Exemptions without Justice?

Liberal jurisprudence on religious exemptions and its political justification

Kim Igorevich Leontiev

UCL

MPhil Stud Philosophical Studies

Declaration

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

Abstract

Religious exemptions to general, neutral laws of uniform application abound in modern liberal states. No other category of identity or interest receives comparable exemptions-coverage or related differential legal treatment such as constitutional constraints (e.g. disestablishment) and/or accommodations (e.g. concessional taxation regimes). This differential or "special" treatment of religion in liberal jurisprudence and state-practice has, more recently, come under increased theoretical scrutiny. A prominent criticism levelled is that there is no distinctive and normatively relevant feature of religion which justifies this differentiation vis-à-vis close non-religious analogues such as certain "deeply-held" commitments of secular morality or individual conscience. Whether religion is indeed *uniquely* special or just within some broader category of protection-worthy interests, the underlying question here is: to whom and in respect of what should exemptions be granted? Yet, this question already presupposes that the contested exemptions are justifiable. Exemptions to protect core liberal freedoms from *directly* discriminatory or targeted interference might be axiomatic, but exemptions to counteract *indirect* or incidental burdens on some (minority) groups by otherwise legitimate neutral laws are far from normatively straightforward. The relevance of such exemptions to liberal justice, even their coherence has been forcefully challenged. After examining the arguably intractable nature of these puzzles, this dissertation considers the possibility of a lateral solution by recasting the issues in terms of liberal political legitimacy.

Impact Statement

This thesis aims to provide the groundwork for novel approaches to conceptualising exemptions to general, neutral laws of uniform application within the political liberal framework. Specifically, it advances the plausibility of a lateral resolution of theoretical debates regarding exemptions in contemporary liberal-state legal systems by recalibrating exemptions as predominantly coextensive with the normative limits to legitimate exercises of political power.

Within academia, this can inform and potentially redirect two current streams of scholarship: (1) political- and legal-theoretical debates on the differential liberal state practice in granting exemptions on religious grounds compared to non-religious analogues; (2) philosophical debates on the requirements of liberal justice and citizenship in response to cultural pluralism and group-differentiated rights claims. Since the novel approach advanced concerns debates within both streams, the thesis could link the scholarship more closely whilst also revealing considerations relevant to, but independent of, the current key points of theoretical disagreement.

Outside academia, the thesis offers insights which may be relevant to jurisprudence and judicial considerations on the constitutional limits of legislative and executive power in interference with individual freedoms or even to government more generally in terms of public policy and law reform on cultural and religious freedoms of private persons and voluntary associations. Principally, the thesis advocates shifting away from context-specific categories of exemptions granted in legislation or executive orders, towards less prescriptive and more inclusive laws alongside a paramount role for judicial oversight in enforcement action against principled individual objectors.

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

I would like to dedicate this thesis to the loving memories of my grandparents Lyubov Leontieva (née Gnedash) and Mikhail Leontiev who have always been firmly and spiritedly with me, but whose untimely passing occurred before I could let them know I've completed this journey.

Acknowledgments

I am indebted to several people over the life of this project. Special thanks to my primary supervisor, Véronique Munoz-Dardé who guided this project with remarkable prescience and energy and kept me focused till the very end. Thanks also to Ulrike Heuer, Rob Simpson, and Amanda Greene for the various discussions that launched and grew into this work. Finally, to my family: my parents, Igor and Nella, without whose support none of this would be possible, and to Jing whose indescribable patience and love carried me through every hurdle, without whom I would not have finished writing these words.

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Introduction

On April 28 1962, California police were drawn to a hogan in the desert outside Needles, some 400 kilometres east of Los Angeles. Inside the hogan were Navajo Indians drinking tea made from the buds of a spineless cactus plant of the genus *Lophophora williamsii*, otherwise known as peyote. The police moved to arrest all involved. The cause? Peyote is an illicit narcotic substance the unauthorised possession of which is prohibited under section 11500 of the California Health and Safety Code ('Code').

For the Navajo Indians, however, peyote is an ancient traditional plant with medicinal and spiritual properties the use of which as a sacrament in religious ceremonies has been recorded since at least 1560, in colonial sources.[1] Its transformative hallucinogenic effects offer direct contact with the transcendent or divine, which peyote itself embodies making it an integral and irreplaceable component of Native American Church (NAC) religious practice (Peyotism). Inadvertently, the Code's drug prohibition had proscribed sincerely-held religious commitments.

The dilemma before the California 2nd District Court of Appeal on these facts in *People v. Woody*[2] was whether an exemption in respect of such commitments should be granted. The majority affirmed the grant. However, confronted with a similar peyote case of its own, the U.S. Supreme Court famously (and controversially) disagreed – ruling, in *Smith*,[3] that the very same constitutional exemption was in fact not applicable to "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[4]

The jurisprudential tensions here are not unique to peyote cases nor the U.S. Constitutional context. Alongside various other public controversies from headscarfs[5] to services for LGBTQ weddings[6] and vaccination refusals[7] they are but one acute instance of the distinctively troubled question of the proper place of religion (and relatedly, conscience) within the (liberal) state.

[1] Anderson (1996), pp. 6, 155.
[2] *Woody*.
[3] *Smith*.
[4] *Smith* at 167.
[5] *Dogru*.
[6] *Ashers-Baking*; *Elane-Photography*.
[7] Ford (2020).

Much like the divided courts, liberal political theorists also hold markedly divergent views. For some, the nature of religion warrants both special constraints such as disestablishment from the state as well as special protections by the state – for example, in the form of legal accommodations and/or exemptions.[8] For others, religion warrants neither of these constraints or protections except to the extent that it (or any part of it) subsists within some broader category of protected interests. [9] Although some have found even this concession problematic, instead opposing special constraints and protections altogether.[10] Between these lie various other views distinguishing and alternating between the permissibility of special protections and constraints.[11]

While these views have chartered the logical territory as to how religion might be treated in accordance with liberal political morality, their debates have hitherto not managed to establish a clear normative position to guide the regulatory practices of liberal states. In fact, concerning the prevalent regulatory form of protection of religion in liberal states – exemptions to general laws – almost all of the above positions proceed on the presupposition that the practice of exemptions is, in general, principally justified within liberal states. Yet, exemptions to legitimate general laws are far from normatively straightforward let alone such exemptions on the basis of religious commitments (beliefs and/or practices) (I will refer to these as '**religious exemptions**' or simply 'exemptions' when context allows).

Religious exemptions therefore present a compounded puzzle (**Religious-Exemptions-Puzzle**) involving both the existential question as to the place of religion within the civil state and the more formal - but arguably, prior question - as to the justifiability of exemptions to legitimate liberal laws of general application. Yet, most views on the Religious-Exemptions-Puzzle have engaged with the first question alone. The situation is only further exacerbated when the coincidence of practical implications between those arguing against religious or like commitments being entitled to exemptions and those arguing against exemptions themselves blurs the underlying distinctions and obfuscates the broader debate. Ultimately, the debates end up entangled and laden with deep theoretical disagreements concerning foundational or otherwise intractable matters.

[8] E.g. Greene (1993); Koppelman (2017).
[9] E.g. Eisgruber and Sager (2007); Nussbaum (2008); Laborde (2017); Maclure (2018).
[10] Particularly: Barry (2001), but also Leiter (2013); Dworkin (2013).
[11] See Schwartzman (2012), (2017) for more comprehensive taxonomies.

This study addresses the Religious-Exemptions-Puzzle with broadly two aims. First, as suggested in the preceding paragraph - though not identically so, it seeks to clarify the Puzzle as actually comprising two distinct but interrelated puzzles. The puzzle about the justifiability of exemptions (in general) to legitimate liberal laws (what I will call the **Exemptions-Justification-Puzzle**) will be posited as logically prior to that about exemptions on the basis of specific categories of interests such as religious exemptions (what I will call the **Exemptions-Demarcation-Puzzle**). Second, focusing predominantly on the prior Exemptions-Justification-Puzzle, and after demonstrating the intractable theoretical disagreements therein, the possibility of a lateral solution will be advanced. The proposed solution is lateral in that it provides a practical resolution to the Puzzles in favour of outcomes consistent with religious exemptions – but not actually comprising grants of exemptions per se. As such, it does not actually answer the questions underlying the entrenched theoretical disagreements which may remain of speculative interest. Nevertheless, by reversing a common baseline assumption about the legitimacy of the application of legitimate liberal laws to exemptions claims, the proposed solution recasts the Puzzles in terms of political legitimacy and renders the theoretical disputes as to justifiability of exemptions largely superfluous. After all, whatever the answers ultimately might be, the proposed solution would continue to impose the same relevant limitations to what the liberal state may in fact legitimately do in any given exemptions scenario.

Importantly, this study makes no claim to a conclusive argument to the proposed further limits on liberal principles of legitimacy or a comprehensive resolution to either Puzzle. These would require more elaborate specification and argument exceeding the scope of this work. Nevertheless, the provisional account presented will establish the plausibility of the proposed solution thereby paving the way for such further substantive projects. This thesis is therefore intended as a preliminary groundwork for subsequent investigation and theory in these areas along the directions proposed.

Specifically, the thesis proceeds as follows.

The first part offers an orientation to the liberal framework and its general response to religion within a sovereign civil state. The Exemptions-Demarcation-Puzzle is then introduced through a discussion of the tensions between liberal political morality and liberal jurisprudence and regulatory practice. These tensions not only exhibit the enlivened practical imminence of the Puzzles, but also highlight the additional significance of exemptions not just as comparative

differentiators to analogous interests but also as innate differentiators setting extraneous limits on politico-legal rationales. From this, the first aim of clarifying the Religious-Exemptions-Puzzle as constituting two distinct but interrelated Puzzles will be achieved.

In the second part, the Exemptions-Justification-Puzzle is elaborated and the central challenge to exemptions presented as what I call the **Coherence-Problem**. As will be explained, since the Puzzles are largely endemic to the liberal-egalitarian paradigm much of the analysis is confined thereto. Accordingly, I will frequently draw on Rawls as the model version of these ideas, providing a condensed presentation of his main ideas where applicable. For the Coherence-Problem I shall daw on Brian Barry not only for the prominence of his arguments in the literature but also for their distinctiveness as primarily a reasons-disagreement with exemptions proponents unlike the more typical political disagreements from "right-wing" critics.

Lastly, in the third and final part, the possibility of the lateral solution is advanced by reference to the principles of political legitimacy within the liberal framework. Though this means the proposed solution is largely internal to this paradigm, this is appropriate given the Puzzles are too. Nevertheless, the solution's practical orientation to matters of actual regulatory practice in liberal states broadens its appeal.

Furthermore, as far as I am aware, there is presently no equivalent proposal for resolving the Puzzles posited within the extant literature. As mentioned, most scholarly treatment of religious exemptions presume exemptions to legitimate liberal laws are justifiable.[12] Cécile Laborde, for example, in her more recent major contribution to this scholarship, makes no formal distinctions within the religious exemptions puzzle but rather largely focuses on defending *religious* exemptions from a critique about their violation of liberal principles of state neutrality. [13] In an endnote to this, Laborde mentions something like the Exemptions-Justification-Puzzle as an alternative form of challenging religious exemptions before expressly declining to detail it further.[14] As such, Laborde's main contributions occur in terms

[12] The remainder construe exemptions through the prism of liberal justice alone. Apart from Barry (2001), Quong (2006) and Patten (2017) will be discussed.
[13] Laborde (2017), p. 201.
[14] Ibid., p. 307. at n2 Laborde writes: "Conclusion 3 could be reached through a different argument – for example an argument that purports to show that exemptions *per se* are incompatible with equality of the rule of law. Although I do not think those arguments generally succeed, I do not discuss them in detail here, as I focus on the specifically liberal egalitarian concern with religious exemptions *qua* religious."

of what I distinguish as the Exemptions-Demarcation-Puzzle and are not central to the aims of this study.

In this regard, the focus of this thesis will be seen as highly specific to questions about the practice of legal exemptions in liberal states and therefore largely orthogonal to the predominant debates on the Religious-Exemptions-Puzzle. Nevertheless, given the interaction and logical relationship between the Puzzles to be explained, as well as the prevalence of religious exemptions in liberal jurisprudence and regulatory practice, the posited possibility of resolving the Exemptions-Justification-Puzzle will also apply to the Exemptions-Demarcation-Puzzle which corresponds to the specifically religious dimension of the Puzzles.

Part I
Exemptions-Demarcation-Puzzle: Is religion special? The divergence of liberal theory and state practice

In the introduction it was noted that the Religious-Exemptions-Puzzle arises as part of a broader problematic as to the regulation of religion in modern liberal states. This Part provides an orientation to that problematic starting with the theoretical dynamics before moving to the concrete manifestations in actual liberal state practice. It then turns to religious exemptions specifically to introduce the Exemptions-Demarcation-Puzzle and clarify its relationship to the Exemptions-Justification-Puzzle.

1. Liberalism, religion and the theologico-political problem

The legal regulation of religion remains a distinctively troubled sphere of sovereign state governance both theoretically and practically in the modern world. In recent times, debates in the public sphere have raged with ever-increasing divisiveness. Some of these have already been observed, but there are more to be mentioned, and countless others still.[15] With each hosting their own specific facts and issues, there is a tendency to see these controversies like isolated fires requiring some political response. Concealed through this tendency, however, is a deeper underlying unity. A conveniently brief insight is offered through the aforementioned peyote cases. At first glance, the cases pose narrow questions of exemptions to a liberal law regulating certain narcotic substances. However, it might be observed that there are no parallel judicial dilemmas with respect to, say, the consumption of alcohol during the Christian Eucharist. Here, it might be said that alcohol is not proscribed because of its different (milder or safer) biochemical properties to peyote. Then again, the fact that throughout the Prohibition the Volstead Act specifically exempted alcohol in wine for "sacramental purposes" [16] undermines the previous conjecture. More importantly, it reveals that although the Prohibition may have been an exceptional period of Pietism compared to the permissive liberal norm, it would be too simplistic to characterise the norm as one of secular neutrality. Just as most Western liberal states designate Christian holy days as official public holidays, the prohibition on peyote and permissiveness on alcohol aligns with a moderate Christian stance in contrast to

[15] Smith (2017) offers a sample range.
[16] Title II, s3.

the regulatory approach in, say, a precolonial (Peyotist) state or even a modern Islamic state like Saudi Arabia. The point here is not that Western liberal states are covertly moderate Christian theocracies (a clear mischaracterisation) but only that questions about exemptions to general laws cannot be assumed to arise in a purely neutral political background.

This seems especially so in relation to religion. According to an initial global study in 2009, about 64 nation-states (32% of the world's total, but accounting for 70% of global population) had "high or very high" restrictions on religion[17] which has since annually increased.[18] The remaining 68% of states had "moderate to low" restrictions.[19] Restrictions of course do not indicate a lack of religious freedoms per se but perhaps an absence for some (disfavoured) religions. Similarly, greater freedoms might signify the suppression of incompatible fundamentalist sects or creeds incompatible with religious freedoms for others. Importantly then, and without distinction between liberal and non-liberal states, the unequivocal indication here is not the levels of religious freedoms, but the almost reflexive regulatory impulse towards religious elements not constitutive of the state itself. This seems to betray a deeper tension between civil and religious authority accounting for the distinctively troubled nature of religious regulation in sovereign state governance. While it is well beyond present scope to comprehensively investigate such overarching themes, the below overview provides useful contextual orientation to subsequent discussion.

An initial layer of the above complexity is already evident in the roots of liberalism itself. As John Rawls famously described, one of the historical preconditions of modern liberalism was the development within medieval Christianity of authoritarian institutional forms and expansionist, totalising, salvationist creeds.[20] When these splintered following the Reformation in sixteenth century, civil authorities were confronted with a new challenge: how to regulate multiple incompatible religious claimants competing for state-endorsement when the accommodation of any one would antagonise the rest. This reality of religious pluralism would eventually expand to include non-religious doctrines thus accounting for the so-called 'fact of pluralism' which remains the fundamental political and philosophical predicament of modern liberal states. Religion then appears as historical precursor or catalyst for the realisation of the independent political value of human reason, or that "belief matters".[21]

[17] Pew Research Center (2009).
[18] Pew Research Center (2019).
[19] *Idem*.
[20] (2005), pp. xii-xxiv.
[21] Mendus (2002b), p. 12.

While belief does matter, it does not always matter in the same way. Rawls may be right that the pluralism of religious beliefs leads to a political morality which safeguards the public realm or institutions of political cooperation from promoting any partial conception of the good, yet this narrow focus means that once the public sphere is secured from impermissible doctrinal determinations there is little difference as to one's attachment to their belief. If so, then the religiosity of the nascent pluralism of liberal states may as well be consigned to a historical accident - substitutable by any similar comprehensive belief-sets. Its historical accuracy aside, such an account underspecifies how beliefs matter beyond their conative dimensions as constituents of political consensus. It overlooks the pre-institutional importance of beliefs alongside their affective mode of belief-commitment. Indeed, whilst people hold thousands of beliefs, not all held beliefs evoke fervour, and even fewer justify immense suffering let alone martyrdom. And although it is true that reasonable citizens are expected to be and indeed are committed to the public conception of justice, this does not thereby render the mode of attachment or commitment to one's comprehensive belief as irrelevant. Thus, apart from the above-described salience in the realisation of the political respect of belief, there lie more fundamental features of religion in its relation to the state in terms of normative and jurisdictional sovereignty.

At its deepest, the equivocal status of religion in liberal states is not confined to the emergence of pluralism but stems from a foundational ambivalence in sovereignty itself. This might, following Leo Strauss, be termed the 'theologico-political' problem.[22] Though he never defines this problem in full, Strauss refers to the co-origins of the divine and the political. [23] Questions about the divine, transcendent or sacred arise in connection with questions about the origins of authority and law, and vice versa. As Steven B. Smith elaborates, civil-political authority and religious authority are foundationally intertwined; lawgiver and prophet are alike: simultaneously and innately both legislative and divine. And so, in separation, each lays claim to being the central source of normative authority[24] constituting the inherent tension between the political and the sacred (in divided form), or what Dane Perry calls the "dynamic" of an "existential encounter" between state and religious authority.[25]

Again, present scope allows but one key observation as to how, more fundamentally, *religious* belief matters when it comes to the relationship with the civil-state. Essentially, even if

[22] (1997), p. 453.
[23] (1964), p. 241.
[24] (2013), p. 389.
[25] (2018) pp. 145, 150.

conditions of pluralism necessarily confront the exercise of political power with questions of justice and legitimacy, religious beliefs raise all this to a superlative degree. The questions transform into those of a sovereign, theologico-political nature. They become questions of *divine* justice and legitimacy, *ultimate* reality and *eternal* damnation and/or reward.

Nor does any of this depend on a formal, institutional schism between civil-state and religious authority. So, for example, while Rawls hails Classical Greece as embracing 'civic religion' which unlike the aforementioned later developments made no competing claims to civil authority,[26] Sophocles's *Antigone* delivers a poignant counterexample as the eponymous heroine is tragically torn between the religious-like deeply conscientious devotion or filial piety to her ancestral line and her civic obligations to abide by the laws of the polis.

Antigone, alongside contemporary clashes between sovereign law and private religious commitments, confirms that the precursory liberal moves towards public harmonisation of civil and religious authority do not actually subdue the more primal and pre-institutional tensions. Thus, while the proclamation of *cuius regio, eius regio* at the Settlement of Augsburg (1555) might have meant that the temporal sovereign and the divine (or transcendent) sovereign order identically it offers no clue to the latent question: on account of which authority does one ultimately obey the coincidental command? Likewise, while the Peace of Westphalia (1648) alleviated the internecine European Wars of Religion by establishing the supremacy of civil authority as sovereign in a territorial realm, these are temporal matters setting the jurisdictional boundary between the neutral political concert of the public domain and the comprehensive enclaves of religious and conscientious interests. A pluralism of transcendent sovereigns still remains. Hence, with any political law come different implications to different individuals. For some, the duty to comply will be met with halcyon indifference. For others, it will present a tormenting legal and spiritual dilemma. Thus, regardless of any formal institutional schism and any political resolution thereto, the fundamentals of the theologico-political problem persist, making the regulation of religion distinctively controversial, including for contemporary liberal states. It is arguably from these conceptual gaps in liberalism's theorisation of religion that the special protections and constraints in respect of regulating religion arise leading to a divergence between liberal political morality and liberal state-practice.

[26] (2005), pp. xxi-xxii.

2. Regulatory Practice

2.1 Overview

That liberal jurisprudence and regulatory practice prominently protects and constrains religion has long been noted[27] and, more recently, critiqued in terms of the **differential** or **"special" treatment of religion**. Yet, with most scholarly commentaries confined to the U.S. constitutional context wherein the regulatory features are helpfully more emphatic, it might seem that the relevant claims about liberal state-practice have not been solidly demonstrated – especially outside the U.S. Thus, to the extent that limited scope here permits and with the primary focus still on exemptions, I will attempt to offer a more precise account of the underlying features of liberal jurisprudence and regulatory practices supplemented with non-U.S. examples.

What then, might the indications of the special treatment be? To begin with, freedom of religion constitutes a distinct international human right.[28] It is also enshrined in the constitutions of many of the world's major liberal democracies and in regional instruments[29] - although nowhere across these is it specifically defined. At the same time, liberal states appear far from homogenised in the legal forms of constraint and protection of religion. For illustration, while some liberal states constitutionally establish a particular religion (e.g. Judaism in Israel, Anglicanism in England, or the Evangelical Lutheran Church in Norway[30]), close to 40% contain constitutional clauses calling for "the separation of church and state"[31] (e.g. France,[32] Japan[33], Australia[34] and the United States[35]). Yet all this somehow helps rather than hinders: for despite the absence of definition and disparate formal expressions, the regulatory outcomes merge closer than the letter might suggest.[36] In practice, by preclusion through rule of law, liberal states do not substantively favour any one religion to the detriment of others. In this non-denominational sense, as a category of human-interest, religion forms the subject of regulatory practice exhibiting substantive convergence. Hence, it is in the legal record of actual liberal state-practice that the convergence on the differential treatment can be traced. Before

[27] Gedicks (1998).
[28] UDHR, art. 1, 18; ICCPR, art. 18.
[29] U.S. Const., amend I; CCRF, s2(a), *GG* art. 4; *Human Rights Act* (UK), art. 9; ECHR, art. 9.
[30] Cross (2015), p. 156.
[31] *Ibid.*, p. 166.
[32] Fr. Const. art. 1 (prescribing a "secular" Republic).
[33] Kenpo, art. 20.
[34] Aust. Const. s.116.
[35] U.S. Const., amend I.
[36] Scharffs (2018).

embarking on this survey of substantive convergence, however, it is useful to clarify the key regulatory forms or mechanisms involved.

2.2 Taxonomy

The standard way of taxonomizing these mechanisms is by reference to **Establishment** and **Free Exercise** corresponding to the names given respectively to the first and second of the U.S. First Amendment's Religion Clauses.

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

Free Exercise can be subdivided into *accommodations* and *exemptions*. Exemptions typically provide a legal excuse to what would otherwise be a contravention of a law. For example, a law requires the wearing of hard-helmets on construction sites but Khalsa Sikhs cannot comply without removing the turban and breaking their religious and/or customary observance of the *Kesh*. An exemption - whether within the same law, a different statute or by judicial grant – would allow them to lawfully enter construction sites without hard-helmets despite the mentioned law.

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

These distinctions may appear formalistic. Accommodations like the above or concessionary tax treatment may equally be construed as exemptions to laws which would ordinarily apply. Likewise, exemptions might appear as accommodations albeit ex post facto ones: had the law been accommodating in the first place there would not be a need for exemption. Generally,

then, accommodations might be interchangeable. Nonetheless, there is a conceptual distinction. Accordingly, my references to (religious) *exemptions* will vary between the general and more technical usage according to context and clarification. Relatedly, as a form of state-directed assistance, accommodations and exemptions may sometimes appear to merge into Establishment. Despite appearances, an adequate difference can be drawn in that Establishment is affirmatory – directing state action in the service of a sponsored religion – whereas accommodations and exemptions are primarily corrective or remedial in nature. There is therefore no comparable interchangeable use between Establishment and the Free Exercise forms.

2.3 Differential Paradigm

Returning to the earlier question, the exemplary starting point for explaining the special constraints and protections constituting the differential treatment of religion is the U.S. First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[37]

The wording here specifically and exclusively picks out 'religion' in relation to both Establishment and Free Exercise.

With regard to Establishment, religion is constrained in terms of the aid it may receive from the state. There is no like prohibition on state-endorsement of non-religious ethical or moral views. Even if there were ultimately a defensible rationale for this, the contrast is nevertheless extraordinary given that non-religious views can be just as controversial or divisive. And yet, as Micah Schwartzman points out, the Establishment Clause is indifferent to their governmental promotion provided there is no religious element: "if a state government can support gay rights, reproductive choice and gun control, why not also prayer in public school, creationism and displays of religious symbols?"[38] The Establishment Clause thus legally constrains, or disadvantages, religion in public life in ways not applicable to secular beliefs and practices.

Against this, it may be suggested that Establishment jurisprudence has moved away from the strict *Everson* "wall of separation"[39] doctrine with the more measured *Lemon*[40] and even stark

[37] U.S. Const. amend. I.
[38] (2012), p. 1353.
[39] *Everson* at 16.
[40] *Lemon.*

departure in *Mitchell v. Helms*[41] (allowing *direct* aid to religious schools was if equally distributed to non-religious schools) mutating the Clause from separation to neutrality.[42]

The neutrality interpretation, however, only extends to endorsements/exclusion of identities - essentially replicating or complimenting the protections of the Fourteenth Amendment.[43]Yet, as Noah Feldman [44] explains, when it comes to the inevitable democratic endorsements/exclusions through public policy (e.g. war memorials excluding pacifists or a Catholic majority state not practicing capital punishment) Establishment exclusively constrains religion or overtly religious endorsements like school prayer or creationism, as described above.

It is this core of Establishment that can be readily found in other liberal jurisdictions. For example, notwithstanding the far narrower judicial reading of Australia's near identical Establishment clause[45], core constraints on direct state-sponsorship of religious purposes such as chaplaincy programmes have been retained.[46] In Canada, where there is no express Establishment clause, courts have blocked Sunday closing laws[47] and prayer before council meetings[48] relying instead on *CCRF* 2(a), which offers a significant ambit for constraint as Patrick Jeremy highlights, labelling it Canada's "hidden establishment clause".[49]

Like Establishment, the Free Exercise Clause too singles out 'religion'. Hence, only religious beliefs and practices are protected. Notably, religion is the only of the freedoms specified which could, in principle, on its own (by virtue of religious practices) encompass all the other constitutional freedoms enumerated (namely, speech, movement, assembly and association) and further potential freedoms. There is no such analogue non-religious freedom stipulated.

Thus, in its seminal Free Exercise decision of *Sherbert v. Verner*[50], the U.S. Supreme Court ruled it unconstitutional for the State of South Carolina to deny unemployment benefits to a Sabbatarian on the grounds that she could have accepted employment requiring Saturday shift-work, but refused upon religious grounds. Since there was no law curtailing the claimant's religious practices the issue here was one of accommodation, namely whether the mere fact

[41] 530 U.S. 793 (2000).
[42] Laborde (2017), p. 29; Greenawalt (2008), Ch 3.
[43] Cf. *Brown*
[44] (2002), pp. 707-710, p. 723.
[45] S.116 Aust. Const.
[46] *Williams-1; Williams-2*.
[47] *Big-M-Drug-Mart*.
[48] *Freitag*.
[49] (2006), p. 36.
[50]*Sherbert*. Although *Sherbert* has been narrowed by the ruling in *Smith*, this applies only to the 'compelling state interest' test rather than the general principles of accommodation discussed here.

that the benefit denied (and by implication a burden suffered) was on account of religious convictions sufficed to invalidate the State's decision (in the absence of an overriding 'compelling state interest as was indeed found).[51] It helps to pause and reflect on this point. There are potentially multiple other reasons to refuse Saturday work some of which may even be of comparable importance to the claimant as observed by Potter J. in his telling example of a "mother unavailable for work on Saturdays because she was unable to get a babysitter" [52] As Justice Potter's example reveals, the multiple potential, important reasons like that of the mother would too have been denied, indicating that the State's decision here is *not* discriminatory in relation to religion, but applies equally to secular concerns of comparable or other importance. And yet, crucially, unlike analogous secular concerns such as of the mother, only the *religious* reason has the benefit of recourse to the constitutional remedy. Religion emerges privileged in legal protection over non-religious reasons of comparable weight. It is worth adding that though Sunday closure laws meant that Christian workers would not encounter this dilemma this discriminatory argument did not form the basis of the decision. Even if successful[53], the proper remedy for that argument would have been the invalidation of Sunday accommodation for Christians rather than the reinstatement of the benefit.

These indications notwithstanding one might question whether the constraints and protections described are actually specific or exclusive to religion. In regard to the first, the widely-quoted statement from Jackson J. in *West Virginia Board of Education v Barnette* comes to mind:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. [54]

Does this not recognise the constraint and protection of certain other categories? Perhaps some deep, meaning-conferring secular analogues of religion?

In regard to the second, other liberal constitutions often enshrine protection of 'conscience' and even 'thought'[55] appearing in conjunction with religion to comprise the same human right.[56] Could 'conscience', in line with *Barnette*, not dilute the characterisation of 'religion' as "special"?

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[51] *Sherbert*, 403-404.
[52] *Sherbert*, 416 (per Potter J., concurring).
[53] *Braunfeld* suggests it would fail.
[54] *Barnette*, 642.
[55] CCRF, s2(a), GG art. 4; *Human Rights Act* (UK), art. 9; ECHR, art. 9.
[56] UDHR, art. 1, 18; ICCPR, art. 18.

The concerns may be addressed in tandem since, much like religion, conscience is nowhere specifically defined. In part, this is because religion and conscience are far from definitionally straightforward. Yet, while religion might have some conventional usage that assists judicial consideration, conscience (save for perhaps its accepted use in pacifist objections to armed-service) is still less straightforward.[57] Whether based on objective moral doctrines, personal moral or doxastic convictions, conscience tends to be thought of as the secular counterpart to religion, but it need not be as its theological roots attest.[58] One might in this sense follow their conscience in coming to their religious faith, or hold non-religious convictions in conscience (on its alternate secular sense). Hence, just as with religion, the meaning and scope of protection for conscience requires construction through implementation and practice. And it is here that conscience in its non-religious sense (as I will use unless stated otherwise) has been legally recognised, [59] though in practice overwhelmingly paling in comparison to the protection of religion, as shall be seen.

To foreshadow this, recall *Barnette*. The quoted statement notwithstanding the actual legal basis for striking down the compulsory pledge and flag salute was not conscience or other non-religious analogue, but a combination of First Amendment Free Speech, Establishment as well as Fourteenth Amendment guarantees.[60] The protection of conscience thus appears derivative of its crucial role in the formation and interpretation of religious beliefs as well as thought more generally, which, in turn, is arguably guaranteed by being incidental to the First Amendment's Free Speech clause.[61] It is arguably in this compound and ancillary sense that conscience stakes its claim in the *Barnette* passage.

The foregoing has canvassed two prominent forms in which religion is specifically constrained and protected in liberal jurisprudence and state regulatory practice. Despite apparent variance in formal legal expression amongst liberal states and definitional absence, the legal record of implementation and practice discloses not only a core pattern of convergence, but also an exclusivity in treatment at least when compared to conscience as the closest secular analogue-interest. Though much more could be discussed for both Establishment and accommodations, the remaining survey turns to exemptions which, as shall be seen, are not only a pre-eminent form of differential treatment of religion, but also more richly problematic.

[57] See Smith (2005).
[58] Kukathas (2003), pp. 48, 70.
[59] Evans (2001), p. 53.
[60] *Barnette*, 633-34, 641-42.
[61] See for example *Stanley*, *Ashcroft*.

2.4 Exemptional Paradigm

Religious exemptions are truly abundant in liberal legal systems. According to one estimate, in the United States alone there are over 2,000 statutes containing a religious exemption to a general law.[62] In many liberal jurisdictions, religious exemptions cover a wide range of subject-matter from ritual slaughter of animals[63], employment[64], taxation[65], housing[66], road safety[67], intellectual property[68], antidiscrimination[69] and criminal laws[70]. It is hard to come up with another such unified category as specifically and diversely protected. Even legal safeguards offered to protected identities such as race, gender, sexual orientation or ethnicity, which primarily deal with antidiscrimination and are not comparable to religious protections in variety and scale. And again, confirming the ambivalence of the special treatment, it has been observed in this regard that religion is often not included as a protected category in general antidiscrimination laws thus leading to the peculiar effect of litigants framing religion as (secular) ethnicity in seeking protection from discrimination while framing ethnicity as religion in invoking exemptions.[71]

It is also here that we can find an even more emphatic contrast with conscience, which despite accompanying religion in constitutional or international instruments is invariably unmentioned in the various statutes granting religious exemptions. It is hard to overstate the significance of this observation for it very starkly marks a division between the aspirational realm of constitutional and human rights pronouncements and the more concrete realities of regulation. When it comes to specific rights across various regulatory subject-matter the free exercise of conscience gains virtually no instantiations.

Is this because of the difficulty in legislatively capturing the infinitude of various views that might be encompassed by conscience as a residual category to religion in the conventional sense? Or a more regimented effort by religious groups giving them greater democratic clout in the political lobbying process? These speculations, however, ultimately do not matter as the further differentiation of religion via judicial exemptions confirms.

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[62] See Bou-Habib (2006), p. 109.
[63] E.g. *Welfare of Animals (Slaughter or Killing) Regulations 1995* Reg 2.
[64] E.g. *Employment Act 1989* c. 38 (UK) s11.
[65] E.g. *Charities Act 2013* (Cth) s 5, s 12.
[66] E.g. *Equality Act 2010* c. 15 (UK) Part 4.
[67] E.g. *Road Traffic Act 1988* c. 52 (UK) s 16.
[68] E.g. *Copyright Act 1976* (US) s 110.
[69] E.g. *Equality Act 2010* c. 15 (UK) Part 2.
[70] E.g. *Criminal Justice Act 1988* c. 32 (UK) s 139(5).
[71] Barry (2001), pp. 33-34.

For a potent illustration, take the decision of *Wisconsin v. Yoder*[72] wherein Old Order Amish and Conservative Amish Mennonites were exempted from school attendance for their children beyond the age of sixteen which was otherwise mandated by State law. The decision serves as a Supreme Court reiteration of lower court pronouncements on the exclusivity of Free Exercise protections in respect of *religious* beliefs (and practices).[73] As the Court made clear emphasising the exceptional place of religion under the Constitution:

> A way of life, a however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation…if it is based on purely secular considerations; to have protection of the Religion Clauses, the claims must be rooted in religious belief.[74]

Thus, the religiosity of the Amish was the material factor as Burger CJ's comparison to the philosophical and personal objection from someone like Henry David Thoreau[75] reveals.

For another example of religious/non-religious differentiation one might turn to *Hosanna-Tabor*[76] - a Supreme Court confirmation of the so-called 'ecclesiastical' or 'ministerial exception', which essentially bars antidiscrimination laws applying to religious institutions in respect of membership and employment decisions. The ministerial-exception alone illustrates the significant privilege afforded to religious practices considering the legitimate, even valuable, objectives of antidiscrimination laws. Since there is no constitutionally recognised exemption for non-religious organisations, such an outcome is simply inconceivable in respect of a secular employer. And yet, as Schwartzman notes, submissions that religious groups are not entitled to protections beyond those analogously available under the Free Speech clause to non-religious expressive associations were expressly rejected, the Court noting the "special solicitude" under the First Amendment to the "rights of religious organizations".[77]

Against this, however, some might raise the two often-cited exceptions of the Vietnam War draft cases: *Seeger*[78] and *Welsh*[79] wherein exemptions were granted to claimants[80] expressly

[72] *Yoder*.
[73] McConnell (1990), p. 1417.
[74] *Yoder*, 215 (per Burger CJ.).
[75] *Ibid*, 216.
[76] *Hosanna-Tabor*.
[77] Schwartzman (2012), p. 1353.
[78] *Seeger*.
[79] *Welsh*.
[80] To avoid unnecessary complexity as to designation of the parties across original and appellate processes as well as jurisdiction-specific nomenclature, I use 'claimant' throughout as a generic term to denote the party seeking the relevant right(s).

professing their non-religious positions. Nonetheless, closer analysis yields a more circumspect assessment.

In the first instance, the exemptions granted were not Constitutional, but implied by statutory interpretation of the Universal Military Training Service Act (section 6(j)) which permitted exemptions where beliefs related to a "Supreme Being"[81]. It was not that 6(j) violated a Constitutional requirement to recognise (non-religious) conscience (Congress could have just as easily not provided an exemption at all or expressly exempted conscience[82]). Accordingly, the decisions already are technically limited to the interpretation of one statutory provision with only *indirect* implications as to the broader law.

Furthermore, despite the noncommittal nature of the claimants in *Seeger* and, in dazzling contrast, the professed non-religious affiliation in *Welsh* (a self-assessment the Court refused to accept) [83], the problem was considered the same. Essentially, the exclusion of religious beliefs not invoking a "Supreme Being" was held too narrow since the legislation intended to cover religious objectors. Ultimately then, the exemptions were granted not qua conscience but rather as a non-theistic or otherwise more expansively construed notion of religion such that, on some interpretations, conventional religions like Buddhism, Daoism or Confucianism might also qualify.

These cases point to the definitional difficulties in the concept of 'religion' even on conventional understandings. Though significant, this is a separate concern. Nevertheless, the notable observation here is that the above cases did not outright abandon 'religion' in favour of another designation. This reflects the deep entrenchment of religion in the First Amendment. As Michael McConnell points out, the exclusive mention of 'religion' therein is not accidental or contingent; the documentary history reveals that the drafters had at first considered adopting the language of "conscience" but in the Senate debates voted it down in favour of "religion", as the text now reads.[84] Indeed, as McConnell corroborates: "The draft cases of the Vietnam War era marked the only instance in the Court's history that it extended religious exemption to persons with essentially secular claims of conscience."[85]

[81] *Seeger*, 165; *Welsh*, 337.
[82] See *Welsh*, 356 (per Harlan J.).
[83] *Welsh*, 341.
[84](1990), p. 1488.
[85] *Ibid*., p. 1491, n420.

Similar observations may be drawn from the European context albeit in a more nuanced way given the required deference to state parties in this treaty jurisdiction rather that one underpinned by the sovereignty of a national court. Also, ECHR Article 9 differs from the First Amendment in protecting the "right to freedom of thought, conscience and religion" which is said to include the "freedom…to manifest…religion or belief".[86] Unlike 'religion', 'conscience' (and 'thought') is omitted from the second clause implying a distinction in law between the two sets. This leads to various conceptual difficulties such as the apparent protection of the manifestation of 'belief' (read as covering non-religious matters) but, strangely, not the holding of such belief. [87] The probable solution to this might be construing 'belief' as the intended subset of 'conscience' (and 'thought') – an interpretation in part supported by the French version of the Article wherein the slightly broader "*conviction*" is adopted over "*croyance*", which in drafts of the UDHR was used to indicate a closer relationship to religious belief.[88]

Even so, the solution remains unclear as to how 'religion' in the latter clause fits into the devised schema, and perhaps for that reason has not been expressly discussed in the caselaw. Rather, the European Court of Human Rights (ECtHR), has sought to maintain an open-ended approach.[89] Specifically, non-religious beliefs such as pacifism[90], veganism[91], atheism[92] and even less doctrinal philosophical convictions of sufficient cogency and seriousness[93] have all been recognised although again the case details leave a more circumspect impression.

In each case, the right, whilst being recognised, was ultimately not granted. The then European Commission of Human Rights ('Commission') has, much like the wording of Article 9, excluded 'conscience' from the manifestation of belief. Thus, in *Arrowsmith*, the distribution of pacifist leaflets was held not to manifest (the practice of) pacifism. The Commission's reasoning to find some delimitation between manifestation of belief and its mere motivation of conduct, even if correct, is risky in determining where the belief falls according to the Commission's idiosyncrasies[94] (and without a margin of appreciation to the subjective ground of the believer in each instance). Indeed, it may well be that were the claimant, say, an Evangelical Christian distributing similar leaflets with Biblical verses the Commission may

[86] ECHR, art. 9.
[87] Evans (2001), p. 53.
[88] *Idem*.
[89] *Ibid*., pp. 53-59.
[90] *Arrowsmith*.
[91] *W*.
[92] *Angeleni*.
[93] *Campbell; Cosans*.
[94] McCrea (2010), pp. 126-127.

have found manifestation, as, for example, in *Kokkinakis v. Greece*[95] where proselytism was recognised as an integral part of manifestation of religion in Article 9.

Even where manifestation is made out, the weight given to conscience raises similar comparative concerns. In *W*, a vegan prisoner refused to participate in mandatory work in the prison-run print shop involving animal-tested dyes. The Commission found the right to manifestation outweighed by the justification of the law and its proportionality to the aim of preserving order and fairness in the prison.[96] And yet, a comparable justification was recently found insufficient with respect to the manifestation of a *religious* belief in *Korostelev*[97] wherein a Muslim prisoner's nightly prayers contravened uniform prison sleep schedules and disciplinary actions were taken. That the religious prayer was sufficient to outweigh orderly uniform schedules while the vegan objections were not raises questions as to the perception of the comparative seriousness or inviolability of religious and non-religious beliefs.

Combined with the statutory record, the small but salient caselaw survey palpably substantiates the differential treatment of religion within the legal practice of liberal states. In practical terms, were a judge required to give an account as to why a religious law is unconstitutional though a similarly ethically contentious secular law is not or why a religious claimant succeeds while, under the same circumstances, their closely analogous secular co-claimant does not, they would find ample support in the legal record.

The comparisons here are important in highlighting the particular sense in which religion attains the differential treatment. It is useful to distinguish between religion being "special" in a (weaker) sense of prominence or importance and the stronger sense of being so exclusively, unlike other analogue counterparts – or, as Alan Patten puts it, "*uniquely* special".[98] It is arguably the stronger sense that the comparisons in the legal record reveal and the sense which I adopt by "differential" and "special" unless stated otherwise.

Having exhibited and clarified the constraints and protections for religion in liberal state practice as special, it now bears to consider what normative implications (if any) does this produce in relation to liberal political morality, which is taken up below.

[95] *Kokkinakis*.
[96] *W*, 4.
[97] [2020] ECHR 314.
[98] *Korostelev*.

3. Exemptions-Demarcation-Puzzle

If one were to ask: "must religion be special?" then, as a matter of law, the answer, based on the record presented, seems to be "yes". Yet, as Schwartzman explains, asking "*Is* religion special?" is a wholly different matter. [99] It is no longer a concern with law, but normativity: it is whether the differential treatment of religion can be justified as a matter of political morality.[100]

As indicated in the introductory remarks, whilst the broader question to religious exemptions might be about the place of religion within the (liberal) state, the somewhat exemptions-specific, narrower version, is what interests, identities and/or categories of circumstances should be entitled to exemptions in the (liberal) state? In other words, how are we to *demarcate* the *coverage* of exemptions or what I have labelled the 'Exemptions-Demarcation-Puzzle'. The underlying difficulty involved here is a risk of normative indeterminacy. Exempting against all interference with private and/or associational interests seems to undermine the coherence of law and legal obligation. Conversely, demarcating more particularly proves volatile between over-and/or under-inclusion. I will focus specifically on the interaction of this with religious exemptions.

By demarcating religion as a special category for the coverage of exemptions and denying exemptions to arguably analogous categories, liberal-state practice enters into the Exemptions-Demarcation-Puzzle from a normatively contested place. I will refer to this as the **Special-Status-Problem**, which can be described in either its negative or positive formulations. I start with the negative below.

As Schwartzman's question suggests, if this differential treatment is not to be morally arbitrary an adequate justification must be furnished. The justification requires identifying some *normatively relevant* feature of religion on which it can also be distinguished from all other (non-religious) analogous practices. So, for example, while religion might have certain qualities like conferring existential meaning these might not suffice to distinguish it from analogous secular philosophies or deep, conscientiously-held convictions. Likewise, religion also comprises less spiritually-charged, prosaic qualities or those which are conventional but not obligatory like singing carols or wearing a Star of David.

[99] (2012), pp. 1351-1353.
[100] *Idem*.

While there have been and remain attempts to justify the legal position on various bases including (but not limited to) the nature of religious commitments,[101] the extratemporal consequences of belief,[102] or even the protection of social cohesion from violent religious conflict,[103] these have become increasingly considered inadequate.[104] Effectively, there appears to be no credible way of distinguishing religion from other beliefs and practices not equivalently treated in liberal state legal systems. And so, the negative formulation of the Special-Status-Problem concludes that liberal state practice appears vulnerable to normative criticism.

In its positive formulation, the Special-Status-Problem arises from the divergence of liberal-state practice and the mainstream liberal (or, more surely, liberal-egalitarian) position. On liberal-egalitarian principles, religion is only normatively relevant as part of a broader moral category variously delineated as Equal Liberty of Conscience'[105] or 'ethical independence'[106] or other such designations of 'respect-worthy beliefs and activities'[107]. Within this broader category religious and non-religious beliefs are in effect comprehensive doctrines advancing their various particular 'conceptions of the good.'[108] Hence, what the category is ultimately concerned to protect (or constrain) is something like the "human capacity for moral and spiritual agency".[109] So, if, as Laborde explains, religion is effectively but "a subset" of this, then religious and non-religious goods are relevantly alike and should be treated as such (as 'egalitarianism' implies).[110]

With regard to Establishment, religion should be excluded from state-endorsement or sponsorship but only because each religion entails a conception of the good and all conceptions of the good - whether moral, philosophical or based in any other religious or non-religious view ('comprehensive doctrine') are to be so excluded. The liberal-state is to be neutral with respect to different comprehensive doctrines and their conceptions of the good. Likewise, with regard to Free Exercise, while religious beliefs and practices may be legally protected it is because these are ways of citizens exercising their ethical independence and pursuing the conception of

[101] Bedi (2007); Brownlee (2017).
[102] Nehushtan (2011), pp. 151-153.
[103] Gedicks (1998), pp. 563-565.
[104] *Ibid.*
[105] Rawls (1971), p. 205 ff.
[106] Dworkin (2011), pp. 211-213; 368 ff.
[107] Laborde (2017), p. 28.
[108] *Ibid.*, p. 13.
[109] *Ibid.*, p. 28.
[110] *Ibid.*, pp. 13-14.

the good, or life they hold valuable. Neutrality and equal liberty therefore require that where legal protection is granted to religion, it should also be granted to comparable non-religious beliefs and practices.

Combining the negative and positive formulations, the Special-Status-Problem becomes not merely about the justification-lacking divergence of liberal-theory and -state-practice but also a more complicated departure from the norms of political morality as construed on the mainstream current of liberalism, viz. the requirements of equality and state-neutrality in the treatment of the pluralism of goods.

Problematising liberal state-practice, the Special-Status-Problem both underscores the tensions described as the theologico-political problem and enlivens the Exemptions-Demarcation-Puzzle with imminent practical complexity. What is one to do about the impugned differential treatment of religion then? Two main approaches arise.

One could abrogate the various differentiations afforded to religion (**levelling-down**), or confer all the same on analogous non-religious claims (**levelling-up**). Thus, even those agreeing with the critical import of the Special-Status-Problem, come to different positions: Brian Leiter, for instance, opts for a rather stringent "levelling-down",[111] while Martha Nussbaum has advanced a more inclusive levelling-up for certain forms of conscience which (alongside certain religious convictions) are directed as questions of ultimate value and concern.[112]

Both have their complications. Apart from problematically maintaining protection for the more prosaic, conventional aspects of religion, levelling-up seems to simply revert to the Exemptions-Demarcation-Puzzle starting point: where to draw the line in a normatively relevant and real-world applicable way – averting anarchy and unrealisable regulation. Levelling-down avoids this complication, but by eliminating exemptions altogether it intersects with the Exemptions-Justification-Puzzle wherein the other complications await. Ultimately, while the Special-Status-Problem grapples with the differential regulation of religion and levelling-up versus levelling-down, the Exemptions-Demarcation-Puzzle still requires its answer as to what criteria (if any) should demarcate the coverage of exemptions.

And yet, everything discussed here has simply presumed that exemptions to general laws is a normatively defensible practice. From the peyote cases at the outset to now, however, this emerges as far from straightforward. It is here that in addition to their comparative prominence

[111] Leiter (2013), p. 100 ff.
[112] Nussbaum (2008), pp. 19, 168-174.

in illustrating the differential treatment of religion that exemptions gain their further significance in elucidating the Exemptions-Justification-Puzzle as a prior problematic of the two within the Religious-Exemptions-Puzzle, as the final section to this Part introduces below.

4. Exemptions-Justification-Puzzle

So far, the special treatment of religion in liberal state-practice has been traced *comparatively* with regard to non-religious analogues. Thus, the religious exemptions in *Yoder* meant the Amish would not be burdened by the general (school attendance) law unlike the wider community. Similarly, in *Hosana-Tabor* antidiscrimination burdens shifted from religious employers to their non-religious employees. In effect, the differential effects of exemptions translate to comparative benefits/burdens between the exempt/non-exempt which corresponds to religious commitments and non-religious analogues.

Though this comparative aspect of the special treatment occurs throughout all the considered regulatory forms, it is especially in exemptions that a non-comparative or *innate* special treatment also occurs. The general law of school attendance arguably serves the future economic and civic interests of the children, while disability antidiscrimination laws, the right to equal dignity. Both justifications for the existence of these laws seem neutral and publicly rational or otherwise legitimate. Put differently, adequate grounds for amendment or repeal would falsify the description just stated. Exemptions then are effectively limitations to such laws and the legitimate aims/rationales they serve. Nor are these limitations internal in the sense of being referable to the relevant aim/rationale. Rather, they are independent of it and grounded in their own rationale such as religious freedom which entails a balancing exercise between the respective weights of the counterpoised rationales. The significance of exemptions being extraneous to the matrix of legitimate rationales will be elaborated in subsequent discussion.

For now, the innate aspect to the special treatment should be apparent in the extraordinary weight assigned to religious interests over general laws and their legitimate objects. Indeed, it is difficult to imagine many other interests which would trump the educational interests of the child or the rights to equal dignity of a disabled employee. And yet, this is precisely what religious interests have managed, as the examples presented attest.

But not always. In contrast to *Woody* the refusal of exemption in *Smith* marked precisely the rejection of the extraneous rationale over that of the legitimate general law. These divergent judicial opinions neatly frame the **Exemptions-Justification-Puzzle**. The question here is against what kinds of state interference may exemptions be offered? The generally axiomatic liberal response is that only *direct* modes of interference warrant exemptions (or other suitable

legal protection) (**narrow-approach**). Yet, extending this principle to *indirect* or *incidental* interference (**broad-approach**) proves greatly controversial as will be seen.

Presently, however, it is worth clarifying that the delineation between targeted and incidental interference is not always clear-cut. For a borderline case, recall *Kokkinakis* where the characterisation of the interference depends on whether proselytism is obligatory or expressive (cf. baptism versus singing Christmas carols). And if obligatory is it nevertheless an unreasonable interference with the legitimate interests of others as the government argued? And even then, does the specificity of the ban on proselytism undermine its being incidental? After all, the drafting could have been more neutral in prohibiting other analogue forms of interference such as intrusive commercial or political methods like door-to-door promotions or lobbying.

These complications aside, on the narrow-approach the correct response is nullifying the aspects of the law which single out a religious interest whilst preserving the nuisance curbing aspects. It might also remedy unequal applications like neglecting the mentioned political/commercial analogues of proselytism.

Conversely, the broad-approach would grant a religious exemption in the above case and even others where the interference is incidental, like seen in the peyote cases for instance. That is not to say that the broad-approach necessarily supports a grant of exemptions in all cases. Indeed, so long as one does not endorse the narrow-approach, there is significant range of movement as to how liberally or sparsely exemptions might be granted.

Different balancing considerations would be involved such as weighing religious exemptions either against others' reasonable interests or against certain compelling state interests, as the case may be. Thus, one could in principle find religious exemptions appropriate to grant for Peyotism while not appropriate in discriminatory instances like in *Hosanna-Tabor* or concerning the (educational) interests of the child as in *Yoder*.

While in relation to the Exemptions-Demarcation-Puzzle, there has been much consistency on the differential treatment of religion, there has been less consistency as to the Exemptions-Justification-Puzzle. Liberal jurisprudence across different states and contexts has vacillated between the narrow- and broad-approaches. I do not intend to detail this more than already

seen in *Woody* and *Smith* other than to note that religious exemptions have been withheld typically based on the reasonable interests of others or compelling state interest.[113]

A curious feature of *Smith* in this regard is the insistence on the narrow-approach even though a grant of exemption would have arguably been harmless in terms of the legitimate interests of others and even the objective of the law itself.[114] The drug, after all, was not used or distributed outside the ceremonial purposes in the wider community and therefore would make no difference to public drug control intended by the law. This reinforces, however, that quite apart from the distribution of benefits and burdens or even harms, the narrow-approach appears grounded in the more fundamental principle of justifiability of disruption to legitimate ends of the general laws to which we shall return.

[113] See Evans (2001) p.149 ff. for further examples in the European context.
[114] McConnell (2013), p. 803.

Part II

Exemptions-Justification-Puzzle:

Liberal Justice, Exemptions, and Coherence

This part addresses the Exemptions-Justification-Puzzle. Regardless of the significant range of internal variation within the broad-approach, if exemptions to general laws are justifiable within the liberal-egalitarian framework validating more than the narrow-approach is required. An overview of the liberal-egalitarian framework and its basis for the narrow-approach will therefore be provided before arguments for extending to the broad-approach. The challenge of the Coherence-Problem is then examined as the pivotal hurdle to the broad-approach and argumentative driver of the narrow. This part begins, however, with a closer analysis of legal exemptions.

5. Exemptions

5.1 Overview

So far, multiple examples of exemptions have been encountered in liberal state statutes and caselaw and yet the basic but philosophically imperative question as to what exemptions actually are or what they entail has not been considered. This need not require a deep semantic analysis, but some specification of definitional coverage and operational mechanics.

Exemptions are normally understood as a specifiable limit to the application of an otherwise general rule. For example, all may X *except for* A(s), or all may not Y *except for* B(s). Inherently then exemptions create differentiation between those to whom the rule applies and to whom it does not. Yet, the same differentiation might be achieved *internally*, through the rule itself (without *express formal exemption*). Take for instance the rule: voting is compulsory for all citizens of eighteen years or older. The differentiation is internal to the rule itself which omits application to all under-eighteens and all non-citizens. This *internal differentiation* might also be called an *implicit exemption*.

Where a rule already contains internal differentiation, adding a formal exemption creates an additional layer of differentiation. Thus, if the above compulsory voting rule is paired with an exemption such as: “except for Anglicans” the effect would be that voting for Anglican citizens

older than eighteen is not compulsory unlike for all other citizens over eighteen. Since differentiation can occur more than once, and in different layers, analysing an exemption requires a clear identification of the differentiation (if any) internal to the rule itself and then whether this rule (including any internal differentiations) is applied uniformly or subject to formal exemptions.

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

What really matters about exemptions then essentially concerns differentiation. This means that if the relevant differentiation is normatively impugned then, in regard to the impugnment, it does not matter how or where (between rules and exemptions) the differentiation occurs. Yet, the distinction between implicit and formal exemptions still matters in at least this: when discussing exemptions, the validity of the rule (including any differentiations therein) must already be established. The principles on which validity is established need not be of concern here since all that matters for present purposes is that prior to discussing exemptions as differentiation to a rule there must be common ground (even if only for argument's sake) that the rule including any internal differentiations are already relevantly valid. Indeed, the validity of an exemption to an invalid rule is a rather specious concern. What must in each instance be identified then is the (presumably) valid rule (internal differentiation inclusive) and the formal exemption in question.

Armed with these clarifications, a trivial sense in which exemptions are problematic (as a layer of differentiation beyond what is valid for the rule) already emerges. What needs to be explained, however, is the kind of differentiation permitted and why. It is here that theoretical bases for the narrow- and broad-approaches are relevant in formatting the resulting substantive differences on these matters. Before embarking on this, a preliminary illustration is useful.

5.2 Illustration

The prima facie problem of exemptions is apparent. Introducing differentiation to a rule otherwise valid for uniform application triggers inequality, which is prima facie unfair. Implied here is that the combined class of exempt and non-exempt subjects are equal in all normatively relevant respects. To take a simple example, it might be that all full-time employees of company ABC are entitled to ten paid days leave per annum *except for* the IT staff and a selection of all and only good-looking staff from various departments. Both this selection and the IT staff are exempt from the '**10-days-rule'** but subject to the **'10-days plus-additional-two-days-leave-each-quarter-rule'**. The exemptions for these groups seem prima facie unfair. After all, what is normatively relevant for the different treatment of the good-looking or full-time IT (as opposed to say full-time accounting or consultancy)?

Suppose the rule was originally worked out by reference to cumulative total service hours of full-time employees. If it turned out that only the IT staff consistently exceeded this total due to extra work requests from ABC, and the exemption represents the relevant proportional adjustment, then the prima facie unfairness might be reversed for IT. The reason is apparent: properly construed, the rule as a relation between service and paid leave hours in fact remains the same between IT staff and other employees because of the explained differences. It is assumed that, except for the stated formula, there are no complicating factors - nothing else special about full-time leave entitlement being exactly ten days. So, it turns out that the prima facie unfairness in IT exemption is reversable in virtue of the inequality of hours worked. This in turn comparatively underscores the normative problem for the good-looking exemption which does alter the rule but only for some and in respect of seemingly irrelevant criteria.

But before moving on, let's retry the example with a further complication. Imagine that behind the dazzling veneer, the reality is not so rosy for the good-looking staff. For various reasons related to socio-cultural norms and subconscious biases/behaviours these staff are frequently time-drained from the cumulative effects of additional and/or longer interactions with co-workers, managers and clients as well as resultant stress, fatigue and like side-effects from these interactions. For argument's sake, assume all this has been verified by a number of scientifically credible empirical studies. These studies conclude that, for the mentioned reasons, workers over the relevant threshold on the "good-looking index" end up working on average two additional days per quarter. The question about exemptions might resurface. Would the earlier-mentioned exemption granted on these considerations be justified?

Unlike with the IT staff, there is no formalised consensual arrangement in relation to the extra hours nor directly related extra product-output. Nevertheless, the extra hours are there; some resulting in measurable additional output, some in intangible productivity or other value, while others not at all, but are only due to the detrimental side-effects. Invariably, however, the extra time and energy consumed means that if given only the ten days under the rule, these staff will be less rested or otherwise less well-off compared to other non-exempt staff unaffected by this 'complication' or any analogue thereof. Does this unequal effect of the rule make the rule unfair so as to warrant an exemption in this hypothetical complication? What about other less hypothetical cases such as employees who may also work more hours on account of a disability, family, or carer responsibilities or those who will be unequally impacted by the ten days rule because they will need additional unpaid days in respect of poor health, observing certain mores or religious obligations not falling on state-recognised public holidays or some other differentiating circumstances. As shall be seen, the answer to these questions converges on both the theoretical framework and the nature of the reason for the unequal effect or impact of the rule.

6. Narrow-Approach

If the prima facie complication of exemptions lies in the introduction of inequalities to a valid rule applying uniformly to subjects equal in all normatively relevant respects, then the corollary is that the uniform application is prima facie fair.

On the narrow-approach to exemptions, the corollary is satisfied by the principles of liberal-egalitarianism. Broadly, liberal-egalitarianism combines the original impulse towards maximising individual liberty in classical liberalism with a concern for equality as a necessary supplement to liberty. There are of course multiple theoretical forms of this general position. For our purposes, the task is to trace a conception of universal citizenship inherent to liberal-egalitarianism which underpins the narrow-approach to exemptions. Call this **liberal-egalitarian citizenship**. In pursuing this task, I rely on the Rawlsian account. I do so given its status as the seminal account of modern liberal egalitarianism endows it with centrality to much of contemporary liberalism.

As Rawls himself notes, his account belongs to a much older liberal tradition.[115] Whatever else this highly-diversified cluster of philosophical and political visions may be, liberalism centres on the normative prescription of individual freedom or liberty (which I treat interchangeably). Indeed, with the exception of J. S. Mill's instrumental rule-utilitarian liberalism, the original impulse of the classical liberal tradition is the "moral sovereignty of each individual."[116] Yet, this gives rise to a political problem for liberalism: if each individual is morally sovereign, how can *any* legitimately impose laws or coercive political power over others? Much of this political legitimacy problem is taken up in the final part where the centrality of individual consent and collective agreement linking the classical liberal and social contract traditions will be examined.

For now, just note that the main complication here concerns the basis on which such consent or agreement could be secured. Even after idealisation of when consent would *hypothetically* be justly obliged (or *unreasonable* to withhold) the deep disagreement as to what ought to comprise such hypothetical consent underscores that an imposition of one apparently reasonable solution will not be legitimate.[117] The Rawlsian question then, is what principles could serve as a basis of liberal justice, furnishing the basic structure of society and terms of fair social cooperation between individual citizens as free and equals.

[115] Rawls (1971), p. 11.
[116] Nagel (2003), pp. 63-64.
[117] Vallier (2011), p. 261.

Rawls's answer consists of just two principles of justice. The first, '**Equal Liberties**', aims to guarantee equal civil and political rights to all, stipulating that:

> each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties of all[118]

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

> first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least advantaged members of society (the **difference principle**).[119]

Together, the principles comprise Rawls's liberal-egalitarian theory of justice: 'Justice as Fairness' (**JAF**). While the two principles already reveal the combination of liberal and egalitarian concerns, it remains to be explained how they can secure the basis of collective hypothetical consent amidst reasonable disagreement. The explanation requires an overview of Rawls's procedural or '**constructivist**'[120] argument for JAF.

Rawls's starting point is the 'fact of pluralism': individuals adhere to differing moral, religious, philosophical or other conceptions of the "good" (collectively, 'comprehensive doctrines' or **CDs**). Coupled with the 'burdens of judgment' (**BOJ**) or variable obstacles to correct reasoning[121] this engenders the 'fact of *reasonable* pluralism', whereby even *reasonable* persons will disagree including on matters as central as justice or terms of social cooperation.

Overcoming the reasonable disagreement, as mentioned, is not a matter of asserting superiority of one CD. A procedure guaranteeing fair choice is required. In simplified terms, the idea here is that if the procedure through which the conception of justice is agreed is fair and reasonably acceptable to all rational and reasonable persons, then the selected conception of justice will be similarly acceptable.

The procedure or modelling device employed in realising this is the Original Position'(**OP**) wherein parties stand behind the 'Veil of Ignorance' (**VI**) which filters out information which would introduce unfair or unreasonable considerations (e.g. CDs, preferences, social-standing, natural endowments etc.). This results in JAF as an adequate response to reasonable pluralism

[118] Rawls (2001), p. 42.
[119] *Ibid*., pp. 42-43 (bolding added).
[120] O'Neill (2003), pp. 347-367.
[121] Rawls (2001), p. 35.

ensuring a basic structure of society wherein persons may cooperate as free and equal citizens.[122] Collective *hypothetical* consent is thus secured by modelling rational and reasonable choice, making JAF *unreasonable* to reject.

More specifically, in relation to Equal Liberties, since parties in the OP cannot know their actual inherent and social, or relational, characteristics committing to a configuration of civil and political rights skewed in favour of a specific CD or identity trait carries serious risk of living in an oppressive regime should they happen to hold the disfavoured traits or CD-informed personal ends. The gravity of such a risk arises not from the odds of "winning" or "losing" (which are anyway not known) but rather the fact that whatever outcome ultimately transpires it is an outcome one must honour over the entire course of one's life – what Rawls captures by the phrase "**strains of commitment**"[123]

Consequently, under the strains of commitment and behind the VI, the most rational and reasonable choice becomes Equal Liberties because only this principle ensures that each can pursue their own conception of the good. That is, it will not be discriminatory or targeted interference with a particular CD over others. Rather, laws and other exercises of political power will need to be neutrally justified on grounds which are in some sense 'public' or accessible to all. Laws or exercises of political power which can be thus justified without reference to any particular CD are thereby *reasonably* acceptable to all (or conversely, rejection of such laws is *unreasonable*). We can refer to this as **public justification** to which we shall later return.

Presently, however, the key observation is that Equal Liberties establishes basic constraints on state curtailment of individual liberties by requiring all political interference be neutral - preserving equality of civil and political liberties and legal standing amongst all. Critically, it also ensures that, in at least the core matters of justice, legal-political power can only be legitimately imposed if publicly justifiable so as to be reasonably accessible to all citizens as reasonable persons.

The parties in the OP would also choose to enact the Socio-Economic, principle given its crucial supplementary role. To explain, while classical liberalism had already sought to eliminate politically-imposed inequalities like serfdom, estates or castes, it failed to acknowledge status inequalities existing not by politico-legal imposition, but by the very

[122] *Ibid*., p. 16.
[123] *Ibid*., p. 29.

operation of the political freedoms which it espoused. [124] Recognising this, modern egalitarian liberalism aspires to safeguard against such structurally resulting inequalities. [125] A way of seeing this is through Rawls's notion of "primary goods" or "things that every rational man is presumed to want". [126] This is quite a diverse set of goods including natural endowments ("health and vigor, intelligence and imagination")[127] as well as *social* primary goods ("rights and liberties, powers and opportunities, income and wealth") alongside "self-respect." [128] Apart from goods determined exclusively by natural determinants, mixed or socially determined goods are configurable in relation to opportunities.

It is here that the second principle is relevant. The parties would, consistent with the strains of commitment, choose the Socio-Economic-Principle given it optimises liberty by safeguarding structurally equal opportunity and access to social primary goods. As seen, the social primary goods are necessary for the substantive or meaningful exercise of one's liberty in pursuit of autonomously set ends. Indeed, the social bases of self-respect are held to be especially pertinent to this considering the necessity of self-respect for self-determination.[129]

Perhaps with the exception of the 'difference principle' condition, the remainder of JAF represents the standard conception of liberal-egalitarianism. At its core are the equal civil and political liberties tempering individual liberty with an equal regard, and a concern for fair distribution of socio-economic goods (especially the bases of self-respect) which are necessary for the realisation of individual liberty to the extent compatible with the same rights of others. Encapsulated here is the unitary conception of liberal-egalitarian citizenship.

In what way, however, might this support the narrow-approach to exemptions? There are at least two main bases. First, most straightforwardly, in its unitary ideal, liberal-egalitarian citizenship rules out conferring privileges or special rights for only some but not others. As Brian Barry notes, liberal-egalitarian citizenship entails a "strong conception of equality of opportunity"[130] to avert structural inequalities from socio-economic factors and equal legal standing without "special rights (or disabilities) accorded to some and not others on the basis

[124] Nagel (2003), p. 64.
[125] *Idem*.
[126] Rawls (1971), p. 62.
[127] *Idem*.
[128] *Idem*.
[129] *Ibid*., p. 440.
[130] (2001), p. 7.

of group membership" [131] This reflects and reinforces the prima facie problem with differentiation discussed earlier.

But not only that. For apart from the disintegration of equal citizenship through differentiation, exemptions can also be burden-shifting. Consider, for instance, the prohibition on carrying bladed articles in public places under section 139 of the *Criminal Justice Act* 1988 (UK) which contains exemptions (inter alia) for "religious reasons".[132] Thus, while some citizens like the Khalsa Sikh may benefit from the religious exemption to carry a *kirpan* other (non-exempted) citizens may not arm themselves with blades in public and consequently assume a relative burden in the risk or disadvantage this entails.[133] As Barry argues, were there no advantage conferred to carrying a blade perhaps there would be no reason for the prohibition in the first place.[134]

It is also worth mentioning that since the very reason exemptions are sought is due to an incompatibility with the general law, the burden-shifting might even be sharper in clashing with the legal protection of liberal-egalitarian citizenship itself. As Christine Hartley and Lori Watson point out, cases of exemptions to antidiscrimination laws arguably undermine the equal standing of citizens who are objects of the exempt discrimination (e.g. gay couples refused wedding services or women refused contraceptive treatments).[135]

The second basis in support of the narrow-approach centres on Equal Liberties and Rawls's *political* constructivism as to the requirements of neutrality and public justification. The implication is that one's *actual* disagreement with a publicly justifiable law notwithstanding there will at least be *in principle* recognition of the reasonable acceptability of the law to oneself and all citizens as free and equals. Should this not be the case then, in principle, the law is arguably not publicly justifiable.

Accordingly, if a law is thus acceptable, then, regardless of its actual acceptance, the claim for exemption becomes superfluous to the normative principles on which the legitimacy or reasonable acceptability of the law is assessed. In the words of Hartley and Watson:

> If certain principles and laws must be justifiable to all reasonable persons as reasonable… then the idea of an exemption…seems peculiar. One requesting an exemption would saying

[131] *Idem*.
[132] See S139(5)(a)-(c).
[133] Barry (2001), p. 38.
[134] *Idem*.
[135] (2018), pp. 109-111.

> something like "yes, that principle or law is reasonably justifiable to *me*…, and yet, given my particular worldview, I should be exempted from compliance."[136]

By disarming such requests and denying differentiation between citizens either on identity or group-membership, liberal-egalitarian-citizenship installs the narrow-approach to exemptions. This, as mentioned, eliminates exemptions outright or, at best, relegates them solely to corrective amendment of impugned laws as previously discussed in relation to *Kokkinakis* and the hypothetical of ABC company IT-staff exemptions. Differentiation as to rights and liabilities is ruled out.

[136] *Ibid*., p. 99.

7. Broad-approach

Is there anything that might be said in defence of inequality or refusals of laws the grounds for which are unreasonable to refuse?

7.1 External perspectives

At the outset, it should be acknowledged that for some the very debate emerging here is already misguided in presuming neutrality and equality as the proper basis for liberal justice. Perfectionist-liberals, for example, would deny this. Clearly, neutrality cannot be absolute or value-free. This would be self-defeating for there would be no grounds for liberalism to restrict illiberal or unreasonable doctrines. There must then be some underlying reason for being neutral which stands apart and informs the mode neutrality should take. Neutrality, as Jeremy Waldron writes, is a distinctly "*political* virtue"[137] a normative value itself prescribing "what legislators…*ought* to do."[138] Yet, what should be the reason for citizens (or legislators) to prioritise neutrality over their actually held commitments? If one holds X to be right or true as opposed to Y and Z what possible reason could there be to remain neutral between the three choices? If, as Rawls insists, it is a moral consensus and not merely political expediency of the *modus vivendi*,[139] then what could support such a commitment?

The answer above was the constructivist procedure of rational and reasonable choice arguably rooted in the fundamental ideas implicit in the public political culture. Yet, as perfectionist liberals like Joseph Raz would argue, this remains strangely underspecified or incoherent. Raz points out that Rawls has defined the project of political philosophy in terms of "achieving noncoerced social unity and stability."[140] But, Raz continues: "why should philosophy contribute to these goals rather than others? Presumably because they are worthwhile goals."[141]And so, even though Rawls seeks to avoid evaluative truths, his account nevertheless implicitly accepts some presuppositions, like the above, as true.

This opens liberal neutrality to perfectionist critique. In brief, Raz's point is why be neutral amongst all CDs particularly those which make no contribution to human flourishing? Since flourishing or well-being is tied to individuals living autonomously then the point of neutrality need not be about justification at all. Rather, it need only ensure an adequate and qualitatively

[137] (1993), p. 155 (emphasis added).
[138] *Ibid*., p. 157 (emphasis added).
[139] Rawls (2001), p. 192 ff.
[140] (1990), p.14.
[141] *Idem*.

meaningful pluralism of values – these being necessary for cultivating autonomy.[142] As Raz puts it: "it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones."[143] Thus, though this does not condone coercive political power except in conditions approximating the Millian 'harm principle',[144] it permits a concern for consequential neutrality amongst different groups and citizens. So, if particular cultural groups were detrimentally affected by a general law, exemptions might be a perfectly valid solution of ensuring that the cultural interests are protected so as to continue to develop (provided that the interests are not inhibitive to individual autonomy). Since there is no overriding commitment to neutrality as a political ideal, it would not matter that this constituted an active endorsement (or discouragement) by the state.

Another notable challenge to neutrality and liberal-egalitarian-citizenship stems from what is loosely-bundled as the communitarian position. There are far too many separate strands of communitarian critique to detail here, but one key contention is with an apparent exclusion of culture and collective identity or 'community' from liberal-egalitarian accounts. Though the principles of justice derived from the constructivist procedure are said to be grounded in the implicit fundamental ideas of public democratic culture, for communitarians this presupposes a monolithic form of political community and the individuals therein as privatized, unencumbered atomistic selves.[145] It overlooks social-historical realities that modern pluralistic political communities are comprised of multiple cultural communities within which individuals as members of families and groups, attain a fundamentally embedded socio-cultural identity.[146] Seen this way, the principles of justice might be more accommodating of community values and cultural differences. For example, while the surveyed state-practice was construed as at odds with (liberal-egalitarian) political morality, from a communitarian perspective, with no overriding commitment to neutrality, the particularism of a political community's affinity for religious freedom might suffice to justify the practice.

Lastly, but importantly, the theoretical resources of perfectionist-liberalism and/or communitarianism have found specific deployment in the critique of liberal-egalitarian citizenship as failing to properly account for the socially and historically embodied cultural dimension of pluralism. This diverse loosely bundled set of theoretical responses might be

[142] Raz, (1986), p. 378 ff.
[143] *Ibid*., p. 133.
[144] *Ibid*., p. 412 ff.
[145] Forst (2002), p. 89, pp.110-111.
[146] Kelly (2002), pp. 1-3.

termed (*normative*) **multiculturalism** (in distinction to the socio-historical *fact* of multiculturalism).[147] Perhaps one way of condensing the diversity of the multicultural challenge to liberal-egalitarian citizenship is as follows:

> even where resources and opportunities are equal, the members of a group are entitled to special rights if their distinctive culture puts them in a position such that they are in some ways less well placed to benefit from the exercise of the rights that provide the standard resources and opportunities than are others.[148]

While this gives little insight into the rich arguments in support of these claims it highlights how multiculturalism's emphasis on culture as a distinct value makes it external to liberal-egalitarianism and a comprehensive doctrine of justice. With one notable exception, to be discussed below, the typical multiculturalist arguments derive from communitarian or perfectionist views outlined above and will not be individually considered.

And so, while the perfectionist-liberal and communitarian or even multiculturalist critiques provide a useful perspective as to the dependence of the Exemption-Justification-Puzzle on the contestable presuppositions of liberal-egalitarianism, I will not pursue these ideas any further.

The reason for sticking within the liberal-egalitarian framework is two-fold. First, there is no obvious advantage to attacking the framework as the equally protracted and complexly layered debates between the above paradigms attest. Second, focusing on the internal resources of a particular framework to address its endemic complications can make an important contribution to clarifying the framework itself regardless of how it ultimately fares. It is worth also mentioning the rather resilient and mainstream status of liberal-egalitarianism, including its reflection in many aspects of actual state practice - even if this happens to be based on expedience rather than political morality.

[147] *Ibid.*, p. 5.
[148] Barry (2001), p. 13.

7.2 Internal perspectives

What then might be the theoretical bases of the broad-approach *within* the liberal-egalitarian *framework?*

7.2.1 Luck-Egalitarianism

One such relevant source might be found in a stream of accounts concerned with the nature of distributive justice arising from Rawls's Socio-Economic Principle. These so-called *luck-egalitarian* accounts are characterised by their focus on counteracting certain effects of luck on distributive justice. Luck-egalitarians however differ as to what *forms of luck* distributive justice needs to be sensitive towards and as to the *currency* of distributive justice.

The standard distinction as to forms of luck is based on a dichotomy between circumstance and choice.[149] While luck is a pervasive force in human affairs, some of its effects can be anticipated or insured against through choices for which agents are responsible. Call this **option luck**. Other effects however are **brute luck**: they cannot be insured against. Most luck-egalitarians consider that distributive justice requires some mode of counteracting inequalities arising from brute luck, but not option luck which are deemed the agent's responsibility based on their *choice.*[150]

Rawls does not fit neatly on the above dichotomy. His 'difference principle' anchors socio-economic inequalities to the greatest benefit of the least advantaged. Part of the rationale for such a pattern of distributive justice is correcting inequalities which arise from liberty but are "arbitrary from a moral point of view".[151] For example, the advantages of the naturally endowed or the disadvantages of the handicapped are chanced or arbitrary in not being deserved. While this might explain the need for Rawls's difference principle condition, it might be considered that by compensating the least advantaged at the same level, it undercompensates those with greater costs owing to their brute bad luck while overcompensating those whose disadvantage stems primarily from their (poor) choices. Adding to the sense of insensitivity to the brute/option luck distinction, Rawls also appears to assert that justice does not require compensating those who are responsible for cultivating so-called 'expensive tastes'[152] – that is,

[149] Knight (2013), p. 925.
[150] *Idem*.
[151] Rawls (1971), p. 72.
[152] Munoz-Dardé (2015), p. 475.

requiring a greater share of primary goods to attain a comparable level of welfare to those with less expensive tastes.

Yet, this is expected since for Rawls justice does not require eradicating the effects of brute luck:

> the difference principle is not of course the principle of redress. It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race.[153]

As Véronique Munoz-Dardé explains, for Rawls, rather than neutralising bad brute luck, the aim is that its effects do not become integrated as systematic disadvantages, given their moral arbitrariness.[154]

The exegetical points aside, the luck-egalitarian distinctions disclose avenues towards justifying a broad-approach to exemptions within the liberal-egalitarian framework. The earlier hypothetical case of the ABC company good-looking staff exemptions offers a case in point. In general terms, a luck-egalitarian might argue that having no choice in their natural traits nor the socially-invested meanings and responses thereto, their disadvantages incurred are morally arbitrary. Being victims of bad brute luck, justice requires redress of these effects such as in the form of exemption to the general rule in favour of differential arrangements compensatory of their brute luck disadvantage. Yet, even setting aside the standard difficulties about how sharply one might delineate brute from option luck (including as to responsibility for overcoming or mitigating brute luck effects), there appears to be a deeper concern with such a justification. This concern is with the 'currency' of luck-egalitarian justice. To see how it alongside the limitations of brute luck problematises the justification, it helps to examine one prominent argument for exemptions proposed by Will Kymlicka. Kymlicka's account is multiculturalist, but, as foreshadowed above, exceptionally so in attempting to reconcile multiculturalism to the liberal-egalitarian framework. The above luck-egalitarian problematic can therefore be addressed concurrently with issues more specific to multiculturalism. In recognition of this hybridity, I will, following Jonathan Quong[155], refer to Kymlicka's position as **luck-multiculturalism**.

[153] Rawls (1971), p. 101.
[154] (2015), p. 475 ff.
[155] (2006).

7.2.2 Luck-Multiculturalism

While partly drawing on perfectionist-liberal and communitarian insights mentioned earlier, Kymlicka, unlike the communitarian multiculturalists, does not argue against the Rawlsian individualistic conception of the person and the exclusivity of individuals as sole rights-bearers. Instead, Kymlicka seeks to present 'culture' as an integral resource in the exercise of individual autonomy. Importantly, this does not necessarily imply a perfectionist-liberal commitment to autonomy as the intrinsic or teleological value of liberalism. That is, realising autonomy or becoming autonomous does not serve as an end here; it is but a capacity. Accordingly, in so far as persons have the capacity for a conception of the good – the ability to rationally form or choose and pursue a life plan as well as being able to revise it[156] - culture furnishes options and renders them meaningful to us, providing as it were a "context of choice" within which to both lead and scrutinise one's "life from the inside". [157] In this instrumental or resourcist conception culture could be conceived as constituting one of the Rawlsian primary goods "which people need, regardless of their particular chosen way of life".[158] If this is correct, then culture, like the primary goods, can be the subject of distributive justice.

Kymlicka distinguishes between 'multi-national' cultural diversity of incorporated minority societal cultures (e.g. aboriginal or national minorities) and 'polyethnic' cultural diversity of non-national, ethnic minorities (e.g. immigrants). The first have self-determination claims whereas the second claims to group-differentiated cultural exemptions/accommodations.[159] According to Kymlicka, while liberal-egalitarian citizenship protects basic associational rights via associational freedoms (e.g. assembly/movement/speech/conscience/religion) these difference-blind rights are inadequate to protect culturally-specific interests marginalised by politico-legal institutional practices of the dominant societal culture. As already noted in the discussion of religious exemptions, general laws may indirectly or incidentally burden certain minorities without affecting majorities. Take the often-referenced example of Sikhs being unable to comply with laws mandating motorcycle helmets whilst maintaining their religious/cultural practices of wearing a turban. Without special group-differentiated rights the Sikh are unequally burdened.

[156] Freeman (2003), p. 5.
[157] Kymlicka (1995), pp. 81-82; (1989); pp. 12-13.
[158] Kymlicka (1995), p. 214 n11.
[159] *Ibid*., pp. 10-11.

If culture is a resource subject to principles of distributive justice, then the inequality in burdens in such cases requires a response beyond the basic constitutional rights of liberal-egalitarian-citizenship. Applying the luck-egalitarian brute/option luck distinction, unlike being born into an unaccommodated national minority, immigration (excluding asylum and refugee cases) is generally a matter of choice and thereby option luck requiring no distributive redress.[160] While this hurdle is probably manageable through an intergenerational analysis of migration, more difficult is the objection as to why equal access to one's *own* culture is relevant?

As Quong observes, if culture holds instrumental value as a resource, the specificity of the culture is not, strictly-speaking, relevant and neither are differentiated group rights.[161] After all, why should assimilation in the dominant societal culture not equally serve to furnish its own meaningful options for one's self-determination? Kymlicka's response stresses the magnitude of cultural bonds and the various injuries to self-respect or well-being that such cultural severance carries.[162] That may be so, but the alternative of insuring minorities by way of differentiated group rights internally-contradicts Kymlicka's own instrumentalist resource-view of culture.

This brings us to an important point about the currency of luck-egalitarian distributive justice also relevant to the ABC hypothetical case above. Specifically, in invoking costs of assimilation Kymlicka raises a concern for equality in welfare outcomes between minority and majority cultures. Yet, this is an entirely separate ground to that of culture being a resource. To illustrate, consider the difference between something like healthcare and health. Where some are unable to afford medical treatment because of bad *brute luck*, distributive justice might require a certain level of free healthcare such as whatever might be the range of conventional medical treatments. What then if having benefited from all this, some bad brute luck affected citizens are still struggling to attain an average level of health? Unless we are specifically concerned with attaining an equality of *welfare*, the distributive justice as to equal healthcare *resources* has already been fulfilled. On the resource currency model, the remaining (outcome) inequalities are supererogatory to justice and might be a matter of charity or other pragmatic considerations. Given that members of minority cultures will be similarly dissatisfied with the burdens of accessing majority societal culture – all of which is orthogonal to whether equality of access to that societal culture is equal (for example, through generous assimilation

[160] Quong (2006), p. 55.
[161] *Ibid.* pp. 54-55.
[162] (1995), pp. 84-94.

programmes) – would Kymlicka's account not fare better by adopting the welfare currency of luck-egalitarian justice?

Quong discusses such a possibility with respect to G. A. Cohen's suggestion to this effect.[163] The likely problem with this revised possibility is that seeking equality of welfare rests on the questionable premise that there is something inherently unfair in unequal outcomes. As Brian Barry argues in relation to legal exemptions, inequality cannot be ipso facto unfair since if this were so no legal system could ever operate fairly in protecting reasonable interests. Laws, by their nature, will alter the totality of interests in any area of social interaction. Thus, nuisance laws protect the interests of those seeking repose at the expense of those with an interest in high-noise activities. Those who do not have this noise-making interest will only be nominally affected. Likewise, laws criminalising drink driving which will restrict 'drink-drivers' but not teetotallers. Speed limits mostly affect those with a penchant for fast driving. Smoke-free zones only affect smokers and so on.[164]

Furthermore, if, anticipating the potential objection, we exclude the patently unreasonable interests which are harmful to, or inconsistent with, the rights or reasonable interests of others, there is still what might be referred to as the problem of 'expensive tastes' (or interests). As mentioned, expensive tastes require comparatively more resources to be satisfied than the "mainstream"/"ordinary taste". The underlying problem is that natural variation between individuals means that welfare outcomes will be different regardless of how uniform or even tailored a state-of-affairs one might achieve through legal and economic means. This cannot mean, however, that each difference in welfare outcomes is problematic for justice. Option-luck, for example, already excuses many such outcome inequalities.

Even with regard to *purely* brute luck, it is arguable that the relevant currency of egalitarian-justice concerns only shares of resources or opportunities. As Barry advances, so long as individuals are afforded equal opportunity or "purchasing power" in accordance with their relevant normative entitlements then their free choice as to what to do with this and how successful they are as a result is arguably up to them and superfluous to justice.[165] Thus, in the ABC staff case, for instance, the equality of paid leave provides an equal opportunity for rest or personal activities for all full-time staff. This satisfies the non-discriminatory considerations of the narrow-approach. While bad brute luck (even if pure) may make some work

[163] Quong (2006), p. 56.
[164] Barry (2001), pp. 34-35.
[165] *Ibid*., p. 35.

proportionately longer compared to others this does not in fact affect the *equality* of the *opportunity* for paid time-off. If anything, it is satisfaction or welfare which is in question, with those more tired from the extra hours potentially overall less well-off on the same temporal leave-provision. But then the requisite considerations extend far beyond work-rest proportionality. Welfare equality would require extra paid leave for those who by pure brute bad luck simply do not feel ten days' leave sufficient or as satisfying as for others.

In short, for Barry, the problem in compensating expensive tastes lies not in whether the cause is pure brute luck, but simply in the currency of distributive justice being *outcome* equality. However, this is precisely the original point in contention. At best, the arguments are indirectly a disagreement over the possibility of *purely* brute bad luck expensive tastes. As Quong's example, of Dan[166] illustrates even if tastes are biologically or otherwise hard-determined, their "expensiveness" might not ever be purely a bad brute luck occurrence but involve a more interwoven set of factors from background socio-economic conditions, life choices and the influence of others.

We thus come to disagreements reaching deeply and resting on differences in key theoretical presuppositions or other foundational premises (**Deep-Disagreement**). Since my aim is not to resolve Deep-Disagreements, but only to track them, it suffices for now to observe that the luck-egalitarian and the multiculturalist foundations for the broad-approach seem dependant on (purely) brute luck and outcome/welfare currency of equality. Since the possibility of grounding exemptions on the basis of opportunity was discussed specifically in relation to culture, I will revisit this possibility in more general terms in the following chapter.

Before closing this chapter, I turn to one other notable attempt to found the broad-approach within the liberal-egalitarian framework from Quong. Since some of the argumentation presented here is also relevant for the Coherence-Problem in the next chapter, I will limit the discussion here to a preliminary overview of the proposal.

7.2.3 Revised Rawlsian Proposal

In contrast to the luck-egalitarian attempts to find a theoretical basis for the broad-approach by extending Rawlsian distributive justice to inequalities stemming from brute luck, Quong's proposal is to re-examine something like the Rawlsian systematic approach itself. In essence,

[166] Dan's taste for opera becomes "expensive" after his move to a rural area to pursue his preferred career as a vet (see Quong (2006), p. 57).

the account of liberal-egalitarian justice aims to ensure that "all citizens have a reasonable or adequate chance to pursue their conception of the good."[167] The emphasis here seems to be opportunity or rather the idea of "fair equality of opportunity", which like Rawls, Quong defines as: "when people with similar abilities and ambitions have the same chances of success."[168] Together the aim and definition seem no different to the Rawlsian account from which the narrow-approach was discerned. Despite this similarity, however, Quong insists that this in fact can "sometimes" justify "cultural exemptions from generally applicable laws"[169] – effectively the broad-approach.

The key, as Quong explains, lies in "something along the lines of Rawls's 'strains of commitment'"[170]. Revisiting this notion, Quong posits that justificatory neutrality or the public justifiability condition on legitimate laws requires more than just avoiding discriminatory intent. It also requires an impartial consideration of the distribution of benefits and burdens as an effect of the law.[171]

By extending the impartial reasoning requirements and strains of commitment to evaluating consequential disadvantages, exemptions might be reasoned permissible or even required by justice.[172] Essentially, the idea here is that differential treatment may be necessary to secure equal treatment.[173] Where this occurs, exemptions will be justified. Specifically, exemptions, Quong argues, will be a requirement of justice when the effect of the law or rule denies a minority the same opportunity enjoyed by the majority to "*combine their (reasonably cultural or religious pursuits with basic civic opportunities like employment and education*."[174]

Quong's proposal is certainly interesting particularly in its economical conceptual reliance on liberal-egalitarian (Rawlsian) principles and non-reliance on luck and the concomitant problematic distinctions between choice and circumstances. In this way, it reveals a possibility for the broad-approach without directly opposing but rather only extending or redeploying the very same theoretical basis from which the narrow-approach was drawn.

Since the external bases involve Deep-Disagreement with the liberal-egalitarian framework while the examined internal possibilities result in the same on distributive justice, this seems

[167] Quong (2006), p. 58.
[168] *Idem*.
[169] *Idem*.
[170] *Ibid*., p. 60.
[171] *Idem*.
[172] *Ibid*., p. 60, p. 58.
[173] *Ibid*., p. 61.
[174] *Ibid*., p. 62 (original italics).

to be a particularly promising broad-approach basis. The imminent complication however is the tension between the Rawlsian account presented and Quong's reinterpretation. Is either of these accounts evidently superior? Is either more internally and/or externally coherent? Can considerations about justice yield a credible solution to the Exemptions-Justification-Puzzle? In the following chapter I turn to explore these questions through the consideration of the Coherence-Problem which will reveal the further complications within the theoretical divergence between the different bases for the narrow and broad-approaches particularly in relation to the conceptions of opportunity and justifiability.

8. Coherence-Problem

Having canvassed the theoretical bases for the narrow- and broad-approaches to the Exemptions-Justification-Puzzle and seen the Deep-Disagreement over matters such as the construal of culture, currency of distributive justice between opportunity/resource or outcome/welfare, requirements of a certain level of consequential neutrality as to opportunities, I not turn to consider whether either of the approaches offers a more plausible or promising resolution. As a trenchant liberal-egalitarian critique of the very coherence of exemptions, the Coherence-Problem occupies a central place here as both a vital hurdle to the broad-approach and a key argumentative driver in favour of the narrow-approach. An influential presentation of the Coherence-Problem comes from Brian Barry although Barry does not specifically refer to it in my terms or within the current rubric. By tracing the Coherence-Problem in Barry's arguments and critical responses thereto this chapter will demonstrate further Deep-Disagreements indicative of the intractable differences between the approaches. This will clear the way for my alternative approach to a resolution to be taken up in the final part. Prior to all this, however, some conceptual preliminaries are in order.

8.1 Preliminary Distinctions

Previously, the essential feature of exemptions was stated as differentiation beyond that already comprising the valid rule. From this came the necessary assumption of validity of the rule in relation to a case for/against various exemptions. Yet, when the question concerns *general* principles of exemption-validity (e.g. whether exemptions on the basis of race or gender or age etc. are, in general, valid) an account of the requirements for rule-validity will be necessary to determine whether the proposed basis for exemption is defensible within that matrix.

From this, there are two distinctions to be made: the first addresses the fact that not all exemptions are *principled*; the second that not all principled exemptions will be *valid* in their principle.

The first distinction then is between **pragmatic exemptions** and **principled exemptions**. By pragmatic exemptions I mean exemptions which are ad hoc (not rule-universal). They stake no normative claim to being required or justified, claiming only expedience upon merits case-by-case. A shopkeeper might, for example, waive the 'no-late-refunds-rule' to avoid protracted argument or losing future custom, a government might exempt some illegal immigrants from

deportation orders to avoid untimely riots and so forth. Principled exemptions stand in opposition to this by their rule-like manner and normative claim in view of the relevant conception of justice or political morality. This makes them evaluable on the merits of their proposed principle rather than particular obtaining circumstances.

The second distinction arises from the previously-hinted significance about the rationale of an exemptions-regime being extraneous to that of the relevant law. There may be multitude principles on which a principled exemption might be sought: age, gender, economic means, ethnicity, health, certain abilities or needs, sexual orientation, professional qualifications, and more. Yet, as seen on the narrow-approach, only principles which are *publicly justifiable* could serve as *valid* principled exemptions and of course in this sense they operate not as exemptions per se, but internal determinants as to legitimate rationales of the relevant general law. These publicly justifiable principled "exemptions" are of course also part of the broad-approach which then further permits exemptions extraneous to this criterion, based on principles around identity or categories of circumstances. It might be useful, at least provisionally, to refer to the first type as **public-principled-exemptions** and to the second as **cultural-exemptions** wherein 'culture' should be construed in the broadest possible sense to encompass ethnic, gendered, religious, doxastic and multiple other identities and practices.

With the benefit of these distinctions, we can say that the Exemptions-Justification-Puzzle applies to all principled (not pragmatic) exemptions while the Coherence-Problem underlines that the only valid principled exemptions are public-principled-exemptions. The starting point in the argument then will be determining how to distinguish between whatever differentiation is permitted on publicly justifiable grounds (public-principled-exemptions) and exemptions (cultural-exemptions). Before that, however, let us briefly overview the Coherence-Problem on Barry's formulation.

8.2 Coherence of Exemptions

At its core, the Coherence-Problem states that since cultural-exemptions are not valid-principled-exemptions and all valid-principled-exemptions are already contained in legitimate liberal laws (by virtue of their public justifiability) the combination of a legitimate liberal law plus exemption becomes internally incoherent.

In its more acute form presented by Barry, the argument runs as follows. Either the law is legitimate and just – in which case there is no further principle for differentiation to its application – or not – in which case, the law itself should be amended or repealed in order to

be legitimate and just. Since, as explained, legitimate laws must be publicly justifiable the principled exemptions in relation to these laws must be too. And because public-principled-exemptions are already contained within legitimate laws there is no remaining valid basis for principled exemptions of other kinds. Thus, having a law together with a grant of exemption(s) – or what Barry terms a '**rule-and-exemption approach**'[175] is fundamentally incoherent. Once a law and its rationale clear all that is needed to be legitimate, it becomes incoherent to argue for exemptions. Not only are they superfluous and/or redundant, they might, as previously discussed, be potentially harmful through the inequalities borne and social cohesion undermined.

It assists to draw on two case studies to which Barry frequently refers. First, consider the enactment of laws across various liberal states mandating the stunning of animals prior to slaughter ("humane slaughter regulations")[176]. The public justification here comprises the legitimate collective concern with animal welfare and sufficient evidentiary basis that prior stunning offers an acceptably painless method of slaughter towards that welfare end. Again, as mentioned, the controversies of whether such a law is publicly justifiable need to be at least for argument's sake sidelined to consider the actual exemptions controversy: whether the laws' impact on Muslims and Jews whose respective halal and kosher slaughter practices cannot be lawfully implemented to produce consumable meat products justifies a grant of exemption?[177] Second, a case already encountered regarding mandatory helmet laws for motorcycles or prohibition of carriage of bladed articles in public places.[178] Though publicly justified (by promotion of road and public safety rationales), these laws burden Khalsa Sikhs, who for customary and religious reasons must wear a turban and carry a *kirpan* meaning that they cannot lawfully ride motorcycles (wearing a helmet) or lawfully attend public places (without possession of a bladed article).

For Barry, the incoherence of exemptions arises from a tension between, on the one hand, there being a reasonable, legitimate public objective which the law seeks to implement while, on the other, there being a claim which, despite agreeing with the above for all the relevant reasons, nonetheless holds that there are sufficient reasonable grounds to limit the said objective by exemptions to it. The claim is thus complicated in simultaneously accepting and denying the importance of the objective. Barry's summary in relation to the humane slaughter regulations

[175] (2001), p. 33.
[176] *Idem*.
[177] *Ibid*. pp. 33, 40-41.
[178] *Ibid*., pp. 33, 38, 44-49.

is instructive here: "(if we did not believe [animal welfare is better served by stunning], there would be no point in having the restrictive policy that makes stunning the rule)."[179] Things becomes sharper still in the second case where the nature of the objective is arguably more zero-sum in nature. If possession of bladed articles in public spaces compromises public safety then even a single instance of possession introduces the safety-compromising risk whether it materialises or not. As such, counterarguments that those not ill-intentioned are no threat while legal prohibition will not succeed in stopping the ill-intentioned anyway are irrelevant: possession carries risk regardless of intention - tragically often proved by unplanned alcohol-induced violence exacerbated by the possession of the dangerous article.[180]

Overall, whether the objective is zero-sum or progressive, the problem remains: each animal slaughtered without stunning, each unprotected head injury undermines the value at stake. Essentially, Barry's point is that if the underlying principle is of sufficient public importance to be (legitimately) legally sanctioned, then having exemptions undermining the very same principle is incoherent. Either the principle is of sufficient public importance as to warrant pursuit through deployment of legal/political power (and this can be done legitimately) or it is not (cannot). If it is, it ought to be uniformly applied to achieve the aim as far as possible, if it is not – and critically – if there is something of greater importance such as what a case for exemptions might reveal, then being coherent requires repeal or amendment to the law, but not retaining the law plus granting exemptions; the duality of the rule-and-exemption approach is incoherent.[181]

An obvious question here is why must we construe the attainment of the particular end in such absolute terms? Animal welfare is important, *but so are* kosher and halal practices; perhaps there is a road safety rationale for crash helmets but there is also one in respecting the rights of certain minority groups. Why should it not be possible for the law to balance these purposes by accepting a somewhat lower than maximal bar of achievement of the legally sanctioned objective owing to the counter-purpose vying for the exemptions? While zero-sum purposes offer a partial response here, Barry does not need to rely on them since the real reason exemptions may not serve as counterbalancing purposes is definitional in the public-principled-/other-exemptions dichotomy.

[179] *Ibid.*, p. 43.
[180] *Ibid.*, p. 53.
[181] *Ibid.*, pp. 40-43.

8.3 Legitimate Laws and Exemptions

Though Barry does not specifically discuss what makes a publicly justifiable rationale in relation to a legitimate liberal law, he does, in introductory remarks, explicitly acknowledge that his position on these matters is broadly Rawlsian.[182] Some of the Rawlsian account has already been explored including the idea of publicly justifiable laws being such as to be *reasonably* accessible to all and *unreasonable* to reject. This point was previously utilised to highlight the superfluity of exemptions. Though close, those arguments do not comprise the Coherence-Problem, which instead centres on the rationale of such laws.

What kinds of rationales might these be? As recounted, they must be founded on the principles of justice, thus guaranteeing basic rights and liberties constituting the social primary goods and a neutrality as to truth claims amongst reasonable CDs together with non-targeted or non-discriminatory intents or purposes. In effect, this precludes rationales which are arbitrary or inaccessibly justifiable to any reasonable citizens being imposed as legally sanctioned ends.

The key implication here is that whatever principled exemptions there could be involves the same public justification norms and processes applicable to the law itself. Therefore, the determination of valid principled exemptions occurs at the same level as the legitimate law itself. Essentially, whatever publicly justifiable exemptions there may be should already be reflected in differentiations within the publicly justified legitimate liberal law (or failing this constitute the grounds for amendment or repeal of the law, not grant of exemptions).

As Simon Caney rightly observes it is the above which allows for valid principled exemptions so often observed in legitimate liberal laws and not subject to Barry's critique.[183] Take for example a law prohibiting certain narcotic substances but providing an exemption for medical use or allowing arms for the military but not for civilians. In these examples, both the rule and the principle of differentiation are publicly justified. Harm to reasonable interests is regulated whilst allowing beneficial use for defence/health. Since health and defence/safety are interests which can command consensus or convergence of all reasonable CDs there is no violation of neutrality. And since there is no unequal differentiation but rather uniform application to all *qua citizens* there is no discriminatory intent or conflict with basic rights and liberties or justice.

By contrast, exemptions which arm a particular group on the basis of their cultural or religious identity directly undermine the public (safety) rationale while providing only a comprehensive

[182] *Ibid*., p. 16.
[183] (2002), p. 85.

doctrinal rationale for doing so. And so, in Caney's summary, exemptions present a rather improbable combination of requisite factors: "(1) there is a good case for a rule, (2) there is some reason for exempting some from this rule, *and* (3) this reason pertains only to some and not to all."[184] Part of the stringency in this combination lies in the fact that, as Barry notes, in respect of something like (3) the outcome is usually either/or: that is, the case for exemption reveals the law should be amended or otherwise repealed in favour deregulation and individual choice (the 'libertarian'[185] approach). There is no room, however for the legitimate law-plus-principled-cultural-exemption(s).

Perhaps so, but even if this is why the middle ground of rule-plus-exemptions is precluded, there might still be another worry. It seems that Barry's argument depends on an implicit premise that we must *exclusively* commit to publicly justifiable rationales even where a non-publicly justifiable rationale might be in some other way useful whilst not being especially detrimental to the public goal. The worry is about intransigence: why insist on either abandoning the law (and its public aim) altogether or complete uniformity?

Without delving into the principles of liberal legitimacy (which I have saved for the following part) to argue that non-publicly justifiable rationales cannot be legally sanctioned, the most straightforward answer to this objection is the following. Where there is no sufficient public reason (and need) to legally sanction the relevant objective, there is no normatively relevant reason for the law. Those supportive of the objective may pursue it (consistent with the equal rights of others) even without the legal requirement. Those supportive may even be the majority – serving an important reminder the public justification may be unavailable even on majority support. Lastly, none of this means that there are not other (non-principled) *practical* or pragmatic reasons for exemptions. Indeed, Barry specifically discusses the possibility of these '*pragmatic exemptions*' for "prudence or generosity"[186] such as in relation to the specific historical circumstances of Sikhs employed in the construction industry being exempt from safety helmets.[187]

Although Barry recognises that some exemptions might be pragmatically justified in the name of good social relations between cultural groups and social integration, he cautions against collapsing his position into the multiculturalist despite many similarities in practical import.

[184] *Ibid*., p. 84 (original emphasis).
[185] Barry (2001), p. 41.
[186] *Ibid.*, p. 39.
[187] *Ibid*., p. 49.

Even if in many cases owing to historically developed structural patterns and other political concerns exemptions are, on the balance of interests, preferable, the reasons remain paramount at least in so far as such exemptions are to be tolerated until more optimal solutions are available and there at least ought to be no extension of exemptions to new cases.[188] Pragmatic exemptions, after all, operate on a case-by-case basis and not as a matter of principle as the exemptions with which we are primarily concerned.

Might all this feel formalistic or even circular? After all, what is the difference between amending a law to incorporate a difference or simply adding it as a formal exemption? On closer examination though, there is an important dimension. Consider the example of exemptions claims to Sunday closure laws for those burdened by the double economic impact of having to close for both Sundays and another religiously prescribed day. On Barry's view, if these groups argue for an exemption on the basis of their CD-guided requirements, there is no public justification for the grant. It might be, however, that the law is discriminatory in its intent to privilege the Christian majority over other religious groups. Perhaps on this basis the law violates non-discriminatory norms and is not legitimate in the first place. Yet, suppose that the law is legitimate because there is no Christian majority or a different day is prescribed. The question of public justification becomes even more critical. If the public justification is to mandate a day of rest for every six days worked then it will turn out that there is in fact no public justification for '*Sunday* closure' as opposed to 'any day every six days closure'. The law should be amended to reflect this – for instance, allowing everyone to pick any day of closure so long as it is no more than six working days apart. The amendment would satisfy the exemptions claims on publicly justified grounds rather than comprehensive ones. The critical upshot here is that prior to an exemptions-claim the legitimacy and public justification of the law and its rationale must be secured against scrutiny. The exemptions-claim might turn out to be partly an indication of a flaw in the existing rule on its own rationale.[189]

8.4 Coherence and Justice

The foregoing has outlined the Coherence-Problem and clarificatory concerns. The below now turns to substantive debates.

[188] *Ibid*., pp. 50-51.
[189] Cf. Caney (2002), pp. 88-90. Things are of course more complex if the rationale is to provide a *uniform* day of rest for the political community. This would require a more intricate argument around choice of day and purposes of uniformity etc.

8.4.1 Liberty of Conscience

A first imminent challenge might be why were cultural reasons consistently excluded from being public reasons? Though the answer may, at first, seem obvious owing to the particularism of culture, one could argue for a universal interest in culture publicly justifiable as a reciprocal cultural advancement between minorities and majorities. After all, are the stock public interests like health and safety any more universal or significant? Indeed, could the exemption-seeking minorities not rely here on something like Rawls's 'liberty of conscience' which he frequently described as what no reasonable CD would reject. [190]

The problem with this challenge is that though public justification extends to liberty of conscience, religion, perhaps even culture it does not extend to the contested exemptions for the same reasons as the failed legal challenges as Barry discusses.[191] In brief, the failure results from the key fact that the law was not restricting any religious practice but only restricting the ability to produce certain kinds of meat products or ride motorcycles without wearing a safety helmet. Things might have been different if the law simply prohibited turbans or proscribed kosher and halal slaughter whilst allowing sufficiently similar slaughter for others. The counterfactual highlights the critical distinction along which public justification extends. Protecting cultural identity under conditions of pluralism requires ensuring a mutually compatible scheme of protection or liberty for all, not singling out some either adversely or beneficially on the basis of identity/culture.

8.4.2 Opportunity

Although, as just mentioned, the uniform legitimate law does not directly target cultural interests, the incidental effects do burden them through unequal impacts as seen in the case studies. If the inequalities materially affecting cultural minorities are, on Barry's account, possible from legitimate laws does not disregarding this implication compromise his argument?

As previously observed, Barry is not alarmed by such implications because like the problem of expensive tastes, these inequalities concern outcomes or welfare which he argues cannot be the relevant metric of distributive justice even where the discrepancies of outcomes are based on pure brute luck. It was also noted, however, that Barry's foundational assumption of opportunity as the relevant metric is not established either. That is, the disagreement here is foundational and leads to debates over justice more generally.

[190] (2001), p. 28; (1971), p. 483.
[191] (2001) pp. 43-54.

One might, however, pursue an alternate course: agreeing with Barry that opportunity is the relevant metric, but deploying it to argue for exemptions on the basis of inequalities of opportunity incidentally imposed by uniform laws.

This, as seen in the last chapter, was part of Quong's strategy in arguing for a Rawlsian liberal-egalitarian argument for exemptions over exemptions arguments on luck-egalitarian accounts. The merits of this argument against Barry and the Coherence-Problem will be explored below. Before that, however, it will be necessary to say something about why Barry holds cases like the humane slaughter regulations and the helmet or bladed items laws as matters of welfare rather than opportunity.

(a) Barry

Expensive tastes are "expensive" contextually. They are preferences which cost more to satisfy in the relevant circumstances. If one is only satisfied by spacious homes one will find it costly to buy or rent in a crowded metropolis. Will the taste become inexpensive if the required spacious-sized home is sought in a smaller town where the cost per square metre is drastically cheaper? Fiscally it might, but not in principle because presumably the individual in question would be limited as to where they can live and work to fulfil this taste. In other words, satisfaction of this taste is expensive because it requires a relatively larger trade-off whether in location, work, or monetarily or with other preferences. But is this also what is going on in Barry's case studies?

Compare the original case-studies with a modified version wherein the relevant groups could lawfully engage in the activity but only by paying a special levy or higher insurance premiums. Does this modified version not more closely conform to the concern with outcomes given that the disbalance lies in the expense or burden of the activity rather than access to it as in the original case-studies? Does this not disclose an error in Barry's presentation of the cases as being about welfare of affected groups (when in fact it is about opportunities)?

For Barry, both the original and modified cases are alike concerned with outcomes. To illustrate, Barry contrasts an individual unable to drive due to a disability and another because of the tenets of their religion.[192] Only one of the individuals truly lacks an opportunity to drive and that is the disabled individual. But why? To discover this, take a third case as the undisputed opportunity-present case such as an individual who chose not to learn driving despite having

[192] *Ibid*., p. 35.

and continuing to have all resources to do so. Unlike this third case, the disability case involves absolutely no choice. Yet, the same seems to hold for religion.[193] Beliefs and even preferences are mostly not a matter of choice. Still, is there not something alterable about beliefs and preferences that is not so when it comes to disabilities? This seems true. As Barry himself states, beliefs are sensitive to evidence and arguments, people are able to scrutinise their beliefs and change them just as they can cultivate or change held preferences.[194]

Nevertheless, this proves to be an inadequate dissimilarity. While, unlike disability, beliefs and preferences may be alterable this feature is merely potential because, as Barry points out, simply deciding to change one's preference or beliefs (not matter how weak or strong) does not of itself guarantee one can succeed since it is not subject to or controlled by the will alone.[195]

The mistake above is the focus on the individual subjects rather than the objective state of affairs. As Susan Mendus observes, the real distinction involved is something like whether the opportunity is objective or subject-dependent.[196] Objectively-speaking, the disabled individual in our example cannot drive at any cost whereas the religious counterpart actually can drive albeit at significant personal, even spiritual, cost. The magnitude of the cost involved is the only difference with the third individual who also has the opportunity. Thus, it is not that belief or preference is unchosen or even that it is potentially alterable unlike disability. On Barry's account, the crucial point is that a believer *can* avail themselves of the opportunity to drive (by violating their creed) yet there is no such sense in which a disabled person has an opportunity to drive. Their (lack of) opportunity is not subject-dependent, but *objective.*[197] As Barry expressly argues, it is not the law mandating crash helmets but the tenets of their religion which prevents the Sikh from lawfully riding a motorcycle.[198] Likewise, it is the kosher and halal requirements (choice notwithstanding) that prevent consumption of legally slaughtered animal products, not the humane slaughter legislation.[199]

Barry's objective view of opportunity is certainly stringent. Surely, an opportunity only available at severe personal (or spiritual) cost is not a genuine opportunity at all making it

[193] It might be argued that adopting or converting to a religion is chosen. This may be so, but assuming the faith is authentically held, the choice of being initiated into the religion flows from prior unchosen beliefs.
[194] Barry (2001), p. 36.
[195] *Idem*.
[196] (2002a), p. 33.
[197] *Idem*.
[198] Barry (2001), p. 45.
[199] *Ibid*., p. 35.

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

None of this is to say that these difficulties are insurmountable, but to reveal Deep-Disagreements on the nature of justice and opportunity involved here. Even upon favourably clarifying the above concerns, the proposal to grant exemptions on the basis of equality of (subject-dependent) opportunity would then need to answer Barry's further critique that granting exemptions to alleviate the burdens of uniform laws creates inequalities between those who now have a special right or privilege where most do not. Granting an exemption for an individual to take a normally written examination verbally on account of their disability simply enables them to do what they could otherwise not do which others can. This differs from relying on subject-dependent opportunity to grant an exemptions to Sikhs to carry a *kirpan* or ride a motorcycle without a helmet because, as Barry points out, doing so results not in the Sikh being enabled to do something that everyone else could do without the exemption, but rather doing something that others cannot do.[200]

(b) Quong

Quong's reconceptualised liberal-egalitarian argument, previously outlined, is interesting in opposing Barry whilst concurring on opportunities as the relevant determinant of the justice of exemptions. More interestingly, while Quong disagrees with Barry's objective account of opportunity, he simultaneously sidelines such disagreements, acknowledging, as I have above,

[200] *Ibid*., p. 38.

the unsuitability of these theoretical disagreements to resolving questions of political justice, which must be able to navigate reasonable disagreements such as these.[201]

Quong argues that even if we accept Barry's account of objective opportunity, laws which force one to choose between their cultural commitments and basic civic opportunities violate the fair equality of opportunities (an equality Barry endorses). Quong draws comparison between two aspiring police officers: a Protestant, and a practicing Jew.[202] In the example, the police department requires everyone to work a certain number of weekends given the unpopularity of those shifts in voluntary up-take. While this might be a drag for the Protestant, for the Jewish candidate this is impossible without breaking their religious obligations on the Sabbath. Consequently, there is no real prospect for a Jewish candidate to pursue a police career. Barry's dismissal of this as a subject-dependent opportunity is too narrow because the opportunity, Quong insists, is not simply police employment but the opportunity of combing such employment with one's reasonable cultural commitments.[203]

By reasonable here, Quong means a fair share of opportunity relative to others. That is, where each worker is entitled to some time off, someone with extensive cultural commitments is not thereby entitled to more time-off, but only the choice of when to take their equal share of time-off regardless of the burden-shift to others[204] (**Fair-Share-Rule**). In this way, the Jewish candidate would presumably simply be rescheduling their shifts without thereby accumulating an unequal share of opportunities.

We might question how accurate the 'no advantage' assessment here is considering there was no voluntary up-take of weekend shifts in the first place. Yet, leaving this aside, one might wonder whether the distribution of weekend work might be settled by consensual arrangements not unlike the scheme Quong himself describes on time-off above. The fact of pluralism could itself yield candidates that would choose Saturday work because of commitments on other days which others like Jews or Sabbatarians could fulfil. In short, the public justification of compelled burden shifting in the Fair-Share-Rule depends on there really being no non-mandating options for distributing or incentivising the unpopular shifts. If a more dire context really permitted public justification of Fair-Share-Rule, then, consistent with the Coherence-

[201] Quong (2006), pp. 62-63.
[202] *Ibid.*, p. 64.
[203] *Idem*.
[204] *Ibid.*, p. 66.

Problem, there indeed would be no public justification for exemptions to another rule (like compelled weekend shifts) either.

Yet, why accept Quong's wide conception of opportunity? Quong presents this as a reading of Rawls's OP wherein the parties would choose so if the other two principles of justice are to *meaningfully* give equal opportunities for social primary goods in the pursuit of individual conceptions of the good.[205] The implied premise here is that a reading like Barry's somehow fails the same ideal. And since the salient difference converges on the account of opportunity, Quong is effectively returning to a dispute which he hoped to avoid. Specifically, Quong's insistence on combination of the cultural and civic opportunities implicitly objects to Barry's objective view of opportunity as insensitive between genuine and non-genuine opportunities. Were this not the case, Quong would not construe the Jewish candidate as being unable to pursue a police career requiring Saturday work. Rather, it would be described as a choice (even if a very dire one). Quong's shift towards combined opportunity implicitly excludes equal opportunity of choice wherein anyone simply not wishing to work Saturdays would relinquish a police career in these circumstances.

There are then, apart from any exegetical debates on the Rawlsian account from which Barry and Quong draw, also complex differences in the conception of opportunity and the nature of how to treat comparisons thereof. Just as before, between opportunity versus outcomes, the resolution to the Coherence-Problem is again complicated by Deep-Disagreement – this time about opportunity itself.

8.5 Summative Remarks

Starting with the general theoretical bases for the narrow- and broad-approaches to exemptions we have seen both the external and internal points of Deep-Disagreement. We have seen, for instance, how exemptions as a problem of differentiation amongst citizens and conceptions of the good clashes with liberal-egalitarian principles of equal regard and state neutrality. Internal attempts to reconceptualise these principles via luck-egalitarian and luck-multicultural revisions of liberal-egalitarianism have stumbled on matters of both adequately distinguishing brute/option -luck via choice and chance/circumstance divide as well as diverging metrics of distributive justice.

The Coherence-Problem then indicated how apart from equal regard and neutrality, the norms of public justification constrain the scope of valid principled exemptions meaning that

[205] *Ibid*., pp. 65-66.

legitimate-laws-plus-exemptions becomes an incoherent position. Through debate, the presumption of opportunity as the relevant currency for liberal-egalitarian justice was highlighted alongside its contestable, but also entrenched, nature between the opposing camps.

Though Quong's interpretation of the Rawlsian model disclosed possibilities for exemptions based on opportunity and even upon neutrality and equal regard requirements, its reliance on the notion of combined opportunities implicitly reverts to Deep-Disagreement with Barry's objective-opportunity.

In the end, without sufficiently detrimental counterargument the Coherence-Problem appears to remain a challenge to exemptions. This of course need not entail that exemptions are theoretically defeated. The persistence of the contest evinces the ongoing reservations and doubts as to the conclusiveness of the Coherence-Problem not to mention the liberal-egalitarian position more generally. In particular, apart from the conflict with liberal state practice - especially on religious exemptions, there appear to be strong intuitive misgivings about the idea that certain individuals or groups may be significantly burdened by an otherwise legitimate law. In part, as I have tried to underscore with the Sunday closure laws example, some of these worries may be allayed given the considerable possibilities that public justification offers for perfecting laws to pursue the relevant rationales with minimal interference and maximal liberty for all. The possibility of deregulation or the so-called individual-choice or libertarian approach provide further solutions where a law faces a sufficient pressure from a publicly reasonable objection. Lastly, areas of structural, intergenerational or historical injustices or other political complexities may also be addressed with pragmatic exemptions.

Still, the persisting in-principle possibility of legitimate laws burdening minorities amongst other theoretical conflicts listed above are all understandable motivations for rejecting the Coherence-Problem arguments and seeking alternative approaches. In the final part, I will argue for the possibility of resolving the intuitive resistance and practical tensions with the Coherence-Problem without a direct engagement with it on matters of justice. Without taking a stance on the traced theoretical disagreements, I will propose an approach to exemptions which is broadly compatible with the theoretical commitments of the narrow- and broad-approaches (Coherence-Problem included). Such a resolution I submit is possible if the Exemptions-Justification-Puzzle is addressed from within the problem of liberal political legitimacy.

Part III

Exemptions as Limits? Liberal Political Legitimacy as a solution to the Exemptions-Justification-Puzzle

In light of the Deep-Disagreement entrenching the debates comprising the Exemptions-Justification-Puzzle, this part advances the possibility for a solution in favour of outcomes consistent with (broad) exemptions, but nevertheless compatible with the theoretical bases of both the narrow- and broad-approaches. The compatibility is achieved by reversing a baseline assumption common to both approaches – a reversal which consists in locating an intermediate space between the domain of legitimate-exercise of political power (legitimate laws) and areas external thereto ('individual choice' or 'deregulation'). The reversal commences with a review of the liberal principle of political legitimacy as the ground of the assumption for which the Rawlsian account supplemented by Thomas Nagel will be used.

9. Liberal Principle of Political Legitimacy

9.1 Liberty, Agreements and Stability

The preceding chapters have peripherally touched upon the key aspects of liberal political legitimacy. Compliance with liberal justice, guarantee of basic rights and liberties, non-discriminatory intent, neutrality and public justification were seen as collectively securing legitimate laws. Moving towards the proposed solution, however, requires a more substantive elaboration of the Rawlsian account as the previously adopted model.

Rawls's account, as noted, reacts to the liberal tradition's political problem: how individual liberty is reconcilable with legitimate exercise of political power (**legitimate-exercise** or **legitimacy** for short) by anyone over others. While its accommodation of reasons-plurality for limiting liberty for social cooperation with others makes agreement or consent an intuitively powerful starting point, this proves problematic. Every withdrawal of consent destabilises collective coordination making the basis of social cooperation impractically fragile. This accounts for the numerous attempts to idealise consent from actual empirical consent to various hypothetical forms. Thus, if consent would or should reasonably be given upon a certain basis

then where that basis obtains, exercise of (political) power (directed to collective coordination) is arguably legitimate.

The fact of reasonable pluralism of course complicates what could serve as the relevant basis for this. Rawls's constructivism and JAF were observed as a response to such reasonable disagreements. The fairness and neutrality (amongst CDs) in the procedure of choice were seen as securing the long-sought reasonable hypothetical agreement.

Yet, while JAF imposes constraints on certain exercises of political power it does not explicitly define what constitutes legitimate-exercise. JAF might be the most reasonable basis for collective hypothetical agreement, but it relies on normative conceptions, [206] subject to *reasonable* disagreement. Indeed, outside the OP, in the real non-ideal conditions, or simply over time, the commitment to JAF may shift or wane meaning that unless there is contingent or accidental stability, then the maintenance of JAF over time may require the deployment of political power. This, however, is a problem. Since power is always coercive in being backed by the state's monopoly on legal force, and because, in democratic regimes, it is regarded as citizens' power imposed "upon themselves and one another as free and equal" [207], justifying its use simply by appeal to an ideal of justice securing collective *hypothetical* agreement is flawed. Political power maintaining stability this way is what Rawls terms the 'fact of oppression' [208] which alongside stability achieved accidentally is not stability *for the right reasons*. [209]

Only when political power is exercised in accordance with what Rawls calls the 'liberal principle of legitimacy' (**LPL**) can it be legitimate and achieve stability for the right reasons.

9.2 LPL

Rawls states the LPL as follows:

> Political liberalism answers that the conception of justice must be a political conception…[which] when satisfied allows us to say: political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason. This is the liberal principle of legitimacy.[210]

[206] Rawls (2001), p. 24.
[207] *Ibid.*, pp. 40, 90.
[208] Rawls (2005), p. 35.
[209] *Ibid.*, p. xxxvii.
[210] Rawls (2001), p. 41.

Additionally, Rawls mentions that it is also a "**desideratum**" that:

> all legislative questions that concern or border on these essentials, or are highly divisive, should also be settled, so far as possible, by guidelines and values that can be similarly endorsed.[211]

From the first line, legitimacy is tied to a political conception of justice (**PCJ**).

Unlike **comprehensive conceptions of justice** endorsed by oppressive use of political power or contingently by those whose CDs are congruent with it (e.g. Kantian or Millian liberals), a PCJ can command an 'overlapping consensus' (**OC**). In an OC, each reasonable citizen endorses the PCJ for reasons implicit in the public political culture (***public reasons***) and/or based on non-public but *converging reasons* peculiar to their CD. A PCJ can achieve this because it is independent or "freestanding"[212] – not derived from any CD in the "background culture" of civil society[213] but grounded in fundamental ideas implicit in the public political culture of a democratic society.

Crucially, this makes a PCJ historically imminent in being upheld by an OC of an actual citizenry rather than any specific CD. It is therefore neutral amongst reasonable CDs and capable of grounding a constitution the essential of which could be reasonably endorsed by all citizens (***constitutional-essentials***, for short). Since constitutional essentials arise from and reflect the PCJ supported by an OC (**OC PCJ**) meeting this necessary requirement of legitimacy means laws will need to be ***publicly justifiable*** (either by reference to public reasons or an OC of CDs – what I have above referred to as converging reasons). Only if publicly justifiable will a law qualify as reasonably acceptable to all.

Thus, whilst retaining its contractarian roots linking legitimacy to collective *hypothetical* consent, legitimacy is no longer subsumed into the justice of the agreement, but formulated on separate additional principles (PCJ is a prerequisite, not constituent of LPL). Of course, the LPL can only arise if there are constitutional essentials, which require an OC PCJ which makes its scope relative to the PCJ and subsisting public culture. Accordingly, the LPL is clear that legitimacy only attains through public justification so as to be reasonably acceptable to all

[211] *Idem*.
[212] *Ibid.*, p. 10.
[213] *Ibid.*, p. 14.

citizens. This is a necessary condition of legitimacy. Yet, importantly, it does not comprise the full set of necessary and sufficient conditions. There seems a deliberate openness here given that such prescriptions could devolve the LPL into a CD-based principle divorced from the mutability of common human reason manifest in public (democratic) culture.[214] Further specification remains open to be normatively constructed consistent with LPL and public culture possibilities of the OC PJC. Any arguable case for additional limitation to legitimate-exercise and the sought solution to the Exemptions-Justification-Puzzle must begin then with a closer examination of public justification on the political liberal framework.

[214] *Ibid.*, p. 41.

10. LPL and Public Justification

A useful clarification of public justification within the Rawlsian account is developed by Thomas Nagel. For Nagel, politics raises impartiality concerns to a compounded level. Conflict arises not only among interests but also amongst values/norms. It concerns not only the correct form of impartiality among persons in the distribution of benefits and burdens but the identification of those benefits and burdens themselves. [215]

Moreover, since the political power is deployed in resolution of collective coordination problems (to be subsequently detailed), and imposes uniform requirements, "support," when not voluntarily given, is still exacted whether through taxation or passive conformity to institutional arrangements.[216] Indeed, the LPL permits those with the balance of political power, from imposing their determination on minorities. Crucially then, on the LPL and in general political power inevitably involves someone being forced to do something they do not want. This problem goes to the very heart of liberal political legitimacy. [217]

For Rawls, the fact that this someone could reasonably accept the imposition resolves the matter. Yet, doubts might arise about this answer when individuals are faced with the choice of following their actually-held beliefs (including about justice or the LPL) or deferring to the OC PCJ neutrality which effectively means following a view they believe mistaken. Why would losing parties remain committed to the PCJ as an OC rather than a *modus vivendi*? My aim, however, is only to explain Nagel's clarifications below as an attempt to answer this question without abandoning Rawlsian tenets.

Nagel's strategy here is to seek a solution via a higher-order impartiality - a "kind of epistemological restraint" [218] or what might be termed '**justificatory-neutrality**' (or **JN**). JN draws limits on appeal to truth in political argument by requiring the adoption of external or impersonal standpoints to one's beliefs. Though believing P typically entrails believing P to be true, there is nevertheless a critical difference: "[looking at certain convictions] from outside, however justified they may be from within, the appeal to their truth must be seen merely as an appeal to our beliefs…"[219] Thus, as Nagel explains:

[215] Nagel (1987), p. 227.
[216] *Idem*.
[217] *Ibid.*, p. 225.
[218] *Ibid.*, p. 229.
[219] *Ibid.*, p. 230.

> To a believer, salvation is more important than liberty, yet in political justification, he may not appeal to the importance of salvation to justify the restriction of liberty, because liberty is a publicly admissible value and salvation is not.[220]

Justificatory-neutrality then plays a similar tole to that of constitutional-essentials in the LPL for Rawls[221], namely distinguishing between reasonable public disagreements which can be *legitimately* resolved by majoritarian exercises of political power (**Legit-Majoritarianism**), and those which cannot. [222] Essentially, justificatory-neutrality sets two requirements for Legit-Majoritarian legitimate-exercise. First, beliefs must be presented so that others can arrive at their judgment on the same basis as the belief-holder (**Common-Basis**). Purely personal presentation such as revelation will not suffice. Second, the error theory for others' not accepting one's belief cannot be circular[223] (**Error-Theory**). Together, the two requirements constitute what Nagel calls **objective common ground**.

This provides a useful supplement to understanding the nature and mechanics of Rawlsian public justification. Specifically, once objective common ground arises Legit-Majoritarianism becomes permissible in being reasonably justifiable to the losing side. Actual disagreement may of course remain but the losing side, being reasonable, will be capable of recognising the justifiability of the majority's imposition given the accessibility of reasons.

JN also reveals how reasonable disagreements rooted in religious and/or *fundamental* moral conflict (**Moral-Conflict**) cannot be resolved by Legit-Majoritarianism because of not being amenable to JN objective common ground. Nagel cites "abortion, sexual conduct, and the killing of animals for food" as examples of Moral-Conflict which in lieu of Legit-Majoritarianism must be left to "individual choice". [224]

In contrast to Moral-Conflict, other reasonable disagreement regarding issues like public policies on healthcare, social security, environmental protection may be capable of objective common ground and therefore permissible for Legit-Majoritarian resolution. We can call this residual category of non-Moral-Conflict '**Other-Conflict**'. Importantly, the difference between Moral-Conflict and Other-Conflict is not that Other-Conflict does not feature any moral disagreements. All the just mentioned examples may have powerful moral arguments

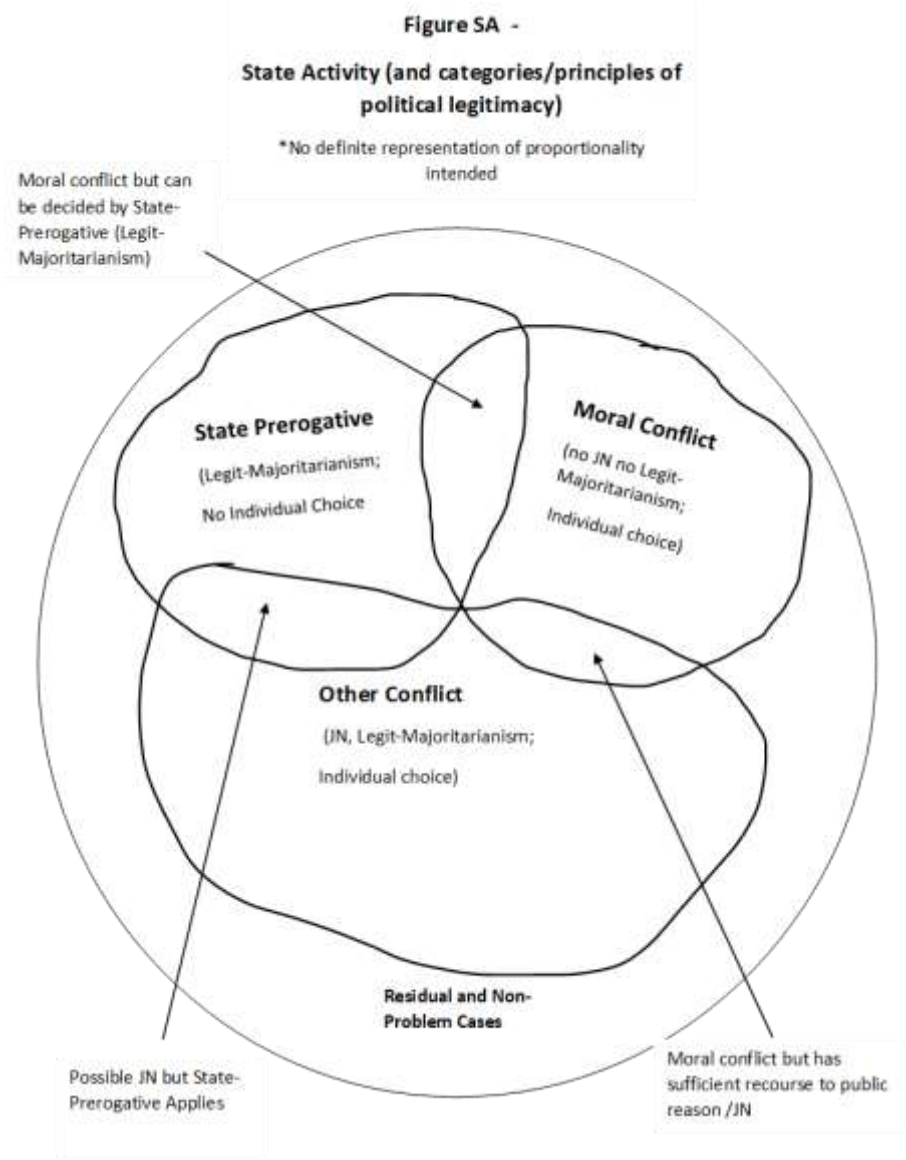
[220] *Ibid.*, p. 237.
[221] See (2001), p. 41.
[222] Nagel (1987), p. 231.
[223] *Idem.*
[224] *Ibid.*, p. 233.

therein. The difference, however, is that in Other-Conflict the disagreement (including any moral components) can all be resolved on objective common ground. This distinction is far from simple to sustain, but its in-principle existence in ideal theory is presently sufficient.

Further, there are three so-called "unproblematic cases" [225] of legitimate-exercise. First, where political coercion is welcome so long it applies to achieve a common benefit requiring uniform compliance (**Uniform-Benefit**). Uniform traffic regulations, for example. Second, for uncontroversial harm-preventions (**Harm-Prevention**). Third, basic forms of paternalism (**Basic-Paternalism)**. The latter two involve a conflict of impartialities but rest upon uncontroversial impersonal values of life, health, and safety. Though Nagel does not expressly classify these cases they do not involve fundamental religious/moral conflict and thus allow for Legit-Majoritarianism.

Finally, as summarised in *Figure SA* (below) there are cases where "the state must decide"[226] (**State-Prerogatives**). Nagel's explanation is self-admittedly thin, but this seems to concern matters that cannot be left to individual choice like whether or not the state will enter into a regional free-trade agreement, institute capital punishment and so on. To be sure, State-Prerogative and Moral-Conflict might appear similar. For example, abortion and capital punishment can both trigger fundamental moral disagreements and entertain the regulation/non-regulation dichotomy. And yet, there is a key difference: not regulating abortion permits diverse individual choice regarding whether and under which circumstances to perform/undergo abortions whereas with capital punishment no such spectrum seems possible.

[225] *Ibid*., p. 224.
[226] *Ibid*., p. 233.



Individuals cannot decide for themselves whether to practice capital punishment or not because criminal sanction, by definition, belongs to the state's legal monopoly on violence: any other killing as punishment for transgression is not capital punishment but retaliatory murder. The same goes for the free-trade agreement or other cases like nuclear (dis)armament – there is no individual variation; solely a matter of either/or controlled by the sovereign state.

State-Prerogatives are special since they permit Legit-Majoritarianism regardless of whether or not JN is satisfied. Accordingly, as Nagel's mention of capital punishment suggests, though there may be overlap with Moral-Conflict, State-Prerogative can trump Moral-Conflict to allow Legit-Majoritarianism.

11. Application and the Limits of Legitimacy

To see how the LPL with Nagel's supplementation might determine the limits of legitimate-exercise and where those limits might prove extendable, we need to consider it in relation to a hypothetical scenario of public disagreement. Consider examples A and B.

11.1 Examples

(A) *Polluting Plant*

Suppose there is a proposal to construct an energy-effective but environmentally-damaging power plant (Plant). The Plant's environmental damage will be significant but not devastating, nor pose any health hazard to citizens. Lastly, the proposal is not to build the Plant for some further end like energy-generation but for the construction of such a plant as an end-in-itself. Naturally, the Plant will generate energy, create jobs and pollute but, for whatever combination of reasons, the majority's end is specifically the Plant. To the opposing side, it is primarily the environmental damage which makes it so objectionable.

(B) *IP Exploitation*

A national government seeks to enact legislation creating an intellectual property (IP) regime covering all forms of expression in material form: images, literary expression, music, architectural design and so forth ("works"). Creators of works automatically get legally-enforceable IP rights including exclusivity on reproduction, publication, broadcast, adaptation, translation etc. – in short, akin to the *Berne Convention* (1886). Enforcement may mean extraction of licence fees or other compensatory damages from those liable in civil suit, even criminal sanctions for grave violations. Commercial entities selling on behalf of IP-creators support the laws which enable enforcement against unauthorised markets. For Romanticist creatives or Marxists such laws are an affront to collective human ownership of all IP given each individual creator creates out of their milieu and zeitgeist, to which all contribute.

Determining how each above disagreement should be treated on LPL requires discerning whether Legit-Majoritarianism applies, which depends on the applicable category of state-action.

To start with, neither A nor B is an 'unproblematic case'. While the end of road safety is a clear Uniform-Benefit (allowing Legit-Majoritarianism as between left/right traffic-direction

means), A and B, as explained, are controversial in their ends, nor involve harms relevant for Harm-Prevention and Basic-Paternalism. At least in B, however, there is a trace of what I will call **'Collective-Coordination**'. By this, I mean something like Raz's reference to "extricate[ing] the population from Prisoner's Dilemma type situations" [227] and other instigations of cooperative collective activity which the state is uniquely-placed to manage given its monopoly on legitimate-exercise. Road rules are an epitome, but B might qualify given that only under state sanction and content-uniformizing can IP-rights be mutually upheld in economic transactions. A might qualify given the magnitude of construction, but this is less certain if non-state collective enterprise might achieve this. The significance of this will emerge later.

Dismissing the unproblematic cases, leaves the triad of conflict and state-prerogative categories. While A and B can be characterised as featuring moral disagreement there is presumably sufficient recourse JN/public-reason resolution such as scientific and economic arguments. Thus, even though the disagreement over the scientific or economic modelling/conclusions may persist there is objective common ground between the opposing views.

Excluding Moral-Conflict-Cases leaves only Other-Conflict (to which JN applies) and State-Prerogative. Whether one or the other is triggered, however, practically makes no difference given that both permit Legit-Majoritarianism. As such, A and B may be resolved by majoritarian legitimate-exercise upon the relevant constitutional procedural requirements.

For completeness, while Rawls's desideratum cautions against permissible Legit-Majoritarianism if A and/or B are particularly divisive controversies, this is discretionary as to LPL. Still, recalling Collective-Coordination, there is an insightful comparison of Legit-Majoritarian resolution and deregulation/individual-choice here. Take A, which might be construed in terms of energy/environmental policy. Non-regulation of the large-scale energy generation may make it harder to achieve the large-scale energy project like the Plant, but, by comparison, individual choice as to environmental protection would almost inevitably cause some degree of environmental damage. The asymmetry here highlights the special character of Collective-Coordination problems like the environment or even a rights-regime (consider, for instance, that one would need to enter into private contracts with everyone to get the equivalent effect of the statutory right).

[227] (1986), p. 56.

11.2 Conceiving Limits

This brings us to a critical point in testing the limits of legitimate-exercise whereby the operation of LPL as exhibited becomes arguably less certain. Suppose Legit-Majoritarianism results in the construction of the Plant and the creation of the IP-regime. The opposing-minorities may actually disagree with these outcomes but subjective-disagreement is no reasonable basis for reversing the laws.

Nonetheless, even if reasonableness requires the acceptance of a world in which there is the Plant or IP-rights does this necessarily entail that the dissenting minorities are legally obliged to comply with the law in all circumstances? Is one, for example, compelled to exercise their IP-rights despite their disagreement? Can one also be legitimately compelled to contribute taxes towards the administration of this regime, or, in the case of A, the construction and maintenance of the Plant?

Consistent with the Rawlsian-Nagelian LPL, the answers to such questions lie in the public justification of the law itself. While the Plant case, as shall be seen, is more complex, in the IP-case, the answer to the first question is presumably negative because on the public justification for the IP-regime, the exercise of IP-rights is intended as discretionary rather than mandatory (this being the nature of rights).

Furthermore, the law's satisfaction of legitimacy makes compliance required whenever a failure to do so interferes with the legitimate rights or interests of others (**LRIO)**. If the law protects IP-rights and the dissenters disregard such rights then their infringement of the IP-rights of others may be legitimately dealt with according to the law. Indeed, for Rawls one of the hallmarks of civil disobedience is the willingness to accept the legal consequences of contravention despite one's disagreements.[228] Thus, when it comes to the LRIO under the LPL-satisfying law, enforcing compliance according to that law is entirely legitimate.

Yet, beyond the clear indications within the public justification of the law and the constraints of LRIO, the LPL does not delve into nuanced differences in how the law operates in various scenarios. It is here, however, that the complications begin to emerge.

Take, for instance, the dissenters in A and their obligation to contribute tax towards the opposed Plant. Is the exercise of political power to extract taxation from these dissenters legitimate even though it coerces them to materially support something they (morally) reject? Does this not

[228] Rawls (1971), p. 366.

make the law imposing taxation in respect of the Plant reasonably rejectable? Or, in Nagel's terms, a Moral-Conflict wherein the state ought to defer to individual choice?

Apart from the logistical complexities of actually dividing consolidated public revenue according to various expenditures the liberal-egalitarian reasons for precluding the differential approach on moral or (broadly) 'cultural' grounds have already been presented. In essence, the tax contribution is part and parcel of the publicly-justifiable law and thereby also reasonably acceptable despite actual opposition.

Such an answer, however, seems indifferent to the particular operation of the LPL-satisfying laws including whether the law's inseparable effects on individuals compel passive or active compliance/involvement/participation (used interchangeably).

Although both the minorities in A and B find the law imposing a state-of-affairs they opposed, the tax contribution required of the B-minorities towards administering the IP-regime differs with A in that, no matter how intangibly, the B-minorities are affected or engaged by the laws – not only by being subject to the rights of others in the marketplace of "works" but also by involuntarily becoming themselves bearers of these same statutory rights.[229] This 'inseparable effect on individual rights and liabilities' within the law might be construed as a form of *compelled participation* though *passive* in kind. In contrast, the law in A does not trigger this. Whatever practical effects the Plant has, it does not alter the rights and liabilities of ordinary citizens – at least not as an inseparable effect of the law.[230] Unlike in A, the tax contribution in B holds a complication in that it comes in tandem with the rights conferred by the IP-regime. To have the rights but not the tax liability engenders a kind of disbalance.

Could it not be said though that the Plant holds certain benefits for all which also means a disbalance if tax is withheld? The validity here is arguably dependant on empirical findings unlike the a priori legally-set disbalance in B.

But what if the minorities in B could opt-out of the IP-regime thereby neutralising the disbalance argument for their tax liability? This option fails, however, not only for the reasons already recited in relation to exemptions given the legitimacy of the uniform law here, but more crucially for reasons relating to the IP-regime itself. The IP-regime arguably constitutes a

[229] Creating a "work" they will automatically become IP-rights-holders at law.
[230] The case might be different if the taxation in respect of the Plant was extracted as a special levy or specific increase rather than as a portion of already existing general tax obligations. But then this would constitute a separable law with its own legitimacy assessment.

Collective-Coordination scenario in requiring universal coverage for its efficacy. Without universal coverage the "works" economy is likely to be compromised by uncertainties in the distribution of rights and liabilities and burdening parties with verification of coverage procedures– especially given the automatic creation mechanism.

In any case, resolving the disbalance disparity between the dissenting minorities' tax liabilities in A and B would at best equate the two, and yet the reason for noting their differences was only to illuminate that the above answer on why taxes belong to the same justification as the law itself was overlooking potentially material nuances. Consequently, the real significance of B is highlighting the *inseparability* of the compelled passive participation (including the tax contribution) in the IP-regime. The absence of this in A makes the tax obligation appear as something ancillary and not inseparable, thus giving credence to the argument in favour of withholding tax in A.

Further examples may highlight the role of inseparability of effects in this speculation. Consider a case (**'C'**) in which Legit-Majoritarianism on education policy enacts a law requiring the inclusion of Darwinian evolutionary theory ("Darwinism") into the science curriculum of public schools and universities.[231] Displeasing as this might be for the opposing minorities, there is at least no compelled active compliance here. While the law requires that Darwinism is taught in public science classrooms, for compelled active compliance the law would additionally need to mandate attendance of such classes. So long as parents can take their children out of those lessons, and one can, in principle, complete a tertiary education without learning that content, the law does not take that additional step towards compelled active participation (call this **alt-C**).

Nothing here claims that the distinction between compelled active and passive compliance is straightforward. Take for example a Legit-Majoritarian resolution on health policy disagreement whereby a law is enacted requiring all persons entering the state to undergo isolation/quarantine (**'D'**). Again, apart from a state-of-affairs some minorities disapprove, the law makes exercising the right of entry conditional on isolation/quarantine. Is this a form of compelled compliance passive or active? On the one hand, it is active since unlike the choice between attending or not attending certain classes, it attaches to the exercise of a fundamental right to (re)enter one's state. Yet, compared to a law which simply imposed a curfew or required

[231] While Darwinism might be a CD its endorsement need not violate public reason norms since it is restricted to science education wherein it is the pre-eminent doctrine, or at least a reasonable one.

all persons to stay home for a period of time (**alt-D**), the compliance seems comparatively passive for the primary effects are indirect such as one's altered interactions with those in quarantine upon (re)entry. Moreover, practical contextual realities often go beyond formal legal expression such that even if one can, in principle, avoid the classes in C, it might be practically difficult to do so. Still, provided that nothing critical rides on this distinction, it remains useful at the formal legal level in distinguishing various inseparable effects of a law which reveal that, for example, C or D is separable from alt-C (and alt-C or alt-D is not separable from itself).

From this, the objection to treating taxation obligations as passive compliance in a situation like A become clearer. If C does not, without more, compel alt-C, why should A (without more) compel tax obligations?

Aside from the stalwart insistence on uniformity already encountered, there are two more nuanced but anticlimactic responses here in terms of legitimacy itself.

First, taxation is special in that it arguably fulfils a Collective-Coordination function. Taken holistically across various LPL-satisfying laws, taxation ensures the state's ability to coordinate social cooperation and resources in an integrated way. Without delving into obvious complexities, the analogy with the IP-regime and its requirement of universal coverage could be drawn on to indicate a potential validity to the Collective-Coordination reply.

Second, and irrespective of the success of the first response, the whole challenge may prove vacuous given that a specific LPL-satisfying law might be enacted levying a particular tax contribution in respect of the Plant or other state activity. There would be no inseparability issue since the law would compel active compliance. This response essentially returns us to publicly justifying the tax contribution on LPL criteria.

While these responses may be adequate for answering the tax contribution challenge as a separate matter to Legit-Majoritarian legitimacy of the law in A (and other cases), they offer no general guidance on interpreting the nuanced differences in the kinds of active compliance LPL-satisfying laws require. Cases where Collective-Coordination or its universality is less obvious than road rules, taxation and certain systems like the IP-regime, will fall outside these answers. To give just one illustration, recall C. If the LPL-satisfying law happens to be unclear as to whether or not alt-C is required the above answers offer no guidance. Without clarity on the requirements of the rule itself the earlier answer as to exemptions also proves incompetent here (without knowing if attendance/alt-C is required, there is no question as to whether individual XYZ is exempt or required to attend). In what follows then, I will draw on the

taxation example but without making use of its special or differentiating properties, treating it as a generic instance of active compliance to discern further potential limitations to LPL which might shed light on why some forms of active compliance are compellable while others are not.

11.3 Axes and Limits

The proposed answer to the above question is based on further distinctions in the operation of compelled compliance which I shall discuss below in terms of the following three "**Axes**".

First, regardless of whether the dissenting minorities tax contribution is simply utilised from consolidated public revenue or specifically extracted by law requiring referable contribution, the taxation obligation operates ***negatively***: there is no ***positive*** conduct compelled of the individual as, for example, a law requiring school attendance or military service – or even positive omissions like cessation of some activity. Rather than acting on the person, the tax law acts on property. One might suggest this fails to consider that individuals must often perform some activity to effect tax transfer to the state, but this relates to the administration of the tax obligation rather than the obligation itself. Conceptually, these are distinct.

Second, taxation obligations are in some sense ***impersonal***. Some laws will carry no positive obligation but will be ***personal*** in nature: for example, while a legal prohibition on abortion or censored literature can be complied with by simply doing nothing there is a qualitative difference: these negative laws are not like the above tax obligations because they broach significantly personal matters (whether pertaining to bodily integrity and reproductive rights or academic freedom respectively). It might be challenged that the extraction of tax as material support for something morally objectionable fits into this Axis. The challenge however overlooks that unlike in the abortion and censorship examples, nothing practical results from the extraction of the tax. The effect is collective: whether or not one's taxes contribute to it or not, the Plant's existence is not affected unless there is a majority reversal.

Third, perhaps most distinctively, is the ***intimacy*** of the legal obligation. By this, I mean how direct and onerous the obligation is although 'onerous' here refers not to difficulty of performance but the requirement's highly-specific nature. A law requiring alcohol vendors to verify purchasers' age, homeowners with swimming pools to enclose to a particular standard, or dog owners to clean droppings in public spaces are arguably *intimate* in the specificity of their requirements even though they might not be *personal* because for example no private convictions are triggered.

While only rough in their formulation, these Axes reveal critical differences between different kinds of compelled active compliance from which the further limits to LPL arise. Since, as mentioned, the aim here is not a conclusive account but a provisional exposure of possibility, I will proceed mainly by extracting the salient applications from comparing various cases.

Compare a law requiring all cars to be fitted with airbags with one requiring mandatory seatbelt-wearing. In the first example, compliance by manufacturers with the airbag law results in an elimination of choice when it comes to this aspect of driving. In the second example the choice is not removed *practically* in the production line, but by law. This means that though it is *practically* possible to leave the seatbelt unfastened, one would be contravening the law.

Now one might say that despite the manufacturer's installation, the possibility of driving without an airbag might also be achieved by an individual removing it (regardless of illegality). Still this does not equalise the cases. This is because the seatbelt case requires a *positive* action from the individual to achieve legal compliance whereas the airbag case does not. The law is not compelling individual drivers to fit airbags (or remove them) Once the airbag is fitted by the manufacturer, the individual would not need to take any positive steps to comply. Compliance is achieved *negatively* (refraining from removal).

Another objection might be that the asserted difference is ultimately immaterial. Why should it matter whether the law achieves its effect through the manufacturer or through each individual driver? After all, fundamentally avoiding illegality requires retaining the airbag and wearing the seatbelt. Choice in respect of both is eliminated. Why should it matter how this elimination is achieved? Indeed, if there were a technology of automatically harnessing seatbelts and the law obliged manufacturers to install it the drivers' choice would be eliminated practically rather than legally. So why should, in the absence of this technology, the legal mode of elimination matter?

The reason it matters is that by using the law to compel active compliance in this way the Axes are triggered. Even though the law ultimately creates the same relevant state-of-affairs and ultimately the totality of individual freedom thereto ends up being the same, the effect on the individual is not identical. The *practical* mechanically-achieved effect differs from the effect achieved through being *specifically directed* by law. This mode is arguably far more intrusive or even offensive experience of politico-legal power given its *positive, personal* and *intimate* mode.

If the above is correct, then it seems not every compelled active compliance is relevantly alike. As contrasted earlier, taxation obligations are *negative* (acting on property, not mandating personal acts/omissions), impersonal (not broaching matters of personal significance) and not intimate (not especially specific or onerous) whereas the above seatbelt case triggers at least the first and third Axes.

My contention is that the Axes are of immense significance to how we should construe the LPL and its (further) limits because they reveal an omitted middle ground between the public reasons legitimating the law and the private, CD-based considerations inapplicable on LPL criteria. While JN-common-ground or public reasons can legitimate a certain exercise of political power in creating a law this operates at the level of the rationale and content for the law, but not to every detailed form of application which the law might take. Ordinarily, the content can set relevant parameters on such forms. For example, laws compelling something comprising Moral-Conflict like abortion will likely fail LPL-satisfaction. But when it comes to other categories, there may well be publicly justifiable laws which indirectly trigger the above Axes upon application. So, although the Axes are superfluous to the public justifiability of the law, they are nevertheless relevant in not being a private, CD-grounded objection to the law.

Rather they occupy an intermediate place between public and private. When there is no interference with the LRIO nor a universal coverage requirement of Collective-Coordination, there is arguably space for a further limit to LPL in terms of enforcement against individual objection formulated in terms of the above Axes or similar grounds.

It is important to realise here that the objection is not specific to any private individual ground but a limit to the exercise of legitimate political power universally (though manifested in a relevant instance). As the seatbelt example illustrates, it is not that the exercise of political power is limited in respect of a specific content (the aim can be achieved in other ways) but that its exercise in this particular way violates a certain formal legitimacy requirement not addressed by earlier discussed legitimacy criteria. When it comes to the Axes the presumption is that these other legitimacy requirements have been fulfilled. Indeed, the LPL including the LRIO/Collective-Coordination addition ensure that at the point of an Axes-based objection to enforcement against an individual citizen, the law has already exhausted all its possible public functions. The success of limiting the application of the law on Axes grounds will not stop the law (content-wise) from being legitimate, protecting LRIO and/or fulfilling Collective-

Coordination. It will only ensure that the exercise of political power is not used to enforce legitimate laws when the legitimacy of the mode of enforcement is questionable.

Returning to the seatbelt example compliance by different individuals will involve their comportment to the Axes. For some, the form of the law on these Axes will pose no concern and so they will be agreeable to comply and contribute towards the publicly justifiable rationale of the law. For others, however, the form will prove offensive on the Axes irrespective of the law's public reasonable-ness. Now assuming that non-compliance will not undermine Collective-Coordination or LRIO, enforcing this law in spite of the Axes-based objections arguably triggers a transformation in the legitimacy of the law. The form of compulsion which is separable from the content of the law makes forcing one to comply illegitimate here.

The above introduces at least plausible considerations for accepting further limits to LPL. Further, as already mentioned, since the LPL is deliberately not specified as a full set of necessary and sufficient conditions, a conceptual space for further conditions exists. Further, consistent with Rawls's description of liberal-democratic political power as that exercised by democratic citizens upon themselves as free and equals, the Axes are addressed towards mutual and reciprocal respect in how legitimate laws are enforced against certain forms of individual objection not specifically grounded in private considerations.

12. Exemptions and Legitimacy

Since the proposed limits to legitimate exercise are not specific to private individual considerations, it may seem unexpected that this could apply to exemptions-claims as discussed in the preceding chapters. Nonetheless, the Axes are arguably quite closely aligned with many of the types of cases in which exemptions might be sought.

Revert to the much-cited Sikh safety-helmets exemption case. Assuming the law is legitimate and exemptions are complexly in Deep-Disagreement, what can the further Axes-based limits achieve here? Like in the seatbelt example, enforcement against the objector with a relevant comportment to the Axes transforms legitimacy in relation to that objector. Hence, for the Sikh enforcement might prove *positive, personal and intimate* in the bodily requirement (wearing the helmet) and the spiritual one (removing the turban).

Take another controversial exemption case like refusal of services in contravention of anti-discrimination protections. Though the laws are publicly justifiable not every mode of enforcement will be. Enforcing anti-discrimination laws in respect of restraining active adverse conduct against another differs markedly from a *positive, intimate* requirement of a *personal* nature like performing services one finds morally disagreeable.

Unlike the helmet laws, there is however a stronger concern here for LRIO. Despite the favourable indication against the legitimate enforcement on the Axes, the violation of LRIO could of course make enforcement nevertheless legitimate. Although whether the LRIO violation in fact occurs is contestable – particularly where alternative services are available. In every case, there can be contention, but what matters is that, at least provisionally, the possibility of enforcement being illegitimate in these kinds of exemptions-claims has been revealed.

The above observation is important because it highlights that even when the Axes indicate a possibility that the enforcement is illegitimate it is not an absolute indication. By this I mean that there may be countervailing considerations that overturn the indication (e.g. Collective-Coordination, LRIO).

What has not been highlighted yet is that the balancing of these different considerations is not static but responsive to actual contextual political necessities. The peyote cases or conscientious objection to conscription are illustrative. If illegitimating enforcement of anti-drug laws against qualifying objectors proves to undermine the law by inauthentic objector

claims or other community increase then there may be a case for no longer illegitimating even for qualifying objectors given the revised contextual considerations affecting LRIO and/or state interests. Similarly, conscription may be illegitimate to enforce on the Axes against a handful of conscientious objectors, yet where the context evolves into a mass anti-draft sentiment which undermines the security of the state, enforcement may prove legitimate due to the new balancing factors involved.

The balancing here resembles a recently advanced proposal by Alan Patten on balancing publicly-justified or sufficiently important political considerations against individual objections to legal obligations in the form of exemptions claims.[232]

Patten's argument stems from a re-examination of the general principles of liberalism's justifiable restrictions on individual liberty. Patten terms this "*fair opportunity for self-determination* (FOSD)" or that "Each person should be given the most extensive opportunity to pursue and fulfil her ends that is justifiable given the reasonable claims of others"[233] Much like the condition imposed on the Axes as to the protection of the legitimate rights and interests of others, the FOSD seems an axiomatic liberal principle. Instead, the tireless centre of controversy lies in how exactly the conflicting reasonable claims of each citizen are to be managed.

Setting aside, unreasonable claims or possibility of independent-standards, Patten posits the relevant solution as "pure balancing".[234] This is described as "giving each [interest or claim] some weight but adjusting the weight according to the significance of the claims at issue."[235] For Patten, there are essentially two types of conflict to which pure balancing applies: *internal* balancing – a conflict between two reasonable claims of FOSD - and *external* balancing - between the FOSD and other extraneous principles or considerations.

For Patten, both internal and external balancing can justify exemptions to general laws because the reasonable FOSD interests of the majority might be balanced by reasonable sufficiently weighty FOSD interests of a minority[236] and, also, the non-FOSD considerations of a publicly justifiable law might be balanced by FOSD interests of a minority.[237] Patten also offers peyote cases since they conflict with no other individual's FOSD interests and the weightiness of the

[232] Patten (2017), pp. 205-219.
[233] *Ibid.*, p. 207-208.
[234] *Ibid.*, p. 210.
[235] *Idem*.
[236] *Ibid.*, pp. 213-215.
[237] *Ibid.*, pp. 215-218.

minority's FOSD (religious commitments of users) might suffice to outweigh the non-FOSD principles (blanket drug-prohibition) thereby justifying exemptions.

Patten's *external* balancing roughly corresponds with the balancing between the Axes and LPL-satisfying laws discussed above. Like Patten's attempts to maximise the FOSD in external balancing, the Axes also carve out conceptual space for individual freedom from coercive politico-legal power whilst remaining sensitive to the legitimacy of such exercises given the publicly justifiable ends they represent. A concern for this kind of possibility against the more rigid demarcation of public and private concerns in liberal-egalitarian responses to exemptions is, I think, a virtuous innovation for a liberal political theory given the core value of individual liberty liberalism historically espouses.

In this regard, Patten's account is a step in the right direction. Nevertheless, the attempt to balance FOSD and non-FOSD considerations seems to fatally turn his account back towards the entrenched problems observed earlier in the debates on the justice of exemptions. Essentially, Patten seems to assume that non-FOSD interests are commensurable with FOSD interests so as to be balanced in terms of justice or "fairness", as he puts it.[238] Critics like Barry can simply insist on the incoherence of such balancing given that the weight of the interests or claims on which it is based stem from private CD-grounded considerations which are not relevant to LPL-satisfying laws and their publicly justified ends. Though Patten could retort that the internal balancing from which such publicly justified ends originate validates his proposal of extending same to external balancing, the debate here starts to again entrench between rival conceptions of justice and its requirements.

From this, the advantage of the proposed recalibrating the Exemption-Justification-Puzzle in terms of political legitimacy becomes apparent. Unlike Patten's balancing, the Axes do not represent a competing principle of justice but the limits of exercising political power to enforce certain publicly justifiable ends upon individuals where there is no interference with LRIO of others or Collective-Coordination. Also, since the Axes do not stem from private or CD-grounded interests but universal formal concerns, they intersect the public/private divide, providing a space in which individual freedom is maximised without detriment to public ends.

[238] *Ibid*., p. 207.

Concluding Remarks

This study commenced with two broad aims: first, clarifying the Religious-Exemptions-Puzzle as two closely related but conceptually distinct Puzzles, and second, advancing a lateral solution to the Exemptions-Justification-Puzzle in light of the intractability of Deep-Disagreements therein.

In relation to the first aim, examining liberal jurisprudence and state practice in the regulation of religion revealed the prominence of exemptions in manifesting the differential legal treatment of religion comparatively and innately. The normative critique thereof was outlined as the Special-Status-Problem. This was seen as part of wider questions about the coverage of exemptions forming the Exemptions-Demarcation-Puzzle. Though some positions within this puzzle propose no exemption outcomes, these were distinguished from a separate tension about the innate differentiation of exemptions against legal rationales leading to the problematic within the jurisprudence that aligned with the Exemptions-Justification-Puzzle. This puzzle, by contrast, was revealed as principally a challenge to the scope of exemptions between direct and indirect legal interference. Distinguishing the Puzzles enables both more cogent examination and parallel but related considerations being brought to bear on the same normatively complex regulatory practices.

In relation to the second aim, following an examination of the salient aspects of Deep-Disagreement between the theoretical bases for the broad- and narrow-approaches, the possibility of the lateral solution based on liberal principles of legitimacy was advanced. As seen, the Rawlsian and Nagelian accounts left the LPL deliberately underspecified permitting the construction of further limits such as those proposed via the universally claimable Axes on which compelled active compliance or enforcement proves illegitimate in certain individual cases. This newfound conceptual space allows maximising individual liberty without incursions on Collective-Coordination or LRIO which can support (consistent with LPL and other liberal-egalitarian commitments) many exemptions claims as encountered in liberal jurisprudence and practice.

Though arguably promising, there is of course much to be worked out on this proposed solution. In respect of each case, for instance, there will need to be clearer guiding principles on how the Axes apply or do not, as well as the other conditions mentioned. To reuse another frequent

example, are the humane slaughter regulations such as to problematise the legitimacy of enforcement against those refusing to comply because of customary or religious commitments?

Initially, the Axes may seem engaged considering that the prohibition requires omission of revered traditional practices with personal significance. Yet, and probably more strongly, it could be countered that there is neither a *positive* nor *intimate* obligation here since the law simply requires abstaining from a certain mode of slaughter. The humane slaughter case thus reveals both the necessity for greater specification in this proposed solution, and that though its lateral approach boasts advantages over other exemptions defences, it also risks losing some coverage. Hence, some notable exemptions claims may need to be conceded or defended via alternative routes.

Even so, the promise of an answer to the Exemptions-Justification-Puzzle which could defend at least a considerable portion of the controversial exemptions claims is a significant development.

Furthermore, because the proposed solution targets the foundational problem of exemptions it also manages to avoid the complications of the Special-Status-Problem and Exemptions-Demarcation-Puzzle. Grounded in legitimacy, the solution does not nominate a specific category of interest or basis on which certain individuals or groups are entitled to (broad-approach) exemptions. There is no need to justify the demarcation of this particular basis or group-interest over excluded analogues.

It also means that liberal state practice on religious exemptions might be justifiable simply as a matter of self-recognised limits of legitimate-exercise. These limits may of course expand or contract in relation to actual legal exemption practices. In essence, the proposed solution would construe the operation of the limits akin to (though of course not in terms of) what John Adenitire advocates as a "general right to conscientious exemption".[239] Analogously to the Axes, it is general in being a legal right "to conscientiously object to *whatever* obligation imposed by law" and contrasted with "context-specific legal exemptions which are usually found in statutes in relation to a particular legal obligation."[240]

In a further parallel to Adenitire,[241] there is an interesting intersection between the proposed solution and the liberal doctrine of the separation of powers. Since the practical implementation

[239] Adenitire, (2019), p. 248.
[240] *Ibid*., pp. 248-249 (emphasis added).
[241] *Ibid*., p. 285.

of the limits to legitimacy concerns *individual* cases of compulsion or enforcement, it is not by a legislative function that these particular limits can be demarcated. The function is an intrinsically judicial one. This division corresponds precisely with the LPL determinations of when political power is legitimate to enact laws for publicly justifiable ends and when, on the Axes, it is illegitimate in compelling active compliance. This also preserves the legitimacy of the relevant law to the very point of enforcement with judicial courts as ultimate arbiters of any requisite matters such as the authenticity of the claimant's assertions in relation to the Axes alongside the balancing considerations with LRIO or other public interests. Finally, it captures the revisable element discussed about peyote or conscription whereby a contextual modification like a flood of other claims might result in a termination of the further limit to legitimacy given the spectre of adverse public effects it carries.

Ultimately, while both the more elaborate specification of the solution and its fuller advocacy in terms of liberal theories of political legitimacy are necessary prior to any conclusive evaluation, the suggestion here is that this is a plausible and promising route to practically resolving the Religious-Exemption-Puzzle and its practical manifestations with which we began. This is a compelling reason for further examination.

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