Religious Accommodation and Disproportionate Burden

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Abstract

The paper offers a critical engagement with Cecile Laborde's book, *Liberalism's Religion*. It elaborates several objections to Laborde's account of religious accommodations, and sketches an alternative approach.

Religious exemptions have long posed a challenge for liberal political theory. Religious freedom is a central value in the liberal tradition and a right that is announced in the constitutions of major liberal democracies. Full protection for religious freedom is often associated with exemptions, which combine protection for religious conscience with the benefits of a general law. But many liberal thinkers have become convinced that exemptions are inconsistent with liberal values and principles. The simplest reason for this arises from the fact that contemporary exemption claims sometimes conflict with other important liberal principles and priorities. In many instances, the laws that religious people seek to be exempted from are both highly salient in contemporary politics and strongly favored by liberals. They promote gender equality or access to health-care, for instance, or protect the rights of LGBTQ persons.

Beyond this basic objection to exemptions lie several more fundamental concerns about fairness. There are in fact two distinct fairness challenges that are pressed against religious exemptions. The first asks whether a practice of exempting people from a generally applicable law when they have a religious

objection is fair to other people who might wish to be exempted from the law but whose objection to it is non-religious in character. In effect, this first fairness-based argument appeals to the liberal principle of neutrality: it is unfair for the law to privilege religious ends over non-religious ones.

The second fairness challenge highlights the cost to others associated with giving exemptions for religious conduct. Most laws are concerned with the social distribution of costs associated with particular types of activity. A law either fairly protects the interests of everyone in the community or it does not. If it does not, then it should be amended or repealed for everyone, and so no exemption is called for. If it does, then to make an exemption would be to reduce the protection afforded to other people that was the rationale for the law in the first place. An exemption for religious conduct thus shifts costs from the religious believer onto third parties. Viewed this way, exemptions conflict with the liberal principle that individuals should bear the costs of their own ends and choices.

So liberals celebrate religious freedom but have doubts about religious exemptions. Faced with this dilemma, many liberal theorists end up embracing a relatively narrow conception of religious freedom that offers little or no support for exemption claims. Religious freedom is understood as an anti-discrimination principle – a right against laws that deliberately target religion, or particular religious views, for unfavorable conduct – rather than as a presumption that one's religiously motivated conduct be free from burdens of the law (Eisgruber and Sager 2007; Dworkin 2013).

One of the most interesting and provocative aims of Cécile Laborde's *Liberalism's Religion* is to develop an alternative to this minimalist, anti-exemption conception of religious freedom.[1] Laborde offers an account of religious freedom that is explicitly grounded in liberal values but that also seeks to explain and justify a range of religious exemptions. In addition to being pro-exemption, the position Laborde paints seeks to be progressive. She does not call for exemptions from laws that protect the rights of children, women, and sexual minorities, or, more generally, for exemptions that would leave the rights and interests of other parties seriously impacted. Within the space leftover after these progressive constraints are applied, Laborde believes that a number of exemptions can be justified on liberal grounds.

I am sympathetic with Laborde's project and share many of her conclusions. Like Laborde I believe that it is possible to articulate a liberal case for religious exemptions that is progressive and that is responsive to the two fairness-based objections pressed by many liberals. This is a project worth undertaking both for the practical reason that exemptions are an important problem facing liberal legal systems but also for the theoretical reason that it promises to deepen our critical understanding of standard liberal claims about fairness.

Notwithstanding these sympathies, there are several issues presented by Laborde's account that are worth discussing. In what follows, I highlight two such issues where ultimately I think that Laborde's position is on the right track, even while raising several questions and concerns. Then, I turn to a central component

of Laborde's liberal theory of religious exemptions that I find to be unpersuasive. I explain why this is and point the way to what I think is a more compelling theoretical approach.

Neutrality and Exemptions for Religion

Laborde begins her account by immediately confronting the neutrality challenge (198-205). Religious exemptions seem to conflict with state neutrality in two different ways. First, they involve judgments about the ethical salience of different attachments and commitments that make up individual conceptions of the good. Legal burdens on some attachments and commitments are regarded as especially serious setbacks to a person's interests and well-being, and it is this judgment that leads to the exemption strategy. The law can apply in general to most people in most situations, since their critical interests are not at stake. But it should not be applied when the setback to individual interests would be particularly severe. On some views of liberal neutrality, it might seem that any presumption by the state that it can identify which elements of citizens' conceptions of the good are especially important and which are not would violate the state's duty to remain neutral on questions concerning the good life.

Second, religious exemptions conflict with neutrality by singling out religion in particular for special solicitude. It is not just that the state is making judgments of salience about how individual lives go under particular laws. If it offers religious exemptions, the state is making the much more controversial judgment that burdens on *religious* conduct are a particularly serious setback to a

person's interests. To many liberals – and not just to those who explicitly endorse a principle of state neutrality – this preference for religion seems unacceptable. Why think that legal burdens on one person's efforts to live according to her religious convictions should be treated by the state as any worse than equivalent burdens on another person's efforts to follow her secular moral conscience (Eisgruber and Sager 2007)?

Laborde's response to the neutrality challenge rejects both of these arguments. Against the first, she maintains that a coherent and defensible formulation of the principle of state neutrality would prohibit the state from disadvantaging particular conceptions of the good because it dislikes or disapproves of those conceptions, but would still allow the law to make some judgments of ethical salience. Asking whether liberals really need to assume that a Muslim veil should have no more salience in the eyes of the law than a clown-hat, Laborde argues that "liberal political philosophy has more structure than a flat neutralism about values would suggest" (200). It can draw on what Laborde calls – borrowing the term from Rawls – a "thin theory of the good." In the case of Rawls, she points out, the basic liberties enjoy special priority because they are connected with the development and exercise of important moral powers.

So Laborde's response to the first argument consists in embracing the particular type of non-neutrality that is being alleged: liberals should not advocate a neutrality principle that rules out all judgments of ethical salience. Her response to the second argument takes the opposite tack. Singling out religion for special privileges *would* be an objectionable departure from neutrality, but the case for

religious exemptions need not be premised on the view that religion is uniquely special. Laborde calls “well taken” the point made by critics that whatever features make religion ethically salient will also be found in many non-religious commitments (201). But she insists that “the fact that religion is not uniquely salient does not entail that religion does not belong to a broader category of commitments and practices that are themselves salient” (201-02).

One of Laborde’s key claims is that this broader category consists of what she calls *integrity-protecting commitments* (IPCs). Integrity, she says, is “an ideal of congruence between one’s ethical commitments and one’s actions” (203). An IPC is any commitment in which this congruence is at stake: it is a “commitment, manifested in a practice, ritual, or action (or refusal to act), that allows an individual to live in accordance with how she thinks she ought to live” (203-04).

Laborde’s proposal is that religious commitments are candidates for exemptions when and because they are IPCs. Against the objection from neutrality, she argues that this proposal is not sectarian. The content of a person’s IPCs is given subjectively – by whatever the person believes is ethically important – and so just about any ethical outlook can agree that it would be valuable for its own adherents to enjoy integrity (204). The relationship between integrity and religion is not peculiar to particular forms of religion, nor to religion as opposed to non-religion. Religions based primarily on practice and ritual involve IPCs, as do “Protestant”-style religions that distinguish more sharply between belief and conduct (205). And people with secular moral beliefs will sometimes find that their integrity is at stake in certain situations where their

actions are restricted or compelled. As long as religious exemptions are offered as part of a more general framework in which all IPCs – based on whatever form of religion, and whether religious or non-religious – are treated as candidates for exemptions, they involve no objectionable privileging of religion.

I am generally sympathetic with Laborde's responses to the neutrality objection. I think she is correct to reject an extreme or "flat" neutralism that condemns all judgments of ethical salience. And I agree with her that any plausible theory of religious exemptions would have to form part of a more general theory of exemptions for a wider category of commitments, a category that includes but is not exhausted by religious commitments. While I share Laborde's views on how to respond to the neutrality objection, there is a possible concern that merits further discussion before moving on to issues where I have a significant theoretical disagreement with Laborde.

Consider the second variation on the neutrality objection. Laborde's response is that religious commitments are part of a larger category – IPCs – and it is this category that is relevant to eligibility for an exemption. Someone who is pressing the neutrality objection might well anticipate this response, however. They won't doubt that religious commitments can be thought of as a part of a broader class of commitments. What they will say instead is that it is implausible to regard all of the commitments in this broader class as eligible candidates for exemptions. To refute the neutrality objection, in other words, we need not only an account of what distinguishes special commitments (exemption candidates) from ordinary preferences. We also need an argument that the class of special

commitments has, at least roughly, the right extension. We need reassurance that the theory will not lead to the justification of a wild proliferation of implausible exemptions.

This latter possibility strikes me as a real concern for Laborde's account, so it is surprising that she says little explicitly about it (the exception being a couple of sentences on p. 214 discussed below). At first glance, it looks like a pretty broad range of commitments could count as protecting a person's integrity – that is, her ability to "live in accordance with how she thinks she ought to live" (203-04). These include a person's religious and core ethical beliefs. But they also include the projects that are central to a person's life, which could include the pursuit of art, raising of one's children and sustaining a good marriage, identification with a geographic place or political entity (e.g. nationalism), belonging to a particular institution or community (e.g. a university, a club), passionate sports fandom, ownership of weapons, or the pursuit of excellence in some game or sport (e.g. chess). Laborde would need to explain either why extending exemptions into all of these areas is not excessive or why such an extension is not a natural implication of her view.[2]

When Laborde acknowledges the concern about exemption-proliferation she dismisses it on the grounds that her account of IPCs is intended only to address the question of which commitments are *eligible* for exemptions (214). It is a further question, involving the exploration of countervailing considerations, whether a particular candidate for an exemption is justified all things considered. Eligibility, on Laborde's view, establishes a presumption in favor of exemption (a

pro tanto reason, as she puts it) but this presumption can be defeated by considerations of the public good, such as the prevention of harm to third-parties or the frustration of important public aims.

While Laborde's rejoinder is helpful I doubt that it completely disposes of the problem. Many people will doubt that there is even a *presumption* against all restrictions on IPCs. Consider the case of a Seventh-Day Adventist who quits her job because it requires Saturday work and who wants to claim an unemployment benefit despite her refusal to accept all available work. Many proponents of exemptions believe that she should be given an exemption from the requirement to accept available Saturday work, and thus that the countervailing considerations (e.g. cost to other workers, administrability) are not sufficient to defeat the presumption in favor of such an exemption. But then compare this case with that of a passionate sports fan who objects to working on Saturday because that is when the weekly matches are played. If the fan regards his sporting commitment as a life-project that is central to his identity, then it would seem to count as an IPC in Laborde's sense. If the countervailing considerations are identical in both cases, and an exemption is owed in the case of the Seventh-Day Adventist, then the argument would seem to imply that an objection is also owed in the case of the sports fan. But (in my experience at least) hardly anyone thinks that the sports fan is owed a exemption.

Laborde offers one further distinction that might be of help in thinking through this contrast and the problem more generally. There are two kinds of IPCs, she suggests, with different degrees of ethical salience (215). The

Seventh-Day Adventist in my example has an “obligation-IPC:” she is burdened in her attempt to do what she believes she has an obligation to do. The sports fan, by contrast, has an “identity-IPC:” he engages in a practice that he values and that provides meaning and connection with others. Missing the weekly matches for the sports fan might threaten his standing in a particular community of fans, and leave him feeling alienated and unfulfilled, but he would not experience himself as committing a wrong. So one way to handle the contrast between the Seventh-Day Adventist and sports fan cases would be to say that both cases involve IPCs, and so in both cases there is a presumption against burdening the commitments in question. But the burden is more severe in the Seventh-Day Adventist case, because it involves an obligation-IPC, and thus the presumption against burdening is weightier. Depending on the nature of the countervailing considerations, then, there may be a case for exempting the Seventh-Day Adventist but not the sports fan.

While this argument is on the right track, some questions and concerns remain. One issue is that it is hard to pin down what precisely counts as an obligation-IPC for Laborde. The idea sounds straightforward – I have an obligation-IPC to ϕ if I believe that I have an obligation to ϕ – but Laborde evidently has something broader in mind. She suggests that “many religious rituals, as well as cultural practices, although not strictly speaking mandatory, are also experienced as having the force of obligations by those who engage in them” (223), adding that “if they are central to an individual’s life, such that her sense of self and integrity is bound up with them, they can have comparable

weight as categorical imperatives." This gloss on obligation-IPCs risks blurring the distinction between obligation- and identity-IPCs. After all, our sports fan might well report that fandom is "central" to his life and important to his "sense of self."[3]

A second concern is that the division of IPCs into two categories – obligatory and identity – seems overly simplistic. A different approach would characterize the ethical salience of particular commitments on the basis of a range of different factors.[4] The fact that a commitment presents itself to the person who holds it as obligatory, or in some other way "non-negotiable," is one important factor in evaluating what is at stake for the person in pursuing the commitment. But there are other important factors too. Some commitments are arrived at as part of a conscious effort to align one's life's course with one's most fundamental ethical and metaphysical beliefs about the roots of normative authority and the nature and meaning of existence (Nussbaum 2008: 164-74). Some commitments play a pivotal role in a person's life. If such a commitment cannot be pursued, then a whole set of other preferences and values will be frustrated too. For instance, denying someone the opportunity to worship as she sees fit might prevent her from establishing and enjoying a relationship of community with her coreligionists and thereby close off a set of options that are connected with that relationship. And some commitments have recognitional salience in the sense that they are implicated in the basic relationships of recognition and respect that a person enjoys with other members of society. A burden on commitments of this kind might reasonably be regarded as excluding

or marginalizing or denigrating the people who are categorized socially in a particular way.

Shifting to a more multi-dimensional approach would be a way of refining rather than rejecting Laborde's approach. A larger question is whether Laborde's theory ends up overtasking the distinction between obligation- and identity-IPCs. This is an issue we will have to defer until the end of this essay. The distinction looms large in Laborde's approach because it determines which normative principle is relevant to assessing the justice of an exemption claim. As I suggest at the end of the essay, if instead there is a single, fairness-based normative principle that provides a basis for exemption claims, then the need to distinguish between higher and lower degrees of ethical salience becomes less pronounced.

Majority Bias

Having described the category of commitments that are candidates for exemptions, Laborde turns next to the conditions that must hold for exemptions to be justified all things considered. The mere fact that a religious commitment is burdened, she says, does not imply that there is any unfairness (218). The law does owe its citizens fair treatment – a "fair framework" in which they can pursue their ends (219) – and so the key to justifying an exemption would be to show that the burden that the exemption is intended to relieve is an unfair one.

Laborde argues that there are two distinct types of unfairness that bear on the justification of exemptions: "disproportionate burden" and "majority bias." My

main critical remarks will be directed at her discussion of disproportionate burden, but let me start with some briefer remarks about majority bias.

Majority bias arises as a result of decisions that a state must make about how to "format" its public institutions. By "formatting" Laborde has in mind the "endowing of…institutions with particular characteristics that unequally disadvantage certain citizens on the basis of their beliefs and identities" (230; see also Patten 2014: 169-71): decisions about what schedules institutions will keep; what uniforms if any their employees will be expected to wear; what food their cafeterias will be serve; what symbols will be used to represent those institutions; what language(s) the institutions will operate in; and so on. For instance, public schools are closed on Sundays, which gives worshipping Christians an advantage not enjoyed by Muslims who worship at their mosque on Fridays. This is an example of "majority bias."

According to Laborde, majority bias is not necessarily objectionable. One could imagine mild or inconsequential forms of it that give rise to no serious concerns. But majority bias becomes illegitimate when its effect is to deny minorities access to core societal opportunities (e.g. to work *and* to worship) that are taken for granted by the majority. Where there is objectionable majority bias, then two remedies are possible. Either one could "equalize down" by getting rid of the accommodation for the religious majority – the pro-majority formatting – or one could "equalize up" by offering an accommodation to minorities that is comparable to what is enjoyed by the majority. When the former is impossible or undesirable, the latter is the preferred approach. Accommodations of the latter

kind will sometimes require an exemption. For instance, Muslim employees might be exempted from regular working hours on Friday afternoon in order to attend Mosque, thereby extending to them an accommodation that is roughly equivalent to that which is enjoyed by Christians in virtue of the fact that workplaces and schools do not operate on Sundays.

I am generally sympathetic with this form of argument, and have relied upon it myself in my book *Equal Recognition* (Patten 2014: ch. 5). It is worth keeping two points in mind, however. One is that the argument from majority bias may have somewhat limited applicability in the religious sphere. For the argument to have purchase, there needs to be a majority accommodation such as Sunday closing that can serve as a benchmark. But, in many cases, there is no benchmark at all. Consider conscientious objection to combat service, for instance. In other cases, there might arguably be a benchmark, but only if special assumptions are made, such as the assumption that an exemption for a sip of Communion wine is comparable to an exemption for religious uses of peyote.[5]

The second observation is that the notion of majority bias would benefit from deeper theorization than Laborde provides. In Laborde's lead example of Muslim school teachers who wish to attend Friday Mosque services, it might be wondered who would cover their classes on Friday afternoons. Suppose the answer is that other teachers would simply be expected to work slightly longer shifts. It is not clear that this arrangement would be fair to them. Why should they be expected to bear some of the costs of their Muslim colleagues' commitments? Laborde's assumption seems to be that the Muslim teachers are bearing costs

associated with the Sunday closing for their Christian colleagues. But this is unpersuasive for two reasons. First, Sunday closing is not costly to Muslim teachers: it is just not as advantageous as Friday closing would be. In this respect, there is an asymmetry between the two kinds of accommodation. Second, it may be that very few, or even none, of the non-Muslim teachers are themselves practicing Christians, in which case the appeal to reciprocity between practicing Christians and Muslims seems irrelevant to justifying the burden that the other teachers are asked to bear. This is not to deny Laborde's claim that the rules are biased against Muslims. But if the problem with bias is unfairness, then one should also consider new forms of unfairness that would be introduced by attempts to remedy the bias.

Or consider a different puzzle for majority-bias arguments. Imagine a public swimming facility that is open for public swimming at various times throughout the week. Anybody may go during an open time, conditional only on respectful behavior towards staff and other swimmers. Now suppose that a group of orthodox Muslim women claim that these rules are biased in favor of majority religious and secular sensibilities: the rules reflect "the pervasive role played by the majority religion in shaping seemingly neutral institutions" (236). The women request that the pool set aside some time every week for female-only swimming. (They wouldn't object to an equal number of male-only hours). The question, then, is whether Laborde would want to count the open-to-all approach of the public facility as in fact a form of majority bias. My own hunch is that this would not be an instance of majority bias. As I understand them, claims of bias should

be evaluated with reference to an underlying idea that each person should enjoy a fair opportunity to pursue and fulfill their commitments (more on this at the end of this essay). Taking into account the legitimate ends of public institutions (including that of providing a forum in which all citizens can interact as equals), I do not think that the Muslim women in the example can reasonably claim that they are denied a fair opportunity. There may be pragmatic reasons to accommodate them, but they are not reasons related to majority bias. From her discussion of the principles underlying the account of majority bias (236-7), it is hard to know what Laborde would say about this case.

Disproportionate Burden

Disproportionate burden is Laborde's second type of unfairness bearing on the justification of exemptions. If I am right about the limited applicability of justifications based on majority bias, then the cogency of disproportionate burden becomes especially important to the success of Laborde's overall project of reconciling exemptions with liberal principles.

A disproportionate burden is one that is serious and can be avoided or relieved without excessive cost. As Laborde observes, the idea of disproportionate burden is naturally formulated in terms of a balancing test (220). The burdensomeness of the law on a particular IPC (measured by the severity and directness of the burden) is balanced against the nature of the public aim that is advanced by the law and the cost-shifting consequences for others of an exemption.

Much of Laborde's account of disproportionate burden is concerned with elaborating each of the elements in this balancing calculus:

- A burden is more or less *direct* depending on how easily it could be avoided by someone subject to it. A law that compels a broad ascriptively defined class of people (e.g. all 18 to 25 year males) to engage in conduct that they believe is wrong (e.g. combat service in the military) imposes a burden that is direct, while the burden associated with a law regulating discretionary recreation (e.g. operating a motorcycle) is indirect.
- The *severity* of a burden depends mainly on whether the IPC that is affected is an obligation-IPC or an identity-IPC. Laborde considers burdens on the former to be more severe than burdens on the latter, even suggesting that if an IPC is not "experienced as obligatory" by the person who holds it then an exemption could only be justified on majority-bias grounds (224-5). Depending on how broadly applicable the majority bias argument is, it may follow that exemptions for identity-IPCs are rarely justified on Laborde's account.
- The *aim* of a law is a matter of how tightly the law promotes a goal of egalitarian justice, and of how much the law requires universal and uniform compliance in order to be effective. The more important a law is for justice, and the less the effectiveness of a law tolerates exemptions, the harder it should be for even a severe burden to justify an exemption.

- Exemptions typically *shift costs onto others*, but they vary as to the nature and magnitude of these costs. All else being equal, the more serious the costs imposed on others the harder it should be to justify an exemption.

At first glance, at least, disproportionate burden seems like a reasonably plausible principle. At its heart is a simple idea: that 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 weighty interests, then it should take a particularly important and inflexible public interest on the other side to tip the balance in favor of that action. If there's no such interest, then the state should refrain from the action; or it should make an exemption for those who would suffer a particularly serious setback.

Laborde's own justification of the principle is really just a roundabout appeal to this same logic (221). She imagines parties to Rawls' Original Position choosing principles of justice. They don't know which conception of the good they possess, but they do assume it would be bad to have to face a serious burden on one of their obligations of conscience. Such a burden would place them under "strains of commitment." They thus choose a principle that would protect them against such burdens, except in cases where a particularly important and inflexible public interest is at stake.

Disproportionate burden and personal responsibility

While the characterization of disproportionate burden as a form of unfairness is appealing in its simplicity, I believe it should be rejected. Laborde notes that "the

mere fact that a person has an IPC does not entail that she should benefit from an exemption from the law" (218). I would go one step further: the mere fact that a law imposes a *disproportionate burden* on a person's IPC is not sufficient to show either that there is any unfairness towards that person or that that person should be offered an exemption. The core of the problem is that whether people find that their commitments are disproportionately burdened by a law depends in part on what commitments they have. And presumably people share some of the responsibility for what commitments they have.

Consider a couple of examples. In Ronald Dworkin's book, *Religion without God*, he imagines a person whose deepest moral commitment is to maximizing his own wealth (Dworkin 2013: 117-18). The "Mammon"-worshipper believes that he has a moral duty to make as much money as he can. As a corollary, he has a moral objection to paying taxes. Laborde's theory has trouble explaining why the Mammon-worshipper should not be given an exemption from paying taxes. Using Laborde's criteria, on one hand the burden on the Mammon-worshipper is both severe and direct. He believes paying taxes to be morally wrong, making his commitment an obligation-IPC, and he cannot easily avoid taxes by making different choices. On the other hand, the countervailing considerations identified by Laborde's account of disproportionate burden do not seem particularly salient in this case. As Laborde puts it in describing a different case, "the aim of the law is not necessarily defeated if a small number" of taxpayers who sincerely worship Mammon are given an exemption (226). Other taxpayers will have to pay more to leave the state with adequate revenues, and

so the case involves “cost-shifting,” but if Mammon-worshippers are a small enough fraction of the population the tax burden that is shifted onto any individual third party may be negligible.

The case of the Mammon-worshipper might seem preposterous to many people, but Laborde insists that we should not second-guess the content of IPCs, except in cases of “morally abhorrent” IPCs such as commitments to infant sacrifice or terrorism that are “flatly incompatible with the basic rights of others” (207). Perhaps she could respond to the example by expanding the notion of “morally abhorrent” IPCs to include IPCs that are constituted in part by a commitment to free-riding on others. (Suppose the Mammon-worshipper does value the services provided by government; he just believes it would be wrong for *him* to pay for them). I believe this reply would be on the right track, but it still does not go far enough.

To see this, consider a second example. Imagine that, faced with environmental crisis, the government imposes a substantial carbon tax that dramatically raises the cost of international travel. Some people believe that they have a religious obligation to go on a pilgrimage to a distant foreign place. They also believe that they have an obligation to spend significant amounts of time every week in worship and devotional activities. As a result, there are limits to the time that they are available for remunerative activities. None of these obligatory actions seem morally abhorrent in any sense. And yet the situation of the would-be pilgrims seems relevantly similar to that of the Mammon-worshipper. The carbon tax would impose a disproportionate burden on them, and so by

Laborde's account they should be offered an exemption. But this seems like the wrong result.

If indeed it is the wrong result, then the implication is that some burdens on IPCs, even when they are "disproportionate," are not relevant to law and policy in general and to the justification of exemptions in particular. These are burdens that the Mammon-worshipper and the Pilgrims are appropriately expected to bear themselves. One way that this point is sometimes put by political philosophers is to say that the Mammon-worshipper and the Pilgrims are *responsible* for their commitments. In the first instance, this simply means that they, and not others in society, are the ones that are rightly expected to bear the burdens associated with having those commitments. Talk of responsibility may also suggest – but I believe this is a further and separable connotation – that the individuals in question are able to exert some control (perhaps over the course of their lives) over what commitments they have[6]. Or at least it suggests that the law should treat them as if they have the capacity to exercise such control (Rawls 2005: 185-90).

Laborde herself endorses Rawls' "social division of responsibility" according to which society is responsible for establishing a fair framework of justice and individuals "have to take responsibility for adjusting their life projects to the common framework" (219; see Rawls 2005: 189). She also quotes with approval Peter Jones' dictum that people must "bear the consequences of their beliefs" (220; see Jones 1994). But Laborde insists that this idea of responsibility does not conflict with the justification of exemptions on disproportionate burden

grounds. She argues that it is appropriate to hold individuals responsible for their commitments only when the other condition of the social division is satisfied – that is, only when society has established a fair framework of justice. And the avoidance of disproportionate burden is itself *part* of a fair framework of justice.

This suggestion trades on an ambiguity, however (see Patten 2017a: 142-44). If the suggestion is that disproportionate 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. It would not be disproportionate burden itself that makes the framework unfair, but some other form of unfair treatment that tends to cause disproportionate burdens. If instead the suggestion is that disproportionate burden *makes* the framework unfair, then this is precisely what the cases of the Mammon-worshipper and the Pilgrims – and indeed a whole series of cases of "expensive tastes" discussed in the literature on egalitarianism – are meant to dispute. There does not seem to be any injustice in taxing the Mammon-Worshippers or the Pilgrims. The mere fact that a person's IPCs are disproportionately burdened by a law does not establish unfairness because the commitment producing the burden might be one for which she is reasonably considered responsible.

To conclude this part of the discussion, let me return to Laborde's suggestion that her argument would be supported by Rawlsian Original Position reasoning. While this is not the place to get embroiled in Rawls exegesis, I am skeptical about the suggestion that Rawls' argument for an equal liberty of conscience "can be generalized to apply to exemptions" (221). The parties to the

Original Position are meant to represent citizens who are endowed with, and concerned to protect, certain moral powers. As Rawls puts it in his overview of "Fundamental Ideas" in *Political Liberalism*, a major "respect in which citizens are viewed as free is that they are viewed as capable of taking responsibility for their ends and this affects how their various claims are assessed" (Rawls 2005: 33; see also 185-90). So while maximin and the strains of commitment are certainly part of Rawls' Original Position argument, the theoretical apparatus must also be specified in a way that captures the idea of responsibility for ends.

Rethinking the Case for Exemptions

One possible fix to the problem I have identified would be to revise the criteria for what counts as a disproportionate burden. Perhaps fairness in the distribution of burdens might be considered a standing part of the aim of any law. If the only way to avoid burdening an IPC would lead to an unfair distribution of burdens, then that burden should not be considered disproportionate. Or perhaps the "cost to others" criterion might lead to the same conclusion. If the only way to avoid burdening an IPC would involve imposing an *unfair* cost on others (however small) then that burden should not be considered disproportionate.

These amendments to Laborde's account of disproportionate burden would help it to get the right answers. But the amended account still seems theoretically unsatisfying. It suggests an analytic framework in which there are *pro tanto* reasons to avoid direct and severe burdens on IPCs, but these reasons are sometimes defeated by considerations related to aim and cost to others,

including considerations of fairness. This framework seems problematic for two reasons. First, in at least some cases, the idea that there is even a *pro tanto* reason to exempt or accommodate seems counter-intuitive. I do not see anything at all regrettable about a refusal to give the Mammon-worshipper a tax exemption. Second, the idea that there is a *pro tanto* reason to avoid burdens on IPCs does not come to terms with the idea that a person's religious commitments might be her own responsibility. If they are her responsibility, then she should bear the costs they imply; she should not expect others to bear them. And in that case there is not even a *pro tanto* reason for accommodation generated by a burden on those commitments (Patten 2017a: 141-42).

The best response for Laborde, I believe, would be to reconsider her "thin acceptability" test for determining which IPCs are *pro tanto* candidates for exemptions (205). According to this test, any IPC that is not "morally abhorrent" is a *pro tanto* candidate for an exemption. I already suggested that refining this test to also disqualify commitments that are partly constituted by free riding might help with the Mammon-worshippers case (but not the case of the Pilgrims). My suggestion here would be to go even further and to say that *any* claim for an exemption based on an IPC is disqualified from the outset if accommodating it would deny others a fair opportunity to pursue their own ambitions and commitments. Only this way can an account of exemptions take seriously the idea that people should be held responsible for their own IPCs so long as society establishes fair background conditions. On this proposal, a person has a *pro tanto* claim on others only for a *fair opportunity* to pursue and fulfill her IPCs.

There is no *pro tanto* claim to realize IPCs that either by their very nature are inconsistent with the fair claims of others, or that for contingent reasons (resource scarcity, etc.) are incompatible with the fair claims of others.

In addition to meshing comfortably with an appealing idea of personal responsibility, a fair opportunity account along these lines would have several other advantages. One is that the fact that a restriction deprives someone of a fair opportunity to pursue an IPC seems like a serious (even if not always decisive) objection to that restriction whether or not the IPC in question is an obligation- or an identity-IPC. By putting the accent less on the degree of burden and more on whether the individuals concerned have a fair opportunity to pursue their ends, the fair-opportunity account is less dependent on a debatable obligation/identity distinction than Laborde's theory. A second, related advantage is that the fair opportunity approach offers a single principle for evaluating exemption claims rather than separating into two distinct types of unfairness. Put differently, it can explain *why* majority bias, in Laborde's sense, is objectionable: it is objectionable because it denies minorities a fair opportunity to pursue their commitments.

Of course the fair opportunity account raises a number of difficult questions of its own. When can we say that a particular burden on an IPC denies a person not just the opportunity to pursue that IPC but a fair opportunity to do so? Do paternalist laws (e.g. laws that restrict the use or sale of narcotics) deny fair opportunity? Does conscription into combat service deny a person with pacifist beliefs a fair opportunity to follow those beliefs? And does disqualifying

someone from an unemployment insurance system who refuses to make themselves available for work on a particular day of the week deny a person with religious objections to working on that day a fair opportunity to follow their religious beliefs?

These are all hard questions, but I believe that the fair opportunity framework is a fruitful one in which to explore them, as well as a powerful tool for addressing some of the hard cases that Laborde highlights in defending thin acceptability (211-2). Elsewhere I have tried to develop the fair opportunity approach, show how it can handle various kinds of cases, and argue that it provides both a powerful justification for various exemptions and a clear account of the moral limits on exemptions (Patten 2017a, 2017b).

Works Cited

Dworkin, Ronald (2013) *Religion Without God* (Harvard).

Eisgruber, Christopher and Lawrence Sager (2007) *Religious Freedom and the Constitution* (Harvard).

Jones, Peter (1994) “Bearing the Consequences of Belief,” *Journal of Political Philosophy* 2:1, 24-43.

Laborde, Cécile (2017) *Liberalism’s Religion* (Harvard).

May, Simon Căbulea (2017) “Exemptions for Conscience,” in *Religion in Liberal Political Philosophy,* ed. Cécile Laborde and Aurélia Bardon (Oxford: Oxford University Press).

Nussbaum, Martha (2008) *Liberty of Conscience* (New York: Basic Books).

Patten, Alan (2014) *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton).

Patten, Alan (2017a) “The Normative Logic of Religious Liberty,” *Journal of Political Philosophy*, 25:2, 129-54.

Patten, Alan (2017b) “Religious Exemptions and Fairness,” in *Religion in Liberal Political Philosophy,* ed. Cécile Laborde and Aurélia Bardon (Oxford: Oxford University Press).

Rawls, John (2005) *Political Liberalism* (New York: Columbia University Press).

Endnotes

1 Laborde 2017: ch. 6. All parenthetical references in the text are to this book.

2 For a challenge along these lines, see May 2017.

3 Laborde also says that “if it is a case that is experienced by women as a practice that engages their integrity in ways that a uniform restriction on the practice makes it a particularly severe cost, then it is an obligation-IPC” (223). This formulation begs the key question. The idea that some commitments are experienced as obligatory was supposed to *explain* why burdens on them were especially severe. One cannot then identify commitments as belonging in the obligation-IPC category, and therefore as particularly severe, on the grounds that burdening them would impose a severe cost.

4 See Patten 2014: 131-36.

5 Eisgruber and Sager 2007: 93.

6 For discussion, see Patten 2014: 137-48.