DWORKIN'S FREEDOM OF RELIGION WITHOUT GOD

CÉCILE LABORDE[*]

INTRODUCTION

There is a common view among critics of secular liberalism that liberal neutrality – for all its claims to be neutral towards religion – is itself a religion, albeit one without God. This common view, however, begs the central question: What do we mean by a "religion" in the first place? In his posthumously published *Religion Without God*, the liberal legal philosopher

[*] Professor of Political Theory, University College London. Drafts of this Essay were presented in Paris, Cécile Laborde, Remarks at the Columbia Reid Hall Global Centre Workshop: Religion, Legal Pluralism, and Human Rights: European and Transatlantic Perspectives (May 30–31, 2012); Cécile Laborde, Remarks at the *Le Centre de Recherches Politiques de Sciences Po* Conference: *Face au Conflit des Valeurs: Quelle Démocratie? Le Pluralisme Libéral et ses Critiques* (Sept. 20–21, 2012), as well as in Geneva, Cécile Laborde, Remarks at the University of Geneva Conference: Moral and Political Perspectives on Democracy (June 27–28, 2012), Oxford, Cécile Laborde, Remarks at the University of Oxford Political Theory Research Seminar (June 6, 2013), London, Cécile Laborde, Remarks at the University College London Religion and Political Theory (RAPT) Workshop (Apr. 22, 2013), and Chicago, Cécile Laborde, Remarks at the American Political Science Association Annual Meeting (Aug. 29–Sept. 2, 2013). I am grateful to the organizers of, and participants in, these events for helpful feedback. I am also grateful to Jean Cohen, George Letsas, Jonathan Seglow, and Lorenzo Zucca for written comments. Research for this Essay was funded by European Research Council (ERC) Grant 283867 on "Is Religion Special?"

Ronald Dworkin squarely addresses the crucial question of what, for legal and political purposes, we should understand religion to be.[2]

For Dworkin, traditional theistic beliefs are just one subset of morally respectable beliefs.[3] Atheists – like those with traditional theistic beliefs – also hold comprehensive conceptions of what is of value in and about human life; we can meaningfully talk of an atheist religion.[4] If we accept this nontheistic interpretation of religion – as any conviction concerning the meaning and importance of human life – we can interpret freedom of religion as protecting the right of each to live in accordance with their her conception of the life well lived. For Dworkin, freedom of religion follows from the key liberal value of ethical independence.[5]

It is easy to see how, within the contemporary U.S. context, the theme of religion without God has proven compelling to liberals such as Dworkin. The Culture Wars have pitted religious conservatives against supposedly nonreligious liberals, whose defense of abortion, stem cells research, gay rights and the nonestablishment of the state is perceived as directed against majority Christian religious beliefs – even against "religion" itself. Dworkin provides liberals with a formidable rhetorical weapon. In his view, liberals have as strong a commitment to freedom of religion as conservatives, but they take freedom of religion to protect all ethical views about how to live life well, with dignity and self-respect. The right of homosexuals to marry and the right of women to have an abortion can now, on Dworkin's deliberately provocative theory, be defended in the name of freedom of religion itself.[6]

I am interested in *Religion Without God* because it fits neatly into a broader set of new theories about liberalism and religion, which I elsewhere call "egalitarian theories of religious freedom."[7] Such theories make three connected claims: (i) what we conventionally call religion should be seen a subset of a broader category of morally respectable beliefs and practices; (ii)

---

[2] *See* RONALD DWORKIN, RELIGION WITHOUT GOD 1 (2013) ("The theme of this book is that religion is deeper than God. Religion is a deep, distinct, and comprehensive worldview . . . .").

[3] *See id.*

[4] *See id.* at 5 ("[T[he phrase 'religious atheism,' however surprising, is not an oxymoron . . . .").

[5] *See id.* at 130 ("[E]thical independence[] means that government must never restrict freedom just because it assumes that one way for people to live their lives . . . is intrinsically better than another . . . .").

[6] *See id.* at 144.

[7] *See* Cécile Laborde, *Equal Liberty, Nonestablishment, and Religious Freedom*, 20 LEGAL THEORY, Mar. 2014, at 52 [hereinafter Laborde, *Equal Liberty*], *archived at* http://perma.cc/3PX9-KZHB (reviewing and criticizing Eisgruber and Sager's theory of equal liberty); Cécile Laborde, *Protecting Religious Freedom in the Secular Age*, *in* AFTER RELIGIOUS FREEDOM (Winnifred Fallers Sullivan et al. eds, forthcoming 2014) [hereinafter Laborde, *Protecting Religious Freedom*], *archived at* http://perma.cc/V278-ZKQ8 (reviewing and criticizing Taylor and Maclure's theory of religious freedom).

traditional believers do not have a special, a priori right to be exempted from general laws; and (iii) the state must guarantee the equal status of all citizens.[8] Let me simply mention two other recent and influential egalitarian theories of religious freedom.

The first is Christopher Eisgruber and Lawrence Sager's *Religious Freedom and the Constitution*. Eisgruber and Sager interpret the Religion Clauses as not providing for special and unique legal treatment for religion above and beyond that granted to "comparable" commitments and practices.[9] The second is Charles Taylor and Jocelyn Maclure's short piece drawing on the reasonable accommodations debate in Quebec, entitled *Secularism and Freedom of Conscience*.[10] Taylor and Maclure argue that individuals with conscientious "meaning-giving commitments" should be considered for exemption from burdensome laws on the same basis as traditional religious believers.[11] Egalitarian theories of religious freedom are intuitively attractive: they analogize freedom of religion with other liberal freedoms; they are rooted in the value of equality and nondiscrimination; and instead of denying protection to religious beliefs and practices they extend protection to secular "conceptions of the good," to use John Rawls's phrase.[12]

For all of their merits, however, I am skeptical that existing theories have succeeded in their main ambition – namely, to demonstrate that (what we traditionally mean by) religion can be unproblematically analogized with, or extended to, other kinds of practices and beliefs. In particular, I am skeptical that a simple strategy of "analogizing" religion with an equally vague category of "conceptions of the good" can adequately ground a sound normative theory of religious freedom. I show elsewhere that Eisgruber and Sager do not provide a stable criterion of what kinds of commitments and practices are relevantly "comparable" to religion in a way that would coherently explain the rationale of First Amendment jurisprudence.[13] Taylor and Maclure, for their part, do not write as constitutional lawyers and therefore are not wedded to doctrinal coherence. Yet in reducing religion to individual conscience, they end up with

[8] Laborde, *Equal Liberty*, *supra* note 7; Laborde, *Protecting Religious Freedom*, *supra* note 7.

[9] *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52-56 (2007) (arguing for a concept of "Equal Liberty" in which "*all* persons—whether engaged in religiously inspired enterprises or not—enjoy rights of free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow religious practice to flourish").

[10] *See* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 13, 75-80 (Jane Marie Todd trans., 2011).

[11] *See id.*

[12] JOHN RAWLS, POLITICAL LIBERALISM 19 (1996).

[13] *See* Laborde, *Equal Liberty*, *supra* note 7.

a narrow, parochial and restrictive account of the values that freedom of religion is supposed to protect.[14]

In this Essay, I assess Dworkin's own attempt to devise an egalitarian theory of religious freedom outlined in lecture three of *Religion Without God* (lectures one and two defend the ethical idea of a religious atheism). Dworkin's approach has a number of virtues over both *Religious Freedom and the Constitution* and *Secularism and Freedom of Conscience*. First, Dworkin – unlike Eisgruber and Sager – does not seek to explain the coherence of U.S. jurisprudence, but rather seeks to draw out the interpretive principles that should ideally guide it (and us). In particular, Dworkin does not attempt to justify the vast array of religious exemptions present in U.S. law – he is, in fact, mostly critical of them.[15] Second, Dworkin embeds his views about law and religion within a complex, comprehensive theory of liberalism. He sees liberal justice as deriving from two commitments: equality and the demand that each individual be treated with equal concern, and liberty understood as the protected right to take responsibility for how one lives one's life. Both commitments can be understood as generating a demand for liberal neutrality. When the state makes laws, it should respect "ethical independence": it must not "assume that one way for people to live their lives – one idea about what lives are most worth living just in themselves – is intrinsically better than another."[16] The state's attitude toward religion, then, is only an application of a broader liberal principle of justificatory neutrality. The state fails to show equal concern towards all its citizens if it sides with one ethical view over others. Dworkin, then, broadens religion into a broader category of "the good."

I. DWORKIN ON RELIGION AND LIBERAL NEUTRALITY

What does liberal neutrality about the good imply for the proper treatment of religion by the law, according to Dworkin? For ease of exposition, I extract three distinct lines of argument from his densely written text.

A. *Freedom of Religion Is a General Right, Not a Special Right*

Religion, Dworkin observes, is not easy to define for legal and political purposes.[17] Either it is defined too narrowly (as theistic religion) and the protections of religious freedom are unjustifiably denied to atheists, or it is defined too broadly (as religion without God, or any sincere conviction about what gives meaning to life) and it covers too much. Instead, Dworkin suggests

[14] For an analysis of the egalitarian theory of religious freedom of Taylor and MacLure, see Laborde, *Protecting Religious Freedom*, *supra* note 7.

[15] *See* DWORKIN, *supra* note 2, at 125 ("[A]n exemption for one faith from a constraint imposed on people of other faiths discriminates against those other faiths on religious grounds.").

[16] *Id.* at 150.

[17] *Id.* at 2 ("The familiar stark divide between people of religion and without religion is too crude.").

a different approach. Rather than "fix[ing] attention on the subject matter in question" (the question of what religion is), we should, for legal and political purposes, "fix[] on the relation between government and citizens . . . [and] limit[] the reasons government may offer for any constraint on a citizen's freedom at all."[18] This allows Dworkin to draw on a crucial distinction, which he introduces in *Justice for Hedgehogs*, between "general" and "special" rights.[19]

General rights are protected when the government does not directly and deliberatively violate the freedom in question; the government may, however, regulate general rights if authorities appeal to appropriately neutral reasons – reasons that respect citizens' ethical independence. While the government must not appeal to the superiority of one way of life over another, it can appeal to neutral reasons – such as just distribution or environmental protection – to justify policies that interfere with citizens' way of life (including religious ways of life). Special rights, in turn, require a higher level of protection. They protect special interests and can only be regulated if the government offers a "compelling justification" for doing so.[20] For Dworkin, freedom of speech is one example of such a special right: the government cannot routinely constrain it in the pursuit of otherwise legitimate goals.[21] Thus, even speech that would seriously undermine a government's economic and distributive strategy must not be abridged.

Freedom of religion, in turn, should be seen as a general right. For Dworkin, a general right to ethical independence gives religion the appropriate amount of protection. Granted, government must not directly violate religious exercise and should not appeal to the truth or untruth of one religion or ethical view in the pursuit of its goals. But freedom of religion does not require a "high hurdle of protection and therefore its compelling need for strict limits and careful definition."[22] To declare that freedom of religion is a special right would be, for Dworkin, troublesome for two main reasons. First, if the concept of religion is extended – as Dworkin thinks it should be – to nontheistic beliefs and commitments such as secular pacifism, views about the permissibility of abortion and even devout materialism, there is a risk that freedom would run "[o]ut of [c]ontrol": special rights of protection would be – absurdly – extended "to all passionately held conviction[s]"; yet, "no community could possibly accept that extended right."[23]

---

[18] *Id.* at 152-53.

[19] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011); DWORKIN, *supra* note 2, at 152-57.

[20] *See* DWORKIN, *supra* note 2, at 151.

[21] *See id.* at 131 ("Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a '*compelling*' justification.").

[22] *Id.* at 152-53.

[23] *Id.* at 117.

Second, granting special rights of exemptions from laws on religious grounds – especially on the expansive definition of religion proposed – would exacerbate the risk that the government would arbitrarily discriminate against nonreligious citizens. To illustrate his claim, Dworkin approvingly cites the landmark 1990 decision of the Supreme Court in *Employment Division v. Smith*.[24] Should members of a Native American community be entitled to an exemption from drug laws because they use a hallucinogenic drug called peyote in their ritual ceremonies? Dworkin thinks not: First, because the purpose of the law is general and nondiscriminatory and is intended to protect all citizens against a substantial health risk and, second, because there is no principled way of distinguishing between "religious" and other uses of a drug (for example, that of Aldous Huxley's followers).[25] If there is no morally relevant boundary between religious and other kinds of attitudes toward life, it becomes impossible to carve out a specific area of protection from the law.[26] In sum, Dworkin concludes, if religion cannot be restricted to theism, the "priority of non-discriminatory government legislation over private religious exercise seems inevitable and right."[27]

B. *Neutral Justification as a Way to "Generalize Nonestablishment"*

We have seen that government respects citizens' ethical independence when it only appeals to neutral justifications in the pursuit of its policies – in particular, when it does not endorse the truth of one religious or ethical view. Dworkin's conception of liberal neutrality, then, generalizes the U.S. constitutional norms of nonestablishment: what is wrong with religious establishment is that, by endorsing the truth of one religion over other conceptions of truth, the state fails to show equal concern for all its citizens. By analogy, the state also fails to show equal concern to all if it endorses a controversial ethical view about how to live life well.

But what kind of views, in particular, are permissible or impermissible justifications for state policy? To understand Dworkin's theory of neutral justification, we must draw on his earlier work.[28] Permissible reasons are 'impersonal' reasons that justify general policies such as environmental protection, the need for taxation, or distributive justice.[29] Impermissible reasons, by contrast, endorse a particular ethical view of what it means to live life well.[30]

---

[24] *See* Emp't Div. v. Smith, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not forbid states from prohibiting "sacramental peyote use").

[25] DWORKIN, *supra* note 2, at 125-26.

[26] *Id.* at 137.

[27] *Id.*

[28] *See* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? (2006).

[29] *Id.*

[30] *Id.* at 70-71.

Typical of these impermissible reasons are those that mandate state regulation of basic decisions with intimate dimensions – decisions about abortion or marriage. For Dworkin, a ban on same-sex marriage is not based on impersonal reasons; it is based on personal disapproval of others' ways of life.[31] It fails to respect citizens' ethical independence and therefore violates the norm of nonestablishment understood as liberal neutrality about reasons, that is, permissible justifications. Just as government should not take sides between orthodox theistic religions, it also should not take sides between alternate ways of living well – between alternate views of good sexuality, for example.[32]

C. *Substantive Liberal Policies Are Mandated By Neutral Justification*

It is not only same-sex marriage but also a range of substantively liberal causes that Dworkin includes in his idea of liberal neutrality. If religious conservatives could just see that their commitment to freedom of religion is rooted in a more general right of ethical independence, they would concede that the point of a liberal state is to let individuals take responsibility for their own lives, whether these are conventionally religious or not. Thus the state has no business interfering with people's sexual and reproductive choices (as long as they do not infringe on others' rights), just as it has no business interfering with the way they practice their religion and in their private display of religious attire and signs. In turn, the state – to respect the ethical independence of all – should scrupulously avoid endorsing religion in its institutions and symbols: it should not teach the truth of religion in its schools, including theories of intelligent design; it should avoid endorsing openly Christian symbols and ceremonies, and so forth.[33] Substantively liberal policies, then, can be defended not through a "first-order" ethical defense of the superiority of nonreligious, progressive, individualistic lifestyles but through a "second-order" moral defense of the value of ethical independence for all citizens.

II. A CRITIQUE OF DWORKIN

What can be said about these three arguments? There is no doubt that Dworkin offers a persuasive and integrated vision, where substantive liberal positions seem to be derived logically from an abstract commitment to neutral justification and where progressive causes such as same-sex marriage and abortion rights follow naturally from a commitment to freedom of religion. I do not intend to challenge the substantive liberal positions that Dworkin

[31] *Id.* at 115-16 (discussing how the government "takes sides among religions").

[32] *Id.* (arguing that it is "wrong to take sides . . . between alternate views of healthy sexuality" and the government cannot "deny . . . immunity just because [people] do not draw their opinion from some conception of a god").

[33] *Id.* at 137-47 (discussing examples of government endorsement of religion and arguing that these government actions are inappropriate).

reaches. But I am skeptical that the structure of his argument is able to support the full weight of his conclusions.

In particular, I point to three limitations of Dworkin's reasoning. First, he does not show that there is no special right to freedom of religion, and sections of his argument suggest that there might be. Second, he does not explain in virtue of what the ideal of religious non-establishment can be extended to 'religions without God.' And third, he does not show that liberal neutrality is conclusive and determinate enough to generate the substantive liberal positions he defends. While the third critique is a familiar critique of liberal neutrality, the first two point to the particular challenges involved in the egalitarian project of analogizing religion with secular ethical views. I suggest that Dworkin's appeal to neutrality towards the good does not succeed in solving some core issues of the law of religious freedom: the question of exemptions from the law, on the one hand, and the question of nonestablishment of the state, on the other. By dissolving religion into a broader category, Dworkin hoped also to dissolve these questions. Unfortunately, they only reappear at a higher level of generality.

A. *Freedom of Religion Can Generate Special Rights on Dworkin's Own Theory*

Recall what distinguishes a special from a general right: while the former protects an especially valuable interest from the burden of a general law, the latter only requires neutral justifications for the law. This means that the fact that a particular practice, say a religious practice, is incidentally burdened by a general law (as in *Smith*) does not mean that the right to freedom of religion has thereby been violated. What matters is that the justification for the law is suitably neutral, nondiscriminatory, and pursues a valid general interest. Here, Dworkin draws very close to a position once famously endorsed by Brian Barry. According to Barry, we should not worry about the unequal incidental burdens a law creates for certain groups of citizens if the law is otherwise legitimate and justified; this position is also that of the French republican conception of equality and *laïcité*.[34] This position relies on a firm distinction between the justification of a regulation and its effects and outcome.

Yet, on closer inspection, Dworkin has a far more complex position about what counts as a neutral justification: it turns out to be one that must also take effect and outcome into account. Dworkin writes that a justification is not neutral if it "directly, indirectly or covertly" presupposes the superiority of one ethical view over another.[35] Let us focus on "covert" non-neutrality. A

[34] *See* BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 40-62 (2001) (discussing ethnic and religious minorities and culturally specific exceptions to law); CÉCILE LABORDE, CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY 6-9 (2008) (discussing *laïcité* in the context of the Hijab controversy and the resulting burdens on Muslims).

[35] Ronald Dworkin, *Religion Without God* (N.Y. Univ. Colloquium in Legal, Political, &

justification is "covertly" non-neutral if, albeit facially neutral, it "ignores the special importance of some issue to some citizens" and thereby constitutes a failure of equal concern. Dworkin goes further, in passing, in his discussion of *Smith*: "[E]qual concern . . . requires a legislature to notice *whether any group regards the activity it proposes to prohibit or burden as a sacred duty*. If any group does, then the legislature must consider whether equal concern for that group requires an exemption or other amelioration."[36]

But this, of course, was precisely the reasoning of critics of *Smith*. Dworkin finds that, *on balance*, the exemption created by the Religious Freedom Restoration Act[37] was not defensible, because the interest pursued by the state (drug control) is an important one.[38] But this is different from saying that there is no special right to freedom of religion *on principle*. Dworkin himself seems to concede that *if* something is considered by a group to be a "sacred duty," a legislature can only ignore it if it can demonstrate a compelling state interest.[39] Now, perhaps drug policy is such an interest. Yet Dworkin avoids any further discussion of whether and which religious exemptions from general law might be defensible if the interests pursued by the law are less than compelling, and yet the duty burdened is seen as sacred.[40] But it is precisely *this* discussion that is needed if we are to assess whether freedom of religion is a special right. As soon as it is conceded that a justification cannot be fully neutral if it fails to take into account some sacred duty held by some group, the distinction

Soc. Philosophy, Working Paper, 2011), *archived* at http://perma.cc/Y3EB-2T4H [hereinafter Dworkin, unpublished manuscript]. Dworkin presented the original text of *Religion Without God* at the Bern Einstein Lectures, *see* Ronald Dworkin, Einstein Lectures (Dec. 12-14, 2011), *archived at* http://perma.cc/G9SF-3JDR, and presented a draft to the NYU Colloquium in Legal, Political and Social Philosophy, *see* Dworkin, unpublished manuscript, *supra*. This distinction was removed from the final text, but Dworkin has maintained the reference to "covert" non-neutrality. Ethical independence outlaws "any constraints neutral on its face but whose design covertly assumes some direct or indirect subordination." DWORKIN, *supra* note 2, at 134.

[36] DWORKIN, *supra* note 2, at 136 (emphasis added).

[37] 42 U.S.C. § 2000bb (2012), *abrogated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding unconstitutional the Religions Freedom Restoration Act as applied to the states).

[38] DWORKIN, *supra* note 2.

[39] *See id.*

[40] Dworkin's unexpected concession to advocates of exemptions could be interpreted as a strategic intervention in political debates about the Religion Clauses of the First Amendment. He could be understood as denying that there is a constitutional right to exemptions but accepting (in line with *Smith*) that exemptions may be granted by *legislatures*, not by courts, as well as affirming that, *if* exemptions are legitimate, then they are legitimate for non-Christian and nontheistic religions too. All of this, however, does not detract from my main point: Even legislators need to know what fairly qualifies as religion to be able to grant legal exemptions.

between neutrality as reason and neutrality as outcome loses its normative force.

Take a concrete example. Dworkin declares that the wearing of religious signs, being an essentially private matter, should not be forbidden by law.[41] But he avoids the more difficult question of whether this private matter may be incidentally burdened by the application of general, nondiscriminatory laws. What if an organization – say, the police – has a policy that requires all its members to wear a suitable uniform, and be bareheaded and clean shaven? The policy clearly has a neutral, nondiscriminatory justification. Yet some would say that it is covertly discriminatory, insofar as it ignores the claim by some of members of the police force – Sikhs, Jews, and Muslims – that the wearing of beards or special headwear is a "sacred duty" for them. Is this covert discrimination in Dworkin's view? How can we know this without assessing the particular weight of the interest in question? It looks as if, on Dworkin's own theory, freedom of religion will sometimes generate special rights of protection. But if that is the case, we need a workable theory of what counts as a burden on freedom of religion. And we will not escape the difficult question – which Dworkin sought to sidestep – as to whether a sacred use of drugs is more foundational, ethically speaking, than a recreational use of drugs.

In sum, the extension of the category of religion to cover godless beliefs and commitments, and the appeal to a general right of ethical independence, do not by themselves resolve the question of where to draw the line between those activities that it is wrong to burden, even incidentally and nonintentionally, through ordinary legislation, and those activities, which are less foundational, that can permissibly be so burdened. Dworkin hoped that broadening the notion of religion to godless beliefs would allow him to solve the question of the legitimacy of exemptions, essentially by dissolving it. Yet by conceding that the state should tread carefully when beliefs are sacred, he reintroduces in his political theory of Part Three the ethical conception of religion described in Parts One and Two. But if the state, in justifying its laws and policies, can legitimately show special concern for a category of beliefs – those that are sacred – then Dworkin has not so much dissolved the exemption puzzle as reformulated it as a higher level of generality. A more general version of this problem – that we cannot avoid defining and singling out religion, even from the perspective of neutral liberal justification – appears in Dworkin's defense of nonestablishment.

B. *Nonestablishment Cannot Be Easily Generalized*

Let us now take a closer look at what the norm of nonestablishment exactly requires. In discussing practical cases of problematic establishment of religion, it would seem that Dworkin has inexplicably shifted his focus away from the broad definition of religion, as encompassing both theistic and atheistic

[41] *Id.* at 138-39 (arguing that facially neutral justifications for such bans are mere "rationalizations" for the denial of the ethical independence of the minorities they target).

religions, towards a more traditional focus on theistic religion. The practical cases he discusses at the end of his lectures involve the familiar U.S. controversies about how much Christian ethics and symbols should be allowed in the public sphere, such as school prayers, municipal crèches, the teaching of creationism and intelligent design theories, and the teaching of sexual abstinence.[42]

A skeptical reader might notice a sleight of hand here. How come, she might ask, the question of religious exemptions is discussed in relation to a broad concept of religion, while establishment cases are discussed in relation to a narrow concept of religion (that is, theistic and, in practice, Christian religion)? Is this not clear evidence of the double standards of liberals, who wish to extend the benefits of freedom of religion to secularists and atheists, yet insist on limiting the burdens of nonestablishment to traditional religious believers? The problem in Dworkin's case might seem particular acute: If a belief in the rights of abortion, or of same-sex marriage, counts (on his theory) as a *religious* belief, why is its endorsement by the state not an impermissible establishment of *religion*?

This critique, however, is too quick for two reasons. First, for Dworkin, there is an asymmetry between the argument for and the argument against abortion and same-sex marriage, such that only the latter counts as impermissible establishment. This is because liberal laws do not express judgments about what people do: they only make it permissible for them to live in conformity with their deepest ethical views about the life they want to lead. So what the liberal state establishes is not the first-order religious belief that abortion is right but the second-order moral commitment to the noncoercion of women in what is essentially a religious choice. A commitment to ethical independence, for Dworkin, does not count as a controversial religion but rather as the fundamental value of political morality. (I discuss this further in the argument that follows.)

Second, Dworkin genuinely intends nonestablishment to apply to "political religion" too. As he had put it in an early draft of *Religion Without God*, "no justification can be found for an immunity that is limited to endorsement of a theistic religion rather than a political religion."[43] In the final version, Dworkin removed references to the ambiguous term "political religion." The relevant sentence now reads: "[W]e cannot deny [a person holding a political ideology such as monarchism] that immunity just because they do not draw their opinion from some conception of a god."[44] Unfortunately, this somewhat vaguer expression does not solve the ambiguities associated with the idea of generalizing nonestablishment.

---

[42] *Id.* at 115 (listing a number of cases in which courts have interpreted the establishment clause to ban public state expressions of religion).

[43] Dworkin, unpublished manuscript, *supra* note 35.

[44] DWORKIN, *supra* note 2, at 116.

The only example Dworkin gives is that of monarchists living in a republic. But the argument remains frustratingly inconclusive. Dworkin begins by drawing a plausible analogy between an atheist in a Christian state and a homosexual in a state that does not recognize same-sex marriage. Both are equally wrongful regimes of religious establishment in the wide sense. Dworkin then tentatively adds: "Or, for that matter, consider a committed monarchist who is surrounded by the official declarations of the nation's commitment to democracy. I do not mean to suggest – I will very soon deny – that religious freedom grants monarchists immunity from public endorsements of democracy."[45] The premise of the argument would suggest that an analogy would be drawn between public endorsements of Christianity, heterosexuality and republicanism (that is, in a U.S. context, commitment to democracy). Dworkin, however, quickly moves to a separate issue: the question of monarchists' "immunity" from public endorsements of democracy – that is, the question of the legitimacy of exempting them from general laws (in this particular case, we might think of civic oaths). In other words, Dworkin turns an "Establishment" issue into a "Free Exercise" issue. But the two are importantly different. If a state establishes Christianity, what atheists can rightly demand is not "immunity" from endorsement of Christianity but, rather, more religiously neutral general legislation – that is, disestablishment. Likewise, if a state mandates heterosexuality, homosexuals can rightly demand not immunity, toleration, or exemptions, but rather a full state of equality. So how about monarchists?

Dworkin's answer shifts the problem away from Establishment to Free Exercise; this allows him to introduce the distinction between special and general rights, and thereby to suggest that exemptions from laws are not generally justified if freedom of religion is not a special right. But this invites the question at stake: We still need to know whether republicanism is a "religion" in the relevant sense in order to determine whether the state can legitimately endorse – "establish" – its values. In other words, what we need to know is not whether the monarchist holds a *special* right (of exemption), but whether his *general* right of ethical independence is violated when the state publicly endorses republican values. The question Dworkin avoids is this: Are republicanism and monarchism religions in the sense that matters to nonestablishment and neutrality? Is it permissible for the state to invoke republican reasons, or is this an impermissible endorsement?

It may well be that one can avoid defining religion in religious exemptions cases (this is what Dworkin tries to do, although unsuccessfully, by simply denying that religion generates special rights of exemptions). But what is truly impossible is to avoid defining religion for nonestablishment purposes. Which features of "religion," exactly, make establishment problematic? What is it about religious beliefs, for example, that makes them unsuitable for the purposes of public justification? The fact that they are controversial? The fact

[45] *Id.*

that they are comprehensive in scope? The fact they are epistemically nonaccessible? The fact that they deal with ultimate matters of life and death? The fact that they appeal to extratemporal sources of authority? The fact that they are sources of social conflict and discrimination? A number of theorists have recently proposed different versions of these claims. But Dworkin, unfortunately, avoids discussing the issue.[46]

Dworkin's general answer to the question of defining religion – as explained previously – is that religion addresses central issues concerning the meaning and value of human life. So perhaps the reason why the state should not regulate people's intimate decisions about sexuality, abortion, or euthanasia, for Dworkin, is because the state should not impose a conception *of the sacred* on individuals.[47] But to know what exactly neutrality bars the state from imposing, we will need to know more about what the sacred is. Given that we need to define religion for establishment purposes, it would make sense – on Dworkin's theory – to suggest that monarchism and republicanism do not amount to establishment because they do not entail a view about the meaning of human life. Although Dworkin does not directly say this, it is a plausible inference from what he says.

Let us grant this is the case.[48] It is plausible to argue that political ideologies qua political have to do with questions such as who should rule, what limits there should be to power, how is power legitimized, and so forth. But if this is what a political ideology is, what then is a political *religion*? Communism and Nazism are often described as political religions, but this is not because they held a view about the meaning and value of human life. It is, rather, because of other features of these ideologies, such as their comprehensive and "totalitarian" nature, their messianic and eschatological aspirations, and their ability to inspire devotion and sacrifice. Of course, within Dworkin's theory, there are powerful reasons that militate against analogizing political religions such as republican democracy to conventional religion. A republican state does not infringe on the monarchist's ethical independence in the same way as a conventionally religious or a heterosexual state infringe on citizens' ethical independence: the political ideology of democratic republicanism does not relate to personal ethics. Furthermore, Dworkin's liberalism itself contains a robust defense of democracy as an essential component of a liberal political

[46] For my attempt to answer this question, drawing on Dworkin's previous writings, see Cécile Laborde, *Is Religion a Conception of the Good?*, *in* BEYOND POST-SECULARISM (Jean Cohen & Cécile Laborde eds., forthcoming 2014).

[47] For an argument to this effect, see RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 239 (1993).

[48] It is so only on a very narrow interpretation of both ideologies. Monarchism is historically tied to a divine ordering of the world – and republicanism is historically connected to a secular view of human beings as able to govern themselves without divine intervention or guidance.

ethics. Many political ideologies, then, would seem to fall under the scope of permissibly impersonal values such as "justice" rather than "the good."

The one exception is substantively secularist ideology, such as the one that Dworkin detects in official justifications for the regulation of religious dress in European public spheres. Let us define a substantive secular view as a view that postulates that a life without God, a life of secular citizenship, is a better life than a conventionally religious life. Clearly, it is impermissible for a Dworkinian liberal state to draw on such substantive secular views; and it is by reference to such views that liberal neutralists – from Rawls to Nagel – have sought to bring out the distinctiveness of their position, by contrast to more perfectionist and comprehensive theories of liberalism. Let us look at Dworkin's brief discussion of the controversy over the prohibition of headscarves and burkas in Europe.[49]

Dworkin alludes to two types of justification for such prohibitions. The first is the idea that "a shared secular identity of citizens would be undermined by divisive badges of religious identification." Dworkin retorts that this violates of ethical independence because it "assumes . . . that one kind of identification is more admirable than another."[50] The second possible justification is that "academic discipline [would] suffer" if students "feel compelled to protest" when others wear badges of a particular religion.[51] Dworkin replies that "there is no evidence for this and so it appears to be rationalization."[52] What can we make of this argument? I think we may agree with Dworkin that the arguments – *as presented* – are bad or wrong arguments. But we may challenge the way he has himself presented the arguments, and show that it is quite easy to reconstruct them in a way that is as compatible with (permissible) liberal secularism as with (impermissible) substantive secularism.

Dworkin illustrates his argument with the comparatively easy case of Turkey – where it can be shown that Ataturk-inspired secularist policies were motivated by anti-Islamic animus, and therefore in breach of neutrality and ethical independence.[53] (This, however, assumes that what is targeted is Islam as a private conception of the good, rather than Islamism as a political ideology. But I leave this complication aside.) Even though many prohibitions against Islamic veiling in Europe are motivated by distrust or animosity towards Muslims, it is just not the case that the public justifications provided for them necessarily draw on Islamophobic views or, for that matter, on any variant of substantive secularism. A permissible case of the ban on religious signs in schools, for example, might draw on the importance of the secular nature of schools as crucial to the creation of an inclusive, nondiscriminatory educational setting. On this view, secular identification is not more

[49] DWORKIN, *supra* note 2, at 138-50.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 139.

[53] *Id.* at 139-40.

"admirable" than others (as a more valuable conception of the good than a life of piety) but, rather, it is "instrumental" to liberal citizenship. One may disagree with the argument; in previous work, I myself present objections to it.[54] But what matters here is that it is not impermissible at the bar of liberal neutrality.

And Dworkin would surely agree that the mere fact that a policy has a differential impact on different citizens in itself does not mean that it is non-neutral. Consider, for example, school uniform policies in U.K. state schools. Such policies may be incompatible with the wearing of some religious signs or dress in the school, but they may also be justified by reference to the broader ideals that the uniform policy serves. In sum, it is not difficult to construct justifications for a range of secular policies that are not essentially different from the rationale of the Supreme Court Justices in *Smith* – a decision that, as we see above, Dworkin endorses. Such general reasons – about secular education or drug policy – may be good or bad, but they are not impermissible. This is because, in many cases, a liberal secular – as opposed to a substantively secularist – argument is available for them.

Leaving aside the narrow case of substantively secularist politics, Dworkin's worry about establishment targets primarily those conservative Christians who seek to use the law to enforce their religious beliefs on the rest of the population. But as he insists on adding to this traditional category of "endorsement of a theistic religion" an additional category of endorsement of "political religion" (or, more vaguely, an opinion "not draw[n] from some conception of a god"), it is quite unclear to what the latter actually refers.[55] As a result, we are left unsure about what the norm of nonestablishment requires, beyond a ban on public endorsement of (theistic, in fact Christian) religious beliefs and symbols. What Dworkin does not do is show how nonestablishment can be generalized. That is, he does not identify a feature of traditional theistic religions that can also be found in secular or political ideologies, and explains that neither theistic, secular, nor political ideologies should be appealed to in public justification. One response might be that religions touch on the meaning and value of human life – but, as we saw, this rather drastically limits the scope of the establishment worry. In addition, it raises a set of other issues relating to whether liberal policies can themselves avoid engagement with such "religious" questions, as we see in the following Section.

C. *Liberal Neutrality Is Not Sufficiently Conclusive to Justify Substantive Liberal Policies*

Recall that Dworkin's first-order defense of state neutrality is justified by a second-order commitment to the value of ethical independence, understood as

[54] *See* LABORDE, *supra* note 34, at 60-62 (arguing that advocates of a strict commitment to an inclusive nondiscriminatory educational setting may actually be self-defeating).

[55] DWORKIN, *supra* note 2, at 116.

the right of all citizens to live their lives by their own ethical lights.[56] Dworkin, then, denies that there is a neutral justification of neutrality (by contrast to Rawls, who seeks to identify neutral, "public" reasons for liberal principles of neutrality).[57] Dworkin believes that it is the liberal commitment to the good of individual liberty (a substantive commitment) that justifies liberal neutrality about how people choose to pursue their good.

Conservative, communitarian, and perfectionist critiques have challenged the substantive commitment to individual ethical independence as a viable foundational value for the state. Here, I highlight a more modest – and more plausible – version of the critique of liberal neutrality. The critique goes as follows: We can agree with Dworkin that personal ethics should be distinguished from questions of justice, and that the state should only enforce the latter. But we may legitimately disagree with Dworkin about where to draw the line between the two. We can point out, for example, that issues of abortion and euthanasia are not simply about personal ethics, but also raise more impersonal questions of justice – concerning the right to life of vulnerable human beings, for example. On this view, women's ethical independence, however important, is a lesser concern when the life of another human being – the fetus – is at stake.

Now Dworkin himself, in his extended discussion of this and related issues, has amply demonstrated that a complex substantive argument is required to justify liberal policies – and that the ideals of ethical independence and state neutrality are not, in themselves, determinate and conclusive enough to generate liberal substantive conclusions.[58] Thus the abortion controversy has to do with the substantive questions of whether the fetus has sufficient interests to generate rights attached to personhood (the "derived" position), and about whether abortion violates the intrinsic sacredness of human life (the "detached" position).[59] The same-sex marriage controversy has to do with the substantive value of loving homosexual relationships, and how this fits with our best interpretation of what marriage should be. The debate about education curricula is about the kinds of virtues that the liberal state should inculcate in its citizens.

It is my view that all these liberal policies can be justified. But I am not convinced that liberal neutrality will generate this defense on its own. Substantively, liberal neutrality is about showing equal concern and respect to all citizens. But such a general principle will not by itself generate the kind of policies that liberals seek. When religious questions about the meaning and

[56] *Id.* at 130.

[57] For Dworkin's critique of the Rawlsian doctrine of public reason, see RONALD DWORKIN, JUSTICE IN ROBES 63-66, 251-54 (2006).

[58] *See* DWORKIN, *supra* note 47, at 118-25 (arguing that the principles that underlie the Bill of Rights can justify liberal policies, but acknowledging that the history and language of the Constitution alone do not provide as strong of a justification).

[59] *Id.* at 11.

value of life are posed, neutrality is not an available position. This is because religious questions are not simply about personal ethics: they are also about justice (protecting the interests of vulnerable persons) and impersonal values (the inherent value of life).

CONCLUSION

In his eloquent book, Dworkin suggests that one way of solving protracted disputes about religious freedom is to present religious freedom as a general, not a special right. If freedom of religion is a general right – a right of ethical independence – religion does not need to be defined precisely, nor does it need to be confined to traditional theism. What should be the focus of our attention is not what religion is, but rather what kind of reasons government appeal to when they restrict people's attempt to live their lives by their own lights.

In this review, I point to three limits to Dworkin's strategy of dissolving religion. The first is that Dworkin accepts that, in some cases, exemptions are legitimate if government burdens the performance of what some groups think of as "sacred duties." A workable theory of exemptions cannot dispense with an evaluation of what kind of burden people experience when they seek to exercise such rights of religious freedom. The second is that Dworkin has not clearly identified what, for nonestablishment purposes, a religion without God is – and as a result, the chief establishment he is in practice concerned with is theistic (Christian) establishment. The third is that Dworkin remains open to the charge that liberals must complement their commitment to ethical independence with more controversial religious commitments about the meaning and value of life.

In sum, it is difficult to see how exactly nonestablishment can be applied to "religions without God," and how it can be generalized and dissolved into a broad ideal of liberal neutrality towards the good. Dworkin's *Religion Without God* offers an exemplary exposition of the promises, and the limits, of the egalitarian approach to religious freedom.