stages is perfectly

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<sup>617</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013.

<sup>618</sup> *Gough v the United Kingdom*, App. no. 49327/11, 23 March 2015.

<sup>619</sup> *Wisconsin v Yoder*, (1972) 406 U.S. 205.

<sup>620</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013,

<sup>621</sup> George Letsas, 'Rescuing Proportionality', *Philosophical Foundations of Human Rights*, Rowan Cruft et al (eds.), Oxford University Press, 329.

<sup>622</sup> See eg Aharon Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge University Press, 2012, chapters 10 and 11.

compatible with the reason-blocking strategy and is not susceptible to biased capturing as is the balancing stage.

Dworkin, for instance, seems to think that the government's ban on peyote use is constitutional as long as it is grounded in a concern for health and safety.<sup>623</sup> However, it might be that the means of achieving this aim are proven to be misguided or overinclusive. This is something that judges are perfectly capable of assessing and which they must do in order to complement their analysis. Not inquiring into whether there is a means and ends connection, or whether the measure is necessary, would give too much leeway to governmental action. If a government is unable to demonstrate that some regulation pursuing a legitimate aim is also rational and necessary, then the interference with the right should be considered unjustified. A reason-blocking strategy, such as the one I have advanced in this section, achieves the goal of granting the most robust possible protection to the right to freedom of religion or belief and, in addition, in a manner that reduces the possibility of introducing biased reasoning. Moreover, it incorporates and relates it to the proportionality analysis already employed by courts around the world.

At this stage, most state action will normally pass muster. The success of claims under the right to freedom of religion or belief will depend on the subsequent stages of the proportionality analysis: rational connection and necessity. The fact that the interference with this right at this stage will be justified in most cases, however, does not necessarily point to the right's weakness. The survival or defeat of a policy at the end of the inquiry is what counts. However, it is important to recall that some policies will fail even at this first stage of the analysis. I have given the example of the S.A.S. case concerning face covering in public on the basis of the ethereal principle of living together and I have also pointed to the ambivalent scope of employers to interfere with their employees' rights by appealing to their own convictions. Following the French Court's limitation of a corporation's appeal to ethical or

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<sup>623</sup> Ronald Dworkin, *Religion Without God*, Harvard University Press, 2013, 134-35.

religious principles would give the right to freedom of religion or belief far more bite at this stage. So would restricting the potential appeals to the public interest which are not closely connected with some identifiable right.

### 3.2.2 Rational connection

So much for the reason-blocking conception as traditionally conceived. However, the judicial inquiry into the legitimacy of a state action does not end at the proper purpose stage. Instead, the next obstacle that a policy must successfully overcome if the interference with the right to freedom of religion or belief is to be justified is, what is commonly termed, the rational connection stage. Here, what matters is whether the policy in question can be deemed to be an appropriate means for achieving the purpose for which it was enacted. The relation between means and ends can also be more or less demanding. One standard of review would require the policy to “fully reach the objective of the law”, while a lesser requirement would ask whether “a contribution, even a slight one, is sufficient”.<sup>624</sup> Barak, for example, considers that “A partial realization of the purpose –provided that this realization is not marginal or negligible– satisfies the rational connection requirement”.<sup>625</sup> I agree that this is the appropriate level of judicial deference: it does not require policies to be “narrowly tailored”, in American parlance, nor does it allow any policy that tangentially improves some objective to survive.

To understand the practical importance of adding this level of scrutiny, consider the practical effects that this would have on such a case as *Smith*.<sup>626</sup> Although the pursuit of the health and safety of the population is a patently legitimate state aim, the criminalisation of every form of drug use seems to have only a tangential relation to this end. In other words, while the use of

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<sup>624</sup> Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’, *University of Toronto Law Journal* 57 (2007) 383, 390.

<sup>625</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 305.

<sup>626</sup> *Employment Division v Smith*, (1990) 494 U.S. 872.

peyote in certain circumstances might conceivably have a strong relation with the health and safety of the citizenry in some cases, a blanket ban on such an activity seems to be overinclusive. It is not hard to think of instances of personal use that would not have negative consequences over the health and safety of the population. The same could be said of cases such as *Yoder*, where the marginal social benefits of requiring mandatory schooling beyond a certain grade diminish to the point where there is no longer a tenable relation between this aim and the measure.<sup>627</sup> In fact, this aim could also be said to be in tension with an adequate level of respect for the value of pluralism. The state's educational interest, in this sense, could also be achieved by allowing other kinds of educational contexts to cooperate in its pursuit.

A different story, however, seems to appear in cases such as *Multani*.<sup>628</sup> There, the safety of students and a policy that bans weapons from school grounds seems to be perfectly capable of overcoming this obstacle. The risk of injury from weapons brought to the school by students and the state objective of avoiding the occurrence of such incidents seems to go hand in hand. This is also the case regarding policies that require individuals to disclose their face for the purposes of identification, eg in a passport or driver's license photograph.<sup>629</sup> In this case, the interests of security and the measure taken to ensure it are also in sync. This will also be the case where it is relevant for a person giving testimony to disclose her face, a fact which was at issue in the SCC's case of *R v N.S.*<sup>630</sup>

Once again, determination of an adequate means-ends relation in certain contexts will prove to be complicated. In the workplace it will be necessary to determine the deference that should be accorded to those measures undertaken in the name of a firm's commercial interests. In prisons, the need to secure the peace and welfare of inmates will usually be called upon to justify a certain measure. Similarly, the requirements of order in the military will be

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<sup>627</sup> *Wisconsin v Yoder*, (1972) 406 U.S. 205.

<sup>628</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256.

<sup>629</sup> *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567.

<sup>630</sup> *R. v N.S.*, [2012] 3 SCR 726.

different than those in the public realm. While some degree of deference will be required, judges should be able to inquire into the precise rationale of the measure in order to adequately protect the claimant's right to freedom of religion or belief.

Contrary to the situation in the first stage, then, it seems that the analysis performed during this second stage would serve to eliminate many state policies which interfere with the right to freedom of religion or belief. The opposite conclusion reached by either incorporating this analysis or not doing so in the *Smith* case are particularly noteworthy. Drug-related regulations are a particularly sensible issue. Thus far, the dominant approach has not been able to deliver policy change in this area. Perhaps adopting this new approach might prove to be an improvement in this regard from the perspective of the right to freedom of religion or belief.

### 3.2.3 Necessity

The penultimate stage of the proportionality analysis is commonly known as the necessity stage and its purpose is to ensure that “the legislator has [chosen] —of all those means that may advance the purpose of the limiting law— that which would least limit the human right in question”.<sup>631</sup> It is, in essence, a heightened extension of the second stage because it still focuses on the means which are employed to achieve a certain aim, except it now considers the possibility of employing other less drastic means.

A particularly interesting area of application of this stage will be workplace regulations related to the appearance of employees. If corporate image is deemed to be a proper purpose, this is where the extent of that purpose might prove to be more limited than might at first appear. Consider for example the airline policy in the case of *Eweida*<sup>632</sup> which restricted the use of

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<sup>631</sup> Aharon Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 317.

<sup>632</sup> *Eweida and others v the United Kingdom*, App. no. 48420/10 et al, 27 May 2013.

religious jewellery, or the cases of *Achbita*<sup>633</sup> and *Bouagnaoui*<sup>634</sup> which prohibited all indication of religious adherence. Are these regulations necessary to sustain a corporate image? Or are they overbroad in their reach? The answers to these questions will depend on how a company justifies its policy in particular. However, it is inevitable that the cost of uniformity will be borne by the employees' ability to express their own identities. When corporate image does not pursue uniformity but only ease of identification, the possibility of justifying the need for the measure will certainly increase. As the acknowledgement of the fundamental role that the workplace plays in people's lives and their ability to exercise their rights becomes more apparent, so will the need to respect employees' individuality at the expense of certain corporate interests.

In a similar vein, consider the case of *Amselem*.<sup>635</sup> While uniformity might seem an advantage in certain settings, it may come at an extremely high cost for some. And there is definitely a distinction to be made between the housing context and other more private ones —such as social clubs— where regulations of the sort at stake in that case may be more appropriate. Limiting the displays that one may place on one's own balcony for structural reasons is one thing: but an outright ban on all sorts of displays for the purpose of uniformity —or on the assumption that it will impact the market value of the property— seems too harsh when one accounts for the myriad of religious interests that this might be burdening.

In the prison setting, necessity should play a very important role in analysing the policies to which the state subjects those who are under its care. Policies that require certain appearance, such as being clean shaven, would not be able to overcome this stage in the analysis. As the SCOTUS found in the *Holt* case, it is a policy that cannot be justified because there are less onerous options.<sup>636</sup> The same can be said about prison diets: as the case of

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<sup>633</sup> *Achbita v G4S Secure Solutions* [2017] CJEU C-157/15.

<sup>634</sup> *Bouagnaoui v Micropole SA* [2015] CJEU C-188/15.

<sup>635</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551.

<sup>636</sup> *Holt v Hobbs*, (2015) 574 U.S. \_\_\_\_.

*Jakobski* showed, the possibility of enriching the options for inmates at no additional cost makes clear the lack of necessity in insisting on limiting dietary options.

As face-covering bans continue to multiply in Europe, necessity should be an extremely important component for determining their constitutionality. Blanket bans on face-covering can hardly be thought to meet the necessity threshold. More likely, only bans which refer to certain contexts would pass muster. Again, all regulations established in the public interest but without a strong tie to a particular individual right should be seen with some level of suspicion, and this stage would be particularly useful in filtering out those which do not meet this standard.

Much like in the case of the second stage, we see that the necessity analysis might serve to strike down some policies which a claimant would conceivably consider to be at odds with her right to freedom of religion or belief. This shows that, far from eliminating the bite of this right, the strategy I propose overlaps substantially and, in some cases, might prove to enhance, the practical results of past experience under the dominant approach. However, it does so without compromising the relevance of the principle of equal liberty. Instead of looking for bespoke, individual solutions for claimants, it is a strategy which focuses on the structural aspect of the situation before a judge. As such, it involves the issuing of remedies capable of benefitting the right to freedom of religion or belief of all persons who might also have an issue with a policy, not just the claimants.

However, the fact that this proposal delivers these results is, as stated before, only incidentally relevant. What matters fundamentally for the purpose of this project is that this adjudicative approach delivers on respecting the principle of equal liberty above all other concerns.

#### 4. Conclusion

The right to freedom of religion or belief under a liberal conception is best respected by acknowledging its scope in the widest possible terms. The diversity among individuals, and the authority that individuals have concerning what they consider to be ethically and religiously valuable, makes it undesirable and problematic to restrict its scope a priori.

A right of an equivalent scope has been the subject of judicial interpretation in several jurisdictions under the title of the right to the free development of the personality. Controversies concerning the right to freedom of religion or belief in the North Atlantic jurisdictions under consideration have been litigated under this other right in several other jurisdictions with great success.

I suggest that the last stage of the proportionality analysis deployed by courts in order to determine whether a right has been violated should not apply to cases concerning the right to freedom of religion or belief because it would replicate the problems I have identified in earlier chapters. However, this does not mean that the other stages of the proportionality test should be shunned as well. The tests concerning legitimate purpose, rationality, and necessity are perfectly compatible with the liberal conception. The legitimate purpose part of the test should be understood under a reason-blocking strategy which would allow restrictions aimed at protecting the rights of others but would not allow justifications premised on the preferability of some ethical alternatives over others.

## **Conclusion**

In this dissertation I set out to demonstrate an inconsistency between theory and practice. Specifically, the conflict between the liberal conception of the right to freedom of religion or belief and a particular approach to its adjudication, which I have termed dominant. In short, the difficulty I have laid bare consists in the judicial inability to legitimately submit the beliefs and motivations of claimants to the myriads of tests called for by the dominant approach while operating under a liberal conception of this right. The subjective vein that characterizes the liberal conception renders illegitimate the reliance on objective criteria to delimit the scope of the right and the motivations of claimants.

I defended this argument by, first, in Chapter 1, stipulating the characteristics of a liberal conception of the right to freedom of religion or belief. I explained that this conception is characterized by two tenets: first, that the politico-legal value of religion is instrumental, relevant only in light of the benefits that individuals accrue from the holding of certain beliefs and practices, and; second, that the individualism of this conception consists in conceding the authority that individuals have over the matter of what beliefs and practices should count as having that value.

Then, in Chapter 2, I offered an account of what I called the dominant approach to the adjudication of the right to freedom of religion or belief. I explained that what is characteristic of this approach is the submission of claims alleging a violation of this right to myriads of tests, seeking to establish two matters: first, the merits of the claimant's beliefs and practices, and; second, the claimant's motivations. Chapters 1 and 2, then, make up the backbone of the project by offering the framework against which the criticisms of chapters 3 and 4, and the proposals of chapters 5 and 6, are directed.

In Chapter 3, the critical analysis of the dominant approach begins by pointing out the tensions that exist between the desire to establish the merits of a claim and the two characteristics of the dominant approach. In this

chapter, I established that the weakness of this first feature of the dominant approach consists in betraying the reasons internalism that characterizes the liberal conception. Far from allowing for this sort of inquiry, the liberal conception's recognition of the individual's authority over her own beliefs renders it illegitimate. Moreover, because the liberal conception values religion instrumentally, the common reliance on proxies —such as traditional religious practices— is inconsistent with this conception. In other words, judges have no means of justifying a finding to the effect that a claimant's beliefs and practices lack the requisite merits in order to fall within the scope of the right to freedom of religion or belief. I closed this chapter by considering each of the tests that the courts considered in this dissertation apply in order to fulfil this first feature of the dominant approach and explained why each of them is problematic.

In Chapter 4, I proceeded to scrutinize the second feature of the dominant approach. I argued that reliance on sincerity tests is misguided because judges lack the evidentiary tools which would render this kind of exercise useful. I explain why this problem applies specifically to litigation under this right following the liberal conception, but not to all sincerity tests applied by judges in other contexts in order to reach a conclusion regarding the mental state of some party before them. In short, what makes this exercise problematic in this context is liberal conception's commitment to individualism. Moreover, this conclusion is fortified by the taking into consideration of the right to change one's religion or beliefs which is derived from the right to freedom of religion or belief.

After having established the shortcomings of both features of the dominant approach, I proceed to offer a proposal for the adjudication of this right which avoids them. In Part III of the dissertation, I argue that it is imperative to rethink the adjudicative strategy employed by courts that endorse the liberal conception of the right to freedom of religion or belief. In this dissertation, I have proposed a possible solution to this conundrum that remains faithful to the liberal conception. In so doing, I have argued in favour

of a judicial approach that does not submit a claimant's beliefs and practices to any form of evaluation in order to determine whether they fall within the scope of the right or whether the claim is adequately motivated. Moreover, this strategy also involves interpreting the scope of the right in the widest possible manner as a right to general liberty. In Chapter 5, I focus on the universal nature of this right in line with its personal element and explain why it is conceptually preferable not to determine the applicability of the right in the case of a certain person by trying to establish their actual interests. Then in Chapter 6, I focused on the benefits of understanding the right to freedom of religion or belief as a general right to liberty and gave example of the successful adjudication of such a right in several jurisdictions.

The solution to the problem that forms the basis of this dissertation is by no means exclusive. Another logically possible way of making right this tension is by proposing a revised account of the liberal conception of the right to freedom of religion or belief. This alternative, however, would entail the revising not only of political and legal theories developed in this area but, more widely, those that have become canonical formulations of liberalism across the board. The difficult and unpersuasive nature of this endeavor, I think, should instead incentivize the critical scrutiny of the current practice, as I have done here. If, as I have argued, the dominant approach to the adjudication of the right to freedom of religion or belief is grounded in a framework that takes exemptions for granted as the appropriate upshot of a successful litigation, then it is this premise that should be put under more stringent consideration. Here, I have tried to demonstrate that this feature is by no means inevitable by offering both a conceptual explanation and by revealing its *sui generis* character. Other arguments, however, can surely be put forth against this practice which has, until now, continued to develop without much resistance. From a political perspective, one objection that comes to mind when considering the wisdom of granting exemptions to individual claimants points to the fact that this remedy dissipates the political capital that might otherwise serve as a catalyst for legal change. In other words, if claimants who feel

directly affected by a particular law, policy, or action are exempted from this perceived injustice, they then lack the incentive to engage in the political forum to remedy this injustice for everyone else.

The precise form that the adjudication over the merits of claims following my proposal may take is still to be determined. Here, I have sought to sketch an account that defines the margins that the state cannot overstep without violating the right to freedom of religion or belief. There is, nevertheless, a fertile discussion to be had about the contours that the proportionality analysis should take in order to separate legitimate reasons for state action from that shouldn't be considered legitimate. This debate, in turn, will have to incorporate the controversy over the scope of the state's neutrality which, as I have displayed, remains a contested topic within the liberal tradition.

The spirit of this dissertation has been to contribute to making a reality that which Arcot Krishnaswami expressed in the following breathtaking quote:

The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces the world has ever known. But its full realization can come about only when the oppressive action by which it has been restricted in many parts of the world is brought to light, studied, understood and curtailed through co-operative policies; and when methods and means appropriate for the enlargement of this vital freedom are put into effect on the international as well as on the national plane.<sup>637</sup>

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<sup>637</sup> Arcot Krishnaswami, 'Study of Discrimination in the Matter of Religious Rights', *United Nations*, E/CN.4/Sub.2/200/Rev.1, 1960, vii.

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