

The Normative Logic of Religious Liberty ***Alan Patten, Princeton University***¹

Disputes about religious freedom are back in the spotlight again. Although many liberals instinctively favor robust protections for religious freedom, a series of recent cases highlight the difficult dilemmas that such protections can introduce. In the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby* (2014) a statutory requirement to accommodate religious conduct was pitted against a provision in the Affordable Care Act mandating that health insurance policies include contraception in their preventive care coverage. Earlier in 2014, the Arizona legislature passed a controversial bill that, in the view of critics, would have made it easier for businesses to discriminate against LGBT customers on religious grounds. These cases follow a pattern, familiar from scores of disputes in the U.S. and elsewhere, in which apparently legitimate laws and protections, based on widely accepted values, are found to conflict with the religious beliefs and practices of some persons. By pitting religious claims against laws and protections that are dear to liberals – government-supported healthcare, gender and LGBT equality, etc. – they raise fundamental questions about the meaning of religious liberty in liberal political theory.

All liberals agree that individuals should enjoy an absolute, or near-absolute, liberty of religious belief. The difficult question is how far a defensible principle of

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religious liberty also includes a liberty of worship and observance. To what degree, and under what circumstances, does religious liberty imply that individuals should be free to conduct themselves in ways that are guided by their religious beliefs? Nobody thinks that religious liberty requires the state to exempt cults believing in infant sacrifice from its murder laws. So religious liberty does not imply an unqualified freedom of religious conduct. On the other hand, few would say that religious liberty has no implications for conduct. As Locke noted in *A Letter Concerning Toleration*, the law should not single out particular kinds of conduct for especially restrictive treatment just when or because they are engaged in with a religious motivation.¹

The theoretical problem for liberals is to identify a principle governing freedom of religious conduct that falls somewhere between these extremes. Is there a principle of religious liberty that offers meaningful protection to religious conduct and avoids conflict with key liberal commitments in other areas? One leading candidate for such a principle emphasizes the great importance to a person of being able to follow her religious convictions. Because it is a serious setback to a person's legitimate interests when the law conflicts with her efforts to follow her religious beliefs, the state should not impose such burdens unless it has a very good reason. In the absence of such a reason, a law conflicting with religious conduct should be withdrawn or amended or an exemption should be carved out to remove the conflict. Since the core of this principle is the idea that legal burdens on religious conduct should normally be avoided, I call it the *No Burden* principle.²

Because it allows that a *pro tanto* claim to freedom of religious conduct can be outweighed by other important considerations, the *No Burden* principle offers the prospect of a reconciliation between religious liberty and other liberal commitments. I shall argue, however, that *No Burden* does not go far enough in protecting other liberal values and commitments. After isolating what exactly is wrong with *No Burden*, the present article seeks to elaborate an alternative principle.

Crucially, the alternative insists that the mere fact of a legal burden on religious conduct is insufficient to trigger the expectation that the law be justified by an especially good reason. There is no presumption against burdensome laws as such. Instead, there is a presumption in favor of fair treatment of religious conduct. A law that conflicts with the fair treatment of religious conduct should have to be justified by an especially good reason, but a law that burdens religious conduct without denying it fair treatment should not.

Pitched at this abstract level, the fairness-based alternative to *No Burden* is a familiar position in debates about religious liberty. Many liberal theorists are attracted to what might be called the *No Discrimination* principle of religious liberty. *No Discrimination* is one possible specification of a fairness-based view, grounded in a particular conception of unfair treatment. For the purposes of defining religious liberty, the *No Discrimination* principle equates fair treatment with the absence of both targeting (where the law singles out a particular religion, or religion in general, for unfavorable treatment) and selective accommodation (where the law extends an accommodation to

relevantly similar conduct but withholds it from some particular instance of religiously motivated conduct).³

For reasons I shall explain, I think that *No Discrimination's* conception of fair treatment is too narrow. A satisfactory principle of religious liberty should be sensitive to forms of unfairness that involve neither targeting nor selective accommodation. A central aim of the current article will be to present and explain a broader conception of fairness that should figure in a principle of religious liberty. I call the resulting principle of religious liberty the *Fair Opportunity* principle. According to this principle, there is a presumption against any law that leaves individuals without a fair opportunity to pursue and fulfill their religious commitments.

Overall, I argue that the best approach consists in adopting the *Fair Opportunity* principle and rejecting the *No Burden* principle. Under *Fair Opportunity*, freedom of religious conduct enjoys substantial protection, but other liberal concerns and values also receive their due. *Fair Opportunity* helps to explain how liberals can be discomfited by *Hobby Lobby* and the Arizona bill, even while affirming a fairly robust principle of religious liberty.

Although the issues explored in the paper are a matter of considerable legal controversy, I mostly leave the legal questions to one side and focus on developing a normative account of religious liberty. The legal issues are complicated by the variety of considerations that appropriately inform legal reasoning besides the normative adequacy of particular positions. These include the legal texts and precedents, and the authority and capacities of relevant institutional actors such as the courts. Rather than

try to keep all these factors in mind, I shall focus exclusively on the core normative issues relating to the scope of religious liberty. Although judges, legislators, administrative officials, and ordinary citizens face different institutional constraints, they share in common a tendency to invoke not just the constraints of their offices but also more abstract ideals of liberty, equality, fairness, and so on, in justifying their actions. My aim is to explore, from a broadly liberal point of view, what these abstract ideals imply about religious liberty. This won't be the whole story for any one of these actors – institutional contexts and constraints matter too – but I assume that it will be enough of the story to make the discussion worth pursuing.

What Follows From Religion's Special Significance?

Many discussions of religious liberty proceed as if the main question revolves around whether religion is special in some sense. As we have seen already, the argument for the *No Burden* principle moves directly from the premise that religion has special significance to the conclusion that there is a presumption against any law that burdens religion. On the other side, advocates of *No Discrimination* sometimes suggest that one of their principle's virtues is that it need not assume that religion is special.⁴ Insofar as *No Discrimination* invokes general requirements of political morality, it sidesteps intractable disputes concerning precisely which category of conduct ought to enjoy special privileging by the law.

However, there is something misleading about this way of framing the problem. Even if it is granted that religion is in some sense special, it would not automatically

follow that there should be a presumption against laws that burden religion. This can be seen by setting out stylized arguments for the *No Burden* and fairness-based principles.

We know that one premise of *No Burden* is the following:

(1) Religious commitments have special significance.

And we know the conclusion is:

(C) There is a presumption against any law that burdens religious commitments.

But, since (C) is not logically entailed by (1), some further premise is clearly required.

The most obvious candidate would be:

(2) If a commitment has special significance, then there is a presumption against any law that burdens that commitment.

Together, (1) and (2) entail (C).

At the same time, fairness-based alternatives to *No Burden* need not be divorced from the premise that religion is special. Instead, the argument might go as follows:

(1) Religious commitments have special significance.

(2') If a commitment has special significance, then there is an especially strong presumption against any law that treats that commitment unfairly.

Therefore,

(C') There is an especially strong presumption against any law that treats religious commitments unfairly.

The important implication is that, even granting (1) – that religion is special – there could still be a disagreement between (2) and (2') – a difference concerning the *normative*

logic of religious liberty. Resolving this disagreement in favor of (2) leads to *No Burden* ((C)); resolving it in favor of (2') results in a fairness principle ((C')).

The discussion to follow in this article will focus on exactly this question about normative logic. I take for granted that some version of (1) is correct and instead consider the relative merits of (2) and (2'). I also argue that, if fair treatment is interpreted to mean fair opportunity, then (C') supports a range of religious accommodations, including exemptions from general laws.

To readers familiar with the debate about whether religion is special, it might seem perverse to take (1) for granted. But for two reasons I think this is a reasonable assumption on which to proceed. First, despite the suggestion that the fairness-based views can do without (1), the rejection of (1) would not be especially good news for such views. Consider the case of the *No Discrimination* principle. While a presumption against targeting or selective accommodation in relation to religion is likely to enjoy widespread support, the same principle becomes more controversial when extended to all kinds of commitments. For instance, liberal perfectionists welcome targeting and unequal accommodation of lifestyle commitments that are reasonably regarded by the state as being of inferior quality. It is hard to see how this perfectionist stance could be combined with an endorsement of *No Discrimination* in the realm of religion unless there is something special about religion.

Anti-perfectionists may have difficulty rejecting the special status of religion as well. Someone who believes that the *No Discrimination* principle should be applied to all kinds of commitments might still think that the presumption against targeting and

selective accommodation is weaker for ordinary commitments than it is for religious or other special ones. Again this would be a difficult position to maintain if there is no principled difference between ordinary and special commitments.

It might seem obvious that there is a very strong presumption in favor of treating people fairly and thus that there should be no hesitation about extending *No Discrimination* (or any other fairness principle) to all commitments. But it is important to distinguish two possible objects of fairness: fairness to persons, and fairness to the ends that are valued and pursued by persons. There is little dispute that persons ought to be treated fairly. But the law does not necessarily treat persons fairly by treating their ends fairly. Treating ends fairly is one but only one aspect of treating persons fairly. For a perfectionist, treating persons fairly also entails helping them to form valuable ends. More generally there may be trade-offs between treating ends fairly and securing other dimensions of fairness to persons. Economic and political institutions important to other dimensions may function more effectively when the law does not treat different ends with perfect fairness. And democratic majorities may act less impermissibly (or not impermissibly at all) when they target or selectively accommodate in some domains than in others.

Of course, these observations concerning *No Discrimination* do not amount to a defense of (1). What they do show is that someone determined to reject religion's special importance would be faced with two unappealing choices. Either they could reject *No Discrimination* for all commitments, including religious ones. Or they could hold that there is an equally weighty presumption against targeting and selective

accommodations for all commitments. What they cannot say is that *No Discrimination* matters more for some commitments than for others.

The second reason for taking (1) for granted is that it is quite a plausible claim. In assessing (1), it is important to distinguish two versions of the claim. The claim might be that religion has *unique significance* that sets it apart from all other kinds of commitments and ends. Or it might be that religious commitments are part of a broader class of significant commitments to be distinguished from another class of what might be called “ordinary commitments” (call this the *shared significance* variant of the claim).

While the view that religion has unique significance has some defenders,⁵ the claim faces a serious dilemma: On the one hand, the claim may well be true if one accepts certain very specific theological premises concerning religious salvation.⁶ But, while these premises may be appropriate for religious believers to endorse in pursuing their own personal lives, they seem too narrowly sectarian to serve as an appropriate basis for law.⁷ On the other hand, the claim could appeal to more general ways in which religious commitments have special significance for people: they matter a lot to them; they involve a sense of obligation; they are connected to judgments about ethics and the meaning of life; their formation and pursuit involves the exercise of a valuable capacity; they are connected with a sense of identity; and so on. The problem with invoking these considerations, however, is that they do not pick out religious commitments as being uniquely special. There are many non-religious beliefs that matter to people, that involve a sense of obligation, or that touch on a person’s core

identity. And there are obviously non-religious beliefs about ethics, ultimate value, and the meaning of life.

But none of this need be an embarrassment to the premise that religious commitments have special significance. By opting for the shared significance version of the premise, one can acknowledge that there are other kinds of commitments that have special significance too. In fact, this is what many critics of special treatment of religion end up proposing. As an alternative to treating religion as special, they point to some larger category – “conscience,” “deep concerns”⁸, etc. – as the one that deserves special solicitude, a category that subsumes without being exhausted by religious convictions.

It is understandable that legal and constitutional scholars would be preoccupied by the question of whether religion is uniquely special since some legal provisions (e.g. the Religion Clauses in the U.S. Constitution) do single out religion for special protection. But we are concerned here with the more basic normative idea that religion should be treated by the law as having special significance. There is no tension involved in maintaining that it should have such significance and in holding that certain non-religious kinds of commitment should also be treated as having special significance.

Admittedly, some philosophers are likely to be skeptical about the claim that there is any class of commitments that is deserving of stronger protections than other commitments. They might argue that, if conscience merits special protection, then why not important life projects? And if important life projects, then why not moderately important projects? And so on, all the way down to the most ephemeral and trivial tastes

and preferences. But, while continuum arguments of this kind highlight the difficulty of drawing lines, they do not establish that no lines should be drawn. It is difficult to justify a particular age of consent, but few people would conclude that we should go without one. What these arguments might support is the plausible thought (which I won't develop here) that special significance is a matter of degree.

For these reasons, then, I shall proceed as if premise (1) is justified. The premise is defensible, and dropping it would, in any case, have troublesome implications for all the principles being considered here. To my mind, the important question is not whether to accept the premise, but what follows from accepting it. The *No Burden* principle and the fairness-based alternatives offer different answers to this question. For *No Burden*, it follows directly that religious conduct should not be burdened without an especially good reason. For the fairness approaches, by contrast, the inference is different: they propose that religious conduct should not be denied fair treatment without an especially good reason. I shall turn later in the article to elaborating a particular version of the fair treatment approach. First, though, let us see where *No Burden* runs into trouble.

The *No Burden* Principle

Two different variants of *No Burden* are sometimes defended in the literature. According to the *absolute burden* version of the principle, it is the fact that a restrictive law imposes a severe burden on one or more persons that accounts for the presumption against the law. For proponents of the *relative burden* version, by contrast, it is the severity of the burden on some people relative to the burdens on other people associated with the

same law that accounts for the presumption against the law. Kent Greenawalt seems to favor the absolute version when he writes that “the state wrongs people if it trespasses on [a] deep-seated conviction without a more substantial need”.⁹ Martha Nussbaum inclines instead for the relative version. “There is unfairness,” she argues, “in being prevented from abiding by the dictates of one’s conscience when others are not so burdened.”¹⁰ Although the two variants are different, they share in common the key assumption that I want to question here – the assumption that a law is presumptively impermissible when, all else being equal, it imposes a serious burden on someone. On the absolute view, this is because of the badness of the burden itself; on the relative view, it is because of the badness of the inequality that is created between the person on whom the burden is imposed and others affected by the law.

Greenawalt and Nussbaum provide the most sophisticated recent defenses of the *No Burden* approach. Each writer devotes a great deal of attention to the question of why restrictions on religious conduct should be regarded as especially severe burdens. For Greenawalt, such burdens are severe because they are burdens on the religious believer’s sense of obligation and/or identity.¹¹ Nussbaum in turn argues that we should care about burdens on religious commitments because such commitments are products of a person’s exercise of her faculty of “searching” for ultimate meaning and truth.¹² Greenawalt and Nussbaum devote much less attention to explaining why it follows from the fact that restrictions on religion represent especially severe (absolute/relative) burdens that there is a presumption against them. They linger over premise (1) but have very little to say about why (1) -> (C).

The closest that either comes to engaging with this question is an interesting passage in Greenawalt's discussion that compares helmetless motorcycle riding and sexual activity.¹³ He suggests that there would be a presumption against a law that sought to prohibit sexual activity, and infers from this that there ought to be a similar presumption against laws prohibiting helmetless motorcycling *if* the pleasure some derive from helmetless riding is comparable to the pleasure that many people derive from sexual activity. This seems to be an attempt to justify a general principle in the neighborhood of (2) to the effect that there is a presumption against a law that interferes with what Greenawalt calls a "strong preference." If this is true of strong preferences, Greenawalt adds, it is even more obviously true of cases in which obligation or identity are at stake. In fact, he suggests that the presumption in question turns from being one of prudence into one of justice.¹⁴

Quite apart from what Greenawalt or Nussbaum have to say, one might think that (2) is a reasonably plausible principle. The absolute variant of (2) is really just an application of a simple logic of balancing. According to this logic, in making law and policy, the state ought to balance the different interests that are at stake. When a state action would impact on especially serious interests, then it should take a particularly important public interest on the other side to tip the balance in favor of that action. The relative variant is also simple and familiar. It can be grounded in the idea that a state committed to equality should avoid making laws that impact much more severely on some people's interests than on others.

I shall argue, however, that (2) is too sweeping and should be rejected. As I have hinted already, the alternative to (2) I favor is (2'). Since (2) and (2') overlap, my opposition to (2) is not based on the view that the presence of burden *never* indicates a presumption against the law's permissibility. Rather, I take aim at (2)'s assertion that serious burden *always* indicates such a presumption – that the mere fact of serious burden is enough, on its own, to trigger the presumption in question. The overlap between (2) and (2') helps to account for cases like Greenawalt's imagined prohibition on sexual activity. In these cases, there is not just a burden; there is also a denial of fair treatment.

The problem with (2) is that not all equally serious burdens should be treated alike. Some are relevant to the permissibility of a state action or decision, but others are irrelevant because the person or persons who face the burden are appropriately regarded as responsible for the position in which they find themselves. Premise (2) should be rejected because it fails to distinguish between relevant and irrelevant burdens. There may be some situations in which the fact that the law would impose a serious burden is a good reason to think that there is a presumption against the law. But there is no general presumption against serious burdens as such.

To make good on these claims, let us begin by considering a case in which the existence of a serious burden does not imply a presumption in favor of the claims of the burdened party:

Marital Problems. The Smiths have a happy marriage, but it is a marriage that, over time, has become highly dependent on a shared interest in

material consumption. The Garcias, who live in a nearby town, also have a happy marriage, the success of which is largely independent of material consumption. The government is considering a policy change that would close some of its offices in either the Smith's town or the Garcia's.

Depending on which decision the government takes, the impact on the economic fortunes of both the Smiths and the Garcias would be identical. For both couples, the closure of the offices in their town would impose a 10% cut in standard of living. The resulting loss of discretionary income would not affect the marriage of the Garcias, but it would jeopardize the marriage of the Smiths.

The government's decision would impact other people besides the two couples, but suppose that these effects are the same in the aggregate no matter which town the government selects. So the operative difference is the one between the Smiths and the Garcias. Whether the concern is with absolute or relative burden, so long as the severity of the burden each faces is the critical factor, it is clear what the government should do. Both couples would suffer an economic setback, but the Smiths also face the possible failure of their marriage. Assuming that people have weighty interests in the success of their long-term relationships, the Smiths would be more heavily burdened by the closure than the Garcias. If burden is the deciding factor, then the more justifiable policy would be to close the offices in the town where the Garcias live.

But this resolution seems obviously unfair to the Garcias. Why should they have to accept an economic setback just because the Smiths have developed their

relationship in such a way that it is especially demanding of material resources? Given the equal economic impact on the two couples, the government could have drawn lots to decide which offices to close. Or it could have used its tax and transfer powers to ensure that no matter which offices it closes residents of both towns suffer a 5% economic loss. Both of these solutions seem fair: the first because it gives each couple an equal chance of avoiding a loss, the second because it spreads the loss equally between both couples. But neither of these fair solutions would necessarily align with a resolution based on burden. If in a lottery the Smiths were to draw the short straw, then the fair approach would have selected the more burdensome outcome. And, if even a 5% economic loss would be enough to jeopardize the Smiths' marriage, then spreading the loss equally would produce a greater burden on them than concentrating the loss on the Garcias.

Marital Problems suggests that, as a general matter, there is no general presumption against a state action that produces a serious burden or that fails to minimize burden. It also reveals *why* there is no such presumption. In calling a decision to favor the Smiths on burden grounds unfair, the Garcias are saying that the further effects of the loss of income on the Smith's marriage ought to be regarded as irrelevant. The success of their marriage is not of course irrelevant to the Smiths – it presumably matters a great deal to them – but this does not make it relevant to everyone else. In particular, the government should not make the success of the Smiths' marriage into the Garcias' problem by imposing on the Garcias a resolution that makes them worse off.

Saying that the success of the Smiths' marriage is irrelevant in this public policy context is equivalent to saying that it is the Smiths' own responsibility. The Smiths are the ones who appropriately enjoy the benefits and bear the burdens associated with the success or failure of their marriage. The Smiths are free to make the success of their marriage depend on favorable economic conditions if they like, but they do not have a claim on others when and because those conditions turn out to be insufficiently favorable. Since the Smiths lack such a claim *on* others – they are responsible for the state of their own marriage – the claims *of* others to scarce resources should not be reduced just in order to promote the success of the Smith's marriage by improving their economic conditions.

A second example illustrates some of the same points:

University Admissions. Juneau and Labelle are both applicants to a well-regarded public university. Juneau's family has attended the university for generations. It would be psychologically crushing to the whole Juneau family if she were not to be admitted. Labelle, by contrast, decided to apply to the university on the advice of a guidance counselor. The Labelle family does not have an identity stake in her attending the university.

There is no doubt that Juneau would be more heavily burdened than Labelle by a negative decision. But, it seems wrong to think that Juneau has the stronger claim just for this reason. The fact that one candidate has an identity stake in the decision and the other does not is simply irrelevant to their claims to admission. This is not to deny the burden's severity for Juneau; perhaps rejection really would be a blow to her identity.

Rather, it is because Juneau is appropriately regarded as responsible for her own identity commitments, and thus for any burdens that arise in virtue of those commitments.

The problem with (2), then, is that it fails to disentangle judgments about how serious a burden is from judgments about whose responsibility it is to prevent that burden from materializing. Just because a burden is serious, it does not follow that preventing or removing it is everyone's responsibility. There are some burdens that are serious but that are reasonably regarded as being the personal responsibility of the person who does or would bear them.

Once the relationship between burden, responsibility, and the justification of state action is seen in this light, the challenge to the *No Burden* principle of religious liberty becomes immediately apparent. *No Burden* asserts that, given its severity, a burden on religious conduct implies the need for an especially strong justification. In the absence of such a justification, an accommodation should be provided. But this inference would be valid only if the burden on the religious believer is not appropriately regarded as the believer's own responsibility. If it is the believer's responsibility, then the religious burden would parallel the marital burden facing the Smiths or the identity burden facing Juneau. The burden may well be serious, but it is not relevant in a public policy context. Most importantly, such a burden would not constitute a justification for an accommodation that would shift burdens onto others.

Here's one more case illustrating the challenge I am pressing here – this time involving a burden on religious commitments:

The Contemplative Pilgrims. A city is home to a small religious group known as the “Contemplative Pilgrims.” They believe that, (a), they must devote a weekly minimum of fifty hours to studying their holy text; and that, (b), they are obliged to undertake an annual pilgrimage to a distant holy place. In virtue of (a) they are much less available for remunerative work than most citizens. However, (b) is quite expensive, and this introduces a constant tension into their lives. Recently, they have been able to manage this tension, finding work in their free time and enjoying very low property taxes on their aging houses. Unfortunately, low taxes have weakened the city’s financial situation, and when a new city government is elected it raises property taxes. With the higher taxes, however, the Contemplative Pilgrims are unable to reconcile (a) and (b). They have no choice but to leave one or other of their obligations unfulfilled.

If the sorts of arguments mustered by Greenawalt and Nussbaum for premise (1) are correct, then this is an instance in which the Contemplative Pilgrims face a severe burden – one that is serious in both absolute and relative terms. But, as with the *Marital Problems* and *University Admissions* cases, it is doubtful that there is any presumption against the city’s proposed tax increase or in favor of giving a tax exemption to the Contemplative Pilgrims if the city does go ahead with a general tax increase. Such a presumption would be inconsistent with viewing the Contemplative Pilgrims as responsible for their own commitments. It would treat the costs associated with those commitments as though they should be borne by everyone else and not by the Contemplative Pilgrims themselves.

One possible response to this challenge is that it ignores a salient structural feature of *No Burden*. *No Burden* does not say that the law should make an accommodation whenever someone is seriously burdened. It says that there is a *presumption* in favor of an accommodation. Proponents of the principle accept that some competing considerations are sufficiently important to outweigh the interests of religious believers. Most obviously, *No Burden* is not committed to supporting accommodations for religious practices that would violate basic rights and liberties, or that would substantially jeopardize the life opportunities and prospects that others enjoy. In these cases, the presumption against a restriction on religious conduct would be defeated by the importance of protecting people from the intolerable burdens that such conduct would create.¹⁵ The response I have in mind builds on this feature of *No Burden* to suggest that the fact that someone is appropriately regarded as responsible for a burden might also be regarded as a reason for thinking that the presumption against the law imposing the burden is overcome. Responsibility, on this view, is always a good enough reason to defeat a presumption in favor of accommodation.

But this response is unconvincing. In cases of religious conduct causing severe harms to others (rights violations, racism, gender oppression, etc.) *No Burden* gets the answer right when it says that the presumption in favor of accommodation would be defeated. But even though it gets to the right outcome *No Burden* still implies that there is a reason to accommodate such conduct, and thus something to be regretted about the fact that an accommodation is not justifiable all things considered. This flies in the face of the sense that some religiously motivated conduct is so egregious that there

would not even be a *pro tanto* reason to think it should be accommodated. The underlying problem is more general. The response does not adequately grapple with the idea that a person's religious commitments might be her own responsibility. If they are her responsibility, then the costs they imply should not be borne by others. And in that case there is not even a *pro tanto* reason for accommodation generated by a burden on those commitments. In other words, the response being considered is left with an incoherent structure in which a burden on a religious commitment produces a demand on others and then that demand is outweighed by the fact that the commitment is the religious believer's own responsibility. If the commitment is really the believer's responsibility, then presumably there is no demand on others in the first place.

Let me close out this discussion of *No Burden* by briefly considering a different response to the challenge I have been mounting. Perhaps I leapt too swiftly to the supposition that (2) provides the bridge between (1) and (C). Another possibility would be to replace (2) with the following:

(2*) If a commitment has special significance, and the person who has the commitment is not appropriately regarded as responsible for it, then there is a presumption against any law that burdens that commitment.

(3) People are not appropriately regarded as responsible for their religious commitments.

Premise (2*) concedes the argument concerning burden and responsibility that I have just been making, while still leaving open a path to (C) via (3).

The key question becomes whether religious commitments are appropriately thought of as being the responsibility of those who hold them. Most liberals are attracted to what Rawls calls the “social division of responsibility.”¹⁶ According to this idea, ensuring that major social institutions provide fair background conditions for people to pursue their ends is a public responsibility. But in the context of fair background conditions, individuals are to be regarded as responsible for adjusting and revising their ends. If individuals find that their ends are thwarted because fair background conditions are not established, then they have a claim on others for fair treatment. But, if fair background conditions are established, and individuals still find that their ends are frustrated, then they have no claim on others and should be expected to bear this burden themselves.

Is there any way of reconciling (3) with the social division of responsibility? Since the latter idea acknowledges that individuals do have a claim on one another for fair treatment by public institutions, it might seem that the answer is yes. The argument might simply be that the fact that religious conduct is burdened by a law is an indication of unfair treatment. But this response trades on an ambiguity. If the suggestion is that a burden is a *symptom* of unfairness, this may well be true, but it would still be necessary to have an independent account of what that unfairness is. If instead the suggestion is that the burden *makes* the law unfair, then this is precisely what the *Marital Problems*, *University Admissions*, and *Contemplative Pilgrims* cases are meant to dispute. The mere fact that a person is (seriously/unequally) burdened by a law does not establish

unfairness because the burden might be one for which she is legitimately considered responsible.

It seems then that the only way forward for *No Burden* would be to defend (3) by rejecting the social division of responsibility. Someone who favors this approach might emphasize that people are sometimes socialized into particular religious beliefs at a very young age. People can also experience their religious commitments as involuntary and as absolutely binding. In these respects, religious commitments are unlike many ordinary preferences, e.g. a taste for expensive coffees, which are freely cultivated by people in their adult years.

While these observations about religious commitments are true, I am skeptical about the suggestion that liberal responsibility applies only to voluntary preferences with a discretionary character. The cases we have considered need not fit into this narrow category, nor do many of the examples that are commonly cited in the literature on “expensive tastes.”¹⁷ Ultimately, however, a defense of the social division of responsibility is beyond the scope of the present article. I am concerned to identify a liberal theory of religious freedom, and I am happy to stipulate for the purposes of the discussion that this means a theory that is consistent with liberal views of responsibility. If such views are rejected, then that is surely reason to reconsider many elements of liberalism, including its approach to religion.

It is worth noting though that some philosophers have questioned the social division of responsibility *because* it seems inconsistent with acknowledging morally desirable accommodation practices.¹⁸ Exactly which accommodation practices are

desirable is up for dispute, so it is difficult to refute this claim decisively. But in general this argument is likely to seem most plausible when *No Burden* is opposed to *No Discrimination*: the latter principle does struggle to justify accommodations. One of the payoffs of the fairness-based alternative to *No Discrimination* to be elaborated below is that it provides a means of justifying accommodations without rejecting the social division of responsibility or endorsing *No Burden*.

Fairness and Religious Liberty

A principle of religious liberty that takes the social division of responsibility seriously must focus on the fair background conditions side of the responsibility formula. In demonstrating that religious liberty has been infringed, it is never enough simply to show that religious conduct has been burdened. It must also be shown that the burden or restriction on religious conduct undermines the fair background conditions against which individuals are entitled to pursue their ends.

The important question is how to characterize fair background conditions for the purposes of formulating an account of religious liberty. One answer is offered by the *No Discrimination* principle. According to *No Discrimination*, there is no presumption against a valid and neutral law of general applicability. However burdensome such a law might be on religious conduct, it does not violate religious liberty. But there is a presumption against laws that conflict with neutrality or general applicability. Religious liberty is

threatened when a law targets a religious view for disadvantageous treatment or when it disadvantages a religious view by failing to offer it an accommodation that has been offered to other relevantly similar views. On this account, then, fair background conditions obtain when the law refrains from targeting and is evenhanded about any special accommodations it offers.

For two different reasons, *No Discrimination* is unsatisfactory as a characterization of religious liberty. The first echoes a concern mentioned above about the social division of responsibility. *No Discrimination* cannot explain or justify some desirable accommodation practices. Consider, for instance, the following case:

Blanket Prohibition. A state adopts a strict prohibition against the sale or consumption of alcohol and of other comparable intoxicants and narcotics. State authorities have consistently refused all requests for exemptions from religious groups seeking to use drugs or alcohol in religious services.

The policy described here need not have involved any targeting or selective exemption. But if the policy's effect is to prohibit a core element of certain forms of religious worship – e.g. the celebration of the Eucharist with communion wine – many would judge that there is a serious affront to religious liberty.¹⁹ One would have to choose between rejecting the intuition or concluding that the *No Discrimination* approach fails to explain a fairly core instance of religious liberty.

A second concern is that, viewed as a characterization of fair background conditions, *No Discrimination* is frustratingly ad hoc. Targeting and selective accommodation do seem like *instances* of unfairness, but it is not clear what the

underlying idea of fairness is that gives them this character. It seems possible that the underlying idea will point to a broader account of fair treatment that goes beyond the two conditions stressed by *No Discrimination*.

Rather than develop these challenges to *No Discrimination* further, I now describe a more promising version of the fairness approach. According to the *Fair Opportunity* principle, there is a presumption against any law that leaves individuals without a fair opportunity to pursue and fulfill their religious commitments. I begin by explaining what in general it means for a person to have a fair opportunity to pursue and fulfill their ends. A little later I turn to the question of what difference it makes, if any, that a person's ends are religious in character. In the next section, some of the implications of *Fair Opportunity* for religious liberty are explored. As will quickly become apparent, my characterization of *Fair Opportunity* is pitched at a fairly abstract level. Just as a proponent of *No Burden* would have to elaborate ideas of burden and presumption before that principle could be a useful guide for judgment, the *Fair Opportunity* view would have to be fleshed out in various ways too. I hope to say enough to clearly distinguish *Fair Opportunity* from *No Burden* and to highlight some of the distinctive advantages of the former from a liberal point of view

Fair Opportunity brings together two key ideas at the heart of liberal political thought.²⁰ The first is the claim that, in general, having the opportunity to pursue and fulfill one's ends is something of considerable value for individuals. I call this the opportunity for *self-determination*. As I use the term, self-determination need not imply any exercise of choice or autonomy; it simply means having the opportunity to pursue

and fulfill the ends that one in fact has. Autonomy is one reason for valuing self-determination: it is important that individuals have the opportunity to pursue and fulfill their actual ends because this is part of shaping and controlling their own lives. But there are other reasons to value self-determination not grounded in a more fundamental ideal of autonomy. The alternative to self-determination is usually to shunt people into activities and directions that they do not value and there are reasons for thinking that nobody's life goes particularly well when this occurs.

A liberal state is, in large part, a state that recognizes and gives appropriate space to the interest that individuals have in self-determination in this sense. The second key idea concerns what space it is "appropriate" to give self-determination. The guiding observation is that the self-determination of one individual can conflict with the reasonable claims of others. The *Fair Opportunity* principle is not tied to a specific account of what these reasonable claims are, and so working them out is to some extent a different project than the one that concerns here. To fix ideas, however, we might understand the reasonable claims of others to include:

- The claim that each other person has to self-determination
- The claim that each other person has to enjoy the conditions of autonomy besides self-determination
- The claim that each other person has to political equality
- The claim that each other person has to the "social conditions of self-respect"

Since it is not necessary to settle on an account of reasonable claims for the purpose of laying out the *Fair Opportunity* principle, readers may revise or augment this list as they see fit. The important point for now is simply that there are reasonable claims of others that can conflict with any given individual's exercise of self-determination.

So the two key ideas are:

(A) Self-determination is of considerable value to individuals.

(B) A person's exercise of self-determination can conflict with the reasonable claims of others.

Putting these two ideas together suggests the following principle:

Fair Opportunity for Self-Determination (FOSD). Each individual has a legitimate claim on the most extensive opportunity to pursue his or her ends that is justifiable given the reasonable claims of others.

On this view, the law denies fair opportunity when it limits somebody's opportunity without a good justification grounded in the reasonable claims of others. A law that prohibits same-sex dating because it offends the moral sensibilities of others would deny fair opportunity to prospective same-sex dating partners, assuming (as seems right) that others do not have a reasonable claim not be offended. And Greenawalt's hypothetical law prohibiting sexual acts would also deny fair opportunity because there is no plausible justification based on the reasonable claims of others for such a law (Greenawalt imagines a paternalist reason).

Importantly, however, not all laws that limit somebody's opportunity thereby deny them fair opportunity, since some such laws may be justifiable given the reasonable

claims of others. A law that taxes the well off and redistributes to the less well off leaves the well off with fewer resources with which to pursue their ends. But it is presumably justified by the reasonable claims of the less well off to have a fair share of resources with which to pursue their own ends.

Understood in this way, *FOSD* explains the unfairness in a law that targets a particular viewpoint by singling out conduct motivated by that viewpoint for especially restrictive treatment. If such a law were justified by an appeal to the reasonable claims of others, then one would expect all conduct of that type to be restricted and not just conduct motivated by the viewpoint in question. Likewise, *FOSD* explains and justifies a concern about the unfairness of selective accommodation: if the law can reasonably make an exemption for conduct motivated by some particular viewpoint, and conduct motivated by another viewpoint is comparable in relevant respects, then there must be no justification grounded in the reasonable claims of others against offering the same exemption to the second viewpoint. However, the absence of targeting and selective accommodation is not sufficient for *FOSD*. Even where both forms of discrimination are absent, a law can deny a person fair opportunity to pursue and fulfill her ends by reducing her opportunity to do so on grounds that are not justified by the reasonable claims of others. In general, paternalist laws conflict with fair opportunity (since they are not justified by the claims of others), as do laws that restrict a person's opportunity in order to protect trivial or irrelevant claims of others (e.g. the claim not to have one's moral sensibilities offended).

A full discussion of *FOSD* would need to include an account of the conditions under which a limit on a person's self-determination is justifiable given the reasonable claims of others. In some situations, the correct response to a conflict is to balance the competing claims, giving each some weight but adjusting the weight according to the significance of the claims at issue. The claims of motorists to mobility and of pedestrians to safety seem like a case of this kind: it is reasonable to limit each claim to some extent to leave space for the other, perhaps attaching extra weight to the claims of the latter. In other situations, however, balancing is the wrong way to think about the adjudication of competing claims. If one party has an unreasonable claim that conflicts with the reasonable claims of others, the right approach is not to give each some of what they are after. If one person's desire to oppress or subordinate or exclude some class of persons conflicts with the reasonable claims of those persons, a fair resolution would simply limit the conduct of the party with the unreasonable ends. In other cases, the conflict between one person's self-determination and the reasonable claims of others occur in a context where there are justifiable standards of fairness and entitlement that are independent of the conflict in question. In these cases, rather than balancing the conflicting claims, a fair resolution would be guided by these independent standards. If two people have conflicting claims because of material scarcity, there is a reasonable case for limiting one's claim if and only if such a limit would align with independent claims of fairness and entitlement each have.

A full account of *FOSD* would need to specify more completely how conflicting claims are to be resolved. *FOSD* is compatible with a variety of approaches to resolving

conflicts. Rather than pursue these matters further, I turn now to a consideration of whether, and in what way, it makes a difference to the fair opportunity approach that a person's commitments are religious in character. One implication of specifically religious commitments can be stated immediately. I suggested just now that in cases of pure balancing of claims (e.g. motorist vs. pedestrian) it is reasonable to weight the competing claims according to their significance. Insofar as religious claims have special significance they should enjoy extra weighting in these contexts. For instance, traffic and parking regulations that impede religious worship seem harder to justify than identical regulations that would impede ordinary leisure activities. An exemption might be justified in situations like this, where the balance favors restriction for ordinary activities but not for religious ones.

A second implication stems from the observation that self-determination is only one of the important interests of individuals. This was implicit in the earlier illustrative list of "reasonable claims," which mentioned self-determination but also other concerns. Self-determination is valuable because it serves autonomy and well-being, but these more fundamental values also depend on other conditions. Well-being is not just a matter of pursuing and fulfilling whatever ends one happens to have. It is also a matter of having worthwhile ends. Likewise, autonomy is not just a matter of pursuing one's actual ends; it also implies having an adequate range of options to choose from and adopting a reflective stance towards those options.

Because self-determination is not the only important interest that individuals have, one can imagine situations in which self-determination would be outweighed by

other considerations. Perfectionists argue that it is sometimes permissible to nudge people into acquiring more valuable ends even at the cost of limiting their opportunity to pursue their current ends. In this scenario, there is an all-things-considered reason not to give people a fair opportunity to realize their actual ends. There may also be cases in which it is legitimate to deny fair opportunity for “pragmatic” reasons (reasons that arise because some people have non-ideal attitudes and behavior). Imagine, for instance, that a religious majority would support state institutions only if those institutions manifested a preference for their religion. This unwillingness to support a religiously neutral state seems indefensible, but there might still be a pragmatic reason to accommodate it: it would be a disaster if state institutions were to become ineffective because the majority withdrew their support. In this kind of scenario, it might be defensible all-things-considered for state institutions to manifest a preference for the majority religion, but we would not then want to say that atheists or minority religionists enjoy a fair opportunity for self-determination.

A limit on someone’s opportunity for self-determination might thus be justified in two different ways. Some such limits are justified by the reasonable claims of other people. In this instance, the limits on opportunity do not deny fair opportunity, but help to demarcate its contours. Other limits on opportunity are external to the structure of fair opportunity. They deny fair opportunity to some person or persons in the name of some other value that competes with, and sometimes outweighs, *FOSD*.

The claim that *FOSD* is a defeasible presumption rather than an absolute requirement brings us to the implication for religious commitments. How strong, we

might ask, is the presumption against denying someone a fair opportunity for self-determination? Suppose somebody insisted that there is nothing special about religious commitments: the law should not treat them as being any more or less important than any other commitment. The *Fair Opportunity* principle can accommodate this view by specifying that the presumption against denying somebody a fair opportunity to pursue and fulfill their religious commitments is no stronger or weaker than the presumption against denying fair opportunity to any other kind of commitment.

Importantly, however, *Fair Opportunity* can also make room for the idea that religion is special. *Fair Opportunity* can accept that individuals have especially weighty interests in being able to pursue and fulfill their religious convictions. Instead of directly grounding a presumption in favor of an accommodation, these interests make the presumption against denying people a fair opportunity to pursue their religious commitments especially strong. Put differently, the importance of religion in the lives of believers means that it takes an especially urgent and weighty countervailing consideration to justify a departure from fair opportunity.

This last twist in the argument makes no difference to the analysis of cases involving limits on opportunity that do not deny fair opportunity. If there is no denial of fair opportunity, the question of the weight to give the presumption against such a denial does not arise. But the special status of religion does matter in cases where a restriction would deny fair opportunity. Indeed, without reverting back to *No Burden*, the argument might even justify religious exemptions to otherwise generally applicable laws. Imagine that a law is being considered that would deny somebody fair opportunity to realize their

commitments in order to advance some paternalist or pragmatic goal. It is quite possible that both of the following statements are true:

(A) The presumption against denying fair opportunity for some ordinary non-religious activity is weak enough that it is defeated by the value of the paternalist or pragmatic goal that would be advanced by the law.

(B) The presumption is strong enough for the same activity when it is pursued for religious reasons that it would not be defeated by the value of that same goal.

In this kind of situation, it seems defensible to impose a general restriction on the activity, thereby advancing the paternalist or welfarist goal in question, but to grant an exemption to people who are engaging in that activity for religious reasons. Such an approach would not involve giving any unfair advantage to those who enjoy the religious exemption. Rather, it simply acknowledges the heightened importance *of fair* opportunity when the commitments at stake are religious in nature. The argument thus straddles the distinction emphasized by some writers between exemptions designed to “privilege” religion (by giving it special consideration) and those that are meant to “protect” religion (from unfair treatment).²¹ Religion is given special consideration that consists in weighting especially heavily the presumption against one dimension of unfair treatment.

Fair Opportunity and Religious Liberty

So what are the implications for religious liberty of shifting to a fair opportunity perspective? I address this question in three stages – first by comparing *Fair Opportunity* with *No Discrimination*, then by comparing it with *No Burden*, and finally by pointing to avenues for further exploration.

(i) Fair Opportunity vs. No Discrimination

According to the *No Discrimination* principle, there is no presumption against a neutral and generally applicable law, no matter how burdensome it might be on religious conduct. Someone whose religious conduct is impeded by such a law would have no claim to accommodation. For instance, *No Discrimination* implies that in *Blanket Prohibition* there is no justification for an accommodation, despite the burden on the sacramental consumption of wine. Likewise, *No Discrimination* would support the U.S. Supreme Court’s reasoning about Oregon legislation outlawing peyote, a drug used in Native American religious ceremonies.²² The law did not target religious users of the drug nor offer exemptions to religions other than the Native American Church. Since it was a “valid and neutral law of general applicability” there was no violation of religious liberty even if the religious practices of the Native American Church were substantially burdened.²³

The *Fair Opportunity* principle suggests a different analysis. Laws that prohibit alcohol or peyote impose a restriction on the liberty of anyone who seeks to use these substances. Such restrictions would deny fair opportunity to would-be users unless they could be justified on grounds that appeal to the reasonable claims of others. Many

standard rationales for prohibitions of this kind would not pass this test. A paternalist justification would fail, for instance, since it does not even appeal to claims of other people. Nor, arguably, would some justifications that do cite the claims of others. Some defenders of drug and alcohol laws argue that prohibition protects community members from being exposed to examples of self-destructive lifestyles. Others suggest that, by regulating and stigmatizing drug and alcohol use, prohibition encourages possible users to perform their social duties. These arguments do invoke the claims of other persons, but it is questionable whether they justify restriction. In other spheres of conduct, setting a bad example is not considered a good enough reason to justify a legal restriction, nor is the fact that an activity might marginally increase the likelihood of a failure to perform social duties.

If the restrictions on drugs and alcohol deny fair opportunity, then there is a presumption against them. That presumption is defeasible. For instance, for some drugs there might be powerful paternalist considerations that justify a restriction. If such considerations are compelling enough, restriction would then be justified all-things-considered even though it would not leave prospective drug users with a fair opportunity for self-determination.

If the presumption in favor of fair opportunity is higher for religious commitments than for ordinary ones, an even stronger conclusion may follow. The paternalist argument might be powerful enough to defeat the presumption for ordinary commitments but not powerful enough to defeat it for religious commitments. The *Fair Opportunity* principle thus suggests that, if drug and alcohol prohibitions are justifiable,

there is still a case to be considered in favor of exemptions for individuals who seek to engage in religious uses. Of course there are many practicalities that would have to be considered in deciding whether exemptions are justifiable all things considered. Is it feasible to isolate users who ought to be at liberty to consume the prohibited substances from the rest of the population? How confident could officials be that religious claimants are sincere? And so on. These are genuine issues, which I am not addressing here. The point is simply that, if *Fair Opportunity* is the right approach, there is a reason of principle that counts in favor of offering an exemption.

(ii) Fair Opportunity vs. No Burden

The *Fair Opportunity* principle also diverges from the *No Burden* principle. One difference arises in cases involving religious conduct that infringes the rights of others. While both *Fair Opportunity* and *No Burden* would oppose accommodations in these cases, they arrive at this conclusion in different ways. Proponents of *No Burden* explain this conclusion in two ways. One is to stipulate that it is only burdens on permissible forms of religious conduct that give rise to a presumption of accommodation.²⁴ The second is to argue that, were there to be a presumption in favor of accommodation even in these cases, the presumption is defeated by the value of protecting rights. The *Fair Opportunity* principle improves on both of these arguments. It improves on the first by explaining *why* some forms of conduct are to be considered impermissible for the purposes of evaluating religious accommodation claims, an assumption that otherwise seems ad hoc when it is advanced by *No Burden*. From the perspective of *Fair*

Opportunity, these forms of conduct give rise to no claim because they violate the reasonable claims of victims of rights violations. While *No Burden* advocates would likely agree with this characterization they treat it as an external check on their principle. By contrast, the fact that the conduct in question violates reasonable claims of others is relevant *within* the logic of *Fair Opportunity*.

Fair Opportunity improves on the second explanation by avoiding the implausible implication that there is even a *pro tanto* reason to accommodate rights-violating conduct. While a restriction on rights-violating religious conduct does constitute a limit on the opportunity of the religious believer, it does not deny such a person fair opportunity, since the restriction is justifiable with reference to the reasonable claims of those who would suffer rights violations. Since an accommodation cannot be justified on the grounds that it secures fair opportunity to the would-be rights violator, there is not even a *pro tanto* reason for accommodation that would need to be balanced against other considerations.

The fair opportunity approach also has a distinctive take on cases such as the *Contemplative Pilgrims*, in which an accommodation would impose mild but unfair burdens on third parties. Suppose that, in the case of the *Contemplative Pilgrims*, the increased tax revenues are earmarked for an expensive new sports facility demanded by a vocal constituency in the city. In this scenario, the contemplative pilgrims would have a decent case for an accommodation. On the one hand, the tax limits their opportunity to follow their religious convictions in a significant way: the pilgrims are left unable to meet all their religious obligations. On the other hand, these limits do not

seem justified by the reasonable claims of others: if background conditions are otherwise fair, there is no reasonable expectation that the public should pay for discretionary goods like sports facilities that are valued by some people but not others. In this scenario, then, the tax would deny the contemplative pilgrims fair opportunity, and there would be a presumption in favor of accommodation.

However, if the tax increase is intended to support public purposes that correspond to reasonable claims of some citizens, then, on the *Fair Opportunity* principle, the contemplative pilgrims would not have any claim at all for an accommodation despite the burdens they are facing. To excuse them from taxes would be to expect other taxpayers to pay more, and these others have a reasonable claim not to have to pay more than their fair share. The contemplative pilgrims may not be able to fulfill their religious obligations and ends, but they cannot plausibly say that they are denied a fair opportunity to pursue their convictions. Since background conditions are fair in this sense, the contemplative pilgrims are regarded as responsible for the predicament in which they find themselves.

A similar analysis can be given of *Hobby Lobby*, which I mentioned at the outset of this article. *Hobby Lobby* concerned a mandate that all health insurance plans cover a list of contraceptive methods, some of which were regarded by the plaintiffs as abortifacients. Given the nature of their complaint, many critics of the law would deny that women have a reasonable claim to have free access to the procedures in question. But this is not how Justice Alito reasoned in his majority decision. The majority decision granted (*arguendo*) that the government has a “compelling state interest” in ensuring

that women have access to contraception.²⁵ What was troubling to the Court majority is that the contraceptive mandate was not the “least restrictive means” of protecting this interest. The law might have asked insurance companies to provide and pay for this coverage or it might have been paid for out of general government funds.²⁶ Instead, religious employers were put in a position of having to support access to contraceptive methods that they viewed as religiously prohibited.

Although *Hobby Lobby* raises many interesting issues, its relevance here is to illustrate the distinctive perspective on religious liberty afforded by the *Fair Opportunity* principle. Suppose we grant that the contraceptive mandate does impose a burden on the religious beliefs of individual owners of certain corporations. The critical question is whether this limit on opportunity can be considered a denial of fair opportunity. As we have seen, this depends on whether the limit is justifiable by appeal to reasonable claims of others. The Court majority allowed that women have a reasonable claim on access to the contraceptive methods in question but denied that this settles the question, since somebody besides the employer might have guaranteed such access. But there is a second reasonable claim that needs to be considered here: the claim that all should bear their fair share of the burdens of supporting justified government programs. For better or worse, in the United States this means that employers are expected to pay for part of their employee’s health care costs. By suggesting that taxpayers could pick up the bill, the Court is overlooking the reasonable claim of taxpayers not to have to pay more than their fair share. On this reasoning, then, the contraceptive mandate can be justified by reference to the reasonable claims of others

(the claim of women to access to contraception + the claim of fairness to taxpayers) and thus does not deprive the religious employers of a fair opportunity for self-determination, even if their religious scruples are in fact burdened by the requirement.

(iii) Fair Opportunity: An agenda for research

The preceding discussion of *Fair Opportunity's* implications for religious liberty has barely scratched the surface of a rich and underexplored notion. To conclude this part of the discussion, let me mention two areas of controversy concerning religious liberty that could be illuminated by further reflection on the idea of fair opportunity for self-determination.

(a) Legally enforced duties to public institutions. Some of the oldest debates about religious liberty concern conscription into combat service in the military. There are also disputes over unemployment insurance concerning whether someone refusing a job for religious reasons is doing their part to support the insurance system.²⁷ These cases tend to be dealt with in a rather ad hoc fashion by the *No Burden* principle, with some discussions emphasizing the severe burden on religious believers and others highlighting the unfairness of exempting religious believers from specific requirements applying to everyone else.²⁸ The *Fair Opportunity* principle, by contrast, encourages us to avert our attention from the balance between burden and public interest and instead to take a closer look at the concern about fairness. The question of fairness in these controversies is more complicated than it initially looks. Everyone agrees it would be

unfair for a conscientious objector to refuse to take on any substantial burden for the public protection, when others are expected to take one on. But conscientious objectors do not typically refuse to do anything at all. They are often willing to take on dangerous and unpleasant tasks that serve the public good, so long as they are not required to kill others intentionally. They ask for latitude in *how* they serve the public, not to be relieved from the general obligation to do so. From this perspective the question of fairness concerns whether a particular system of conscription is excessively prescriptive about how individuals are to discharge their public obligations. Is it possible to design a fair system that would meet the public's needs *and* that would allow conscriptees some flexibility so that they can mesh their public obligations with their religious commitments?²⁹ The unemployment cases raise a very similar question. Can a fair and workable unemployment insurance scheme be developed that leaves people some latitude over the time, manner and place of their contribution, allowing them to reconcile their duties to support the system with their religious obligations?

(b) *Conflicting self-determination claims.* Conflicts between one person's self-determination and another's are a familiar possibility. The criminal law deals with the most egregious kinds of conflict, as do aspects of the civil law. But there are genuinely hard cases that a fully developed account of *Fair Opportunity* would have to resolve. One example is the employer who imposes particular workplace rules (dress-code, schedules, etc.) that conflict with the religious commitments of employees. Another would be the business-owner who refuses on religious grounds to serve certain

customers (e.g. same-sex weddings). These cases require a deeper discussion of the reasonable claims of the different parties than the illustrative sketch that I offered. Questions that would have to be considered include the importance of economic freedom to fair opportunity for self-determination (taking into account that economic freedoms derive their value, in part, from the value of a free and fair market), the availability of alternative employment for affected employees and alternative business-providers for affected consumers, and whether a private business practice contributes to a general pattern of stigmatization and exclusion from which people have a reasonable claim to be free.

Conclusion

Liberals are conflicted these days about religious liberty. Protecting religious liberty is an important and longstanding part of the liberal tradition, but it seems that a month seldom passes in which there is not some new story about a religious claim that conflicts with other liberal priorities. Using the tools of political theory, the paper has tried to alleviate this tension by reconsidering the normative logic of religious liberty.

After arguing against one of the leading contemporary approaches – the *No Burden* principle – the present article has introduced a new liberal principle of religious liberty – the *Fair Opportunity* principle. This principle helps to alleviate some of the liberal tensions about religious liberty. It can explain why, in some of the most controversial recent cases, there is no good claim to religious accommodation at all, even though there is plausibly a burden on religious conduct. The core idea, as we have

seen, is that where there is no departure from fair opportunity there is no basis for an accommodation. At the same time, *Fair Opportunity* offers strong protection for many forms of religious conduct, and can even lend support to calls for religious exemptions. Many situations in which an accommodation is claimed are plausibly regarded as ones in which particular religious believers are being denied a fair opportunity for self-determination.

Notes

¹ John Locke *Political Writings* (Penguin: 1993) 414-15.

² Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality Toward Religion," 39 *DePaul L. Rev.* 1990; Michael McConnell, "Religious Freedom at a Crossroads," *U. Chicago Law Review* (1992); Kent Greenawalt, *Religion and the Constitution*, 2 vols. (Princeton, 2006 and 2008); Martha Nussbaum, *Liberty of Conscience* (Basic Books, 2008); Paul Bou-Habib "A Theory of Religious Accommodation," *Journal of Applied Philosophy* (2006); Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard, 2011).

³ Christopher Eisgruber and Lawrence Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," *U. Chicago L. Review* (1994); Eisgruber and Sager, *Religious Freedom and the Constitution* (Harvard, 2007); Ronald Dworkin, *Religion Without God* (Harvard, 2013); Brian Leiter, *Why Tolerate Religion?* (Princeton, 2013).

⁴ Dworkin, *Religion*, ch. 3; Leiter, *Why Tolerate?*, 100-1.

⁵ Michael McConnell, "The Problem of Singling out Religion," *DePaul Law Review*, 2000.

⁶ *Ibid.*, 28-31.

⁷ Eisgruber and Sager, "Vulnerability," 1262.

⁸ Eisgruber and Sager, "Vulnerability," 1283; Greenawalt, vol. 2, 299

⁹ Greenawalt, vol. 2, 315

¹⁰ Nussbaum, 138; see also 128, 144, 159, 164.

¹¹ Greenawalt, vol 2, 307-16.

¹² Nussbaum, 164-74

¹³ Greenawalt, vol 2, 308.

¹⁴ *ibid.*, 315

¹⁵ Nussbaum, 170.

¹⁶ John Rawls, *Political Liberalism* (Columbia, 2005)189; Ronald Dworkin, *Sovereign Virtue* (Harvard, 2000)

¹⁷ E.g. Dworkin, *Sovereign Virtue*, ch. 1.

¹⁸ Seana Valentine Shiffrin, 2004. "Egalitarianism, Choice-Sensitivity, and Accommodation", in R. Jay Wallace, Samuel Scheffler, Michael Smith (eds.), *Reason and Value* (Oxford) 271. Brian Barry and Jonathan Quong also see a tension between accommodations and responsibility for preferences. See Barry, *Culture and Equality* (Harvard, 2000); and Quong, "Cultural Exemptions, Expensive Tastes, and Equal Opportunities," *Journal of Applied Philosophy*.

¹⁹ Laycock "Formal," 1000.

²⁰ In what follows I drawn upon, and seek to develop further, my discussion in Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton, 2014), chapter 4. See also my forthcoming article, “Religious Exemptions and Fairness,” in Cécile Laborde and Aurélia Bardón (eds.) *Religion in Liberal Political Philosophy* (Oxford, forthcoming).

²¹ Eisgruber and Sager, “Vulnerability,” 1250-4; Greenawalt, vol. 2, 302.

²² Employment Division, Department of Human Resources v. Smith. 1990. 494 U.S. 872.

²³ Ibid. 879

²⁴ Greenawalt, vol. 2, 307.

²⁵ Burwell v. Hobby Lobby. 2014. 134 U.S. 2751, at 2780.

²⁶ Ibid., 2780-3.

²⁷ Sherbert v. Verner. 1963. 374 U.S. 398.

²⁸ Compare Greenawalt, vol. 1, 53-4 and 173-74.

²⁹ Greenawalt, vol. 1, 53-4, describes a possible system.