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15. The Claims of Religious Identities in Secular Societies

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Abstract

In this essay I explore the question of why people in secular societies should honor the claims of religious identities. I argue that the due recognition that is granted to religious identities should be founded on the value of equal respect for persons. Additionally, I argue that there are good reasons to regard religious identities as special – in a way that is congruent with equal respect for persons – such that they are deserving of special moral and legal consideration. But I affirm that views that are not traditionally religious can also make special claims insofar as they resemble the paradigm cases of religious identities and thus are at least “quasi-religious.” I then apply my account of the claims of religious identities to two key issues in secular democratic societies with regard to these claims: (1) the issue of religious accommodations; and (2) the issue of free speech and whether we should limit offensive or blasphemous speech (morally if not legally).

Keywords: religion, secularism, conscience, religious accommodation, free speech

Introduction

In a secular society, why should those who do not accept a particular religious worldview nevertheless honor the claims of the identities shaped by such a worldview?¹ I will argue that the due recognition that is granted to religious identities in secular societies should be founded on the value of equal respect for persons, which is integral to the good of a democratic way of life. However, much depends upon how we fill out an account of why persons are worthy of equal respect. I will argue here for a particular thick understanding of the nature and value of the person where what is of central significance to being a person is the capacity for conscientious meaning-seeking by which one defines his or her moral or religious identity.

Next, in light of the value of equal respect for persons, we can ask: are religious identities *special* such that they are deserving of special moral and legal consideration? The First Amendment of the U.S. Constitution in fact seems to affirm that religious identities are special, though some have seen this as being in conflict with the value of equal respect. I will argue that there need not be a conflict here. Further, I will argue that there are in fact good reasons to regard religious identities as making special claims. I will discuss four points in particular: (1) the specific nature of religious convictions of conscience as involving *demands of the sacred*; (2) the *intrinsic goodness* of religion as a distinctive and especially important basic human good; (3) the *instrumental goodness* of religion for society; and (4) the *special vulnerability* of religion to political abuse. However, I will affirm that views that are not traditionally religious can also make special claims insofar as they resemble the paradigm cases of religious identities and thus are at least “quasi-religious.”

I will then apply this account of the claims of religious identities to two key issues in secular democratic societies where these claims find expression: (1) the issue of religious accommodations; and (2) the issue of free speech and whether offensive or blasphemous speech should be limited. In regard to the first issue, I will argue that there are good reasons for some but not all forms of religious accommodation. In regard to the second issue, I will argue that we at least have moral reasons for limiting offensive or blasphemous speech. However, I will also contend that there is a strong presumption in favor of legal protection for free speech and whether we should establish legal limitations will depend upon the good exercise of practical reason within a particular context.

A brief note here on my approach: the following arguments are *moral* arguments (as opposed to merely pragmatic or legal arguments). They aim to establish a specific conception of “political morality,” which concerns how we *ought* to live in our political lives, particularly in the context of contemporary secular democratic societies. Political perspectives cannot in fact be neutral with respect to competing conceptions of the good life for human beings and thus what we must try to do is to convince our fellow citizens of how the good life is best understood with an aim to forming a political consensus that promotes the common good.

¹ These claims, I will argue, are rooted in *convictions of conscience* and involve demands for certain kinds of recognition, as we will see in the two issues I explore: religious accommodations and the possible moral and legal limits on speech that is deemed blasphemous or offensive to religious people.

Equal Respect for Persons: Thick and Thin

Equal respect for persons is a constitutive value of democratic societies (see Maclure and Taylor: 11). It is part of what makes the democratic life the valuable kind of social and political life that it is. It is a life based on an ideal in which each member of society treats all other members as having the same *intrinsic value* as persons. From this it follows that each person is to have an equal scheme of basic rights, liberties, and opportunities. But we must ask here: is there anything specifically about religious identities that makes claims upon us that we must respect? The answer to this depends on how one understands the nature and value of human personhood.

One way of understanding the nature and value of being a person is what we might call the “thin view.” According to this view, what is most important to being a person is the capacity for freely and rationally choosing one’s own ends and thus for becoming an autonomous self. Michael Sandel refers to this as the Kantian liberal conception of the person, which involves an “unencumbered” view of the self where the self is “given prior to and independent of its purposes and ends.” Thus, Kantian liberalism is opposed

. . . to any view that regards us as obligated to fulfill ends we have not chosen – ends given by nature or God, for example, or by our identities as members of families, peoples, cultures, or traditions. Encumbered identities such as these are at odds with the liberal conception of the person as free and independent selves, unbound by prior moral ties, capable of choosing our ends for ourselves. This is the conception that finds expression in the ideal of the state as a neutral framework. For Kantian liberals, it is precisely because we are freely choosing, independent selves that we need a neutral framework, a framework of rights that refuses to choose among competing values and ends. For the liberal self, what matters above all, what is most essential to our personhood, is the not ends we choose but our capacity to choose them (12).

Sandel goes on to note that for many the attraction to this liberal position is due, first, to its “powerful liberating vision” of the autonomous self that is unencumbered by moral and social ties antecedent to choice, and second, to its way of understanding and grounding the value of equal respect for persons. Respect for persons is not based upon any of the particularities of individuals, but rather on the human capacity for freely and rationally choosing one’s own ends. “Liberal justice,” Sandel writes, “is blind to such differences between persons as race, religion, ethnicity, and gender, for in the liberal self-image, these features do not really define our identity in the first place” (13). According to this sort of “difference-blind liberalism,” equal respect for persons means respecting individual autonomy by allowing each person to live as he or she deems fit, so long as he or she does not infringe on the ability of others to do likewise (see Taylor 1995: 233-37, 249-56).

But is the thin view of persons adequate for capturing our best self-understanding? Sandel thinks it is not because it cannot make sense of how most of us actually live and experience our lives:

It cannot make sense of our moral experience, because it cannot account for certain moral and political obligations that we commonly recognize, even

prize. These include obligations of solidarity, religious duties, and other moral ties that may claim us for reasons unrelated to choice. Such obligations are difficult to account for if we understand ourselves as free and independent selves, unbound by moral ties we have not chosen. Unless we think of ourselves as encumbered selves, already claimed by certain projects and commitments, we cannot make sense of these indispensable aspects of our moral and political experience (13-14).

It is also not clear why we should regard the capacity for choice as so important and worthy of respect if the ends of choice are not also seen as being of great importance, but instead are seen merely as a matter of personal preference, i.e., a matter of what we just happen to desire. Furthermore, the difference-blind liberal ideal of neutrality is questionable because it is not truly neutral between competing conceptions of the good life, as it does indeed have its own conception of the good life – viz., the life of the unencumbered, preference-satisfying self – and in virtue of this it imposes greater burdens on those with significantly encumbered identities than those with unencumbered (or less encumbered) identities.²

Thus it seems we need a thicker view of the person that can account for the experience of being an encumbered self and make better sense of the respect-worthiness of persons. One plausible candidate for such a thick view of the person is expressed in the thought that we are not simply choosing or preference-satisfying creatures, but rather, we are *meaning-seeking creatures* (see Sacks: 19-38). In other words, what is distinctive and especially admirable about human life – as contrasted with the life form of non-human animals – is that we are capable of being concerned, and often are concerned, with a deeper sense of meaning in life, i.e., with living a *worthwhile* life. Drawing on the work of Roger Williams, Martha Nussbaum maintains that an important basis of respect for persons is precisely this human capacity for meaning-seeking. She writes:

[The] faculty with which each person searches for the ultimate meaning of life is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly. The faculty is identified in part by what it does – it reasons, searches, and experiences emotions of longing connected to that search – and in part by its subject matter – it deals with ultimate questions, questions of meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudging the question whether there is a meaning to be found, or what it might look like. From the respect we have for the person's *conscience*, that faculty of inquiring and searching, it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the rights of others

² Alasdair MacIntyre writes: “liberal individualism does indeed have its own broad conception of the good, which it is engaged in imposing politically, legally, socially, and culturally wherever it has the power to do so, [and] in doing so its toleration of rival conceptions of the good in the public arena is severely limited” (1988: 336). Later it will be seen more specifically how this liberal view imposes greater burdens on those with significantly encumbered identities than those with unencumbered (or less encumbered) identities.

or comes up against some compelling state interest (168-69; my emphasis; cf. 19, 37, 51-58).

In other words, it is not merely the choice of a particular way of life that warrants our respect, but rather, such respect is due when the choice of a particular way of life is connected to a conviction of *conscience*, as opposed to a mere life-style preference (cf. Sandel: 63-71). These convictions of conscience are constitutive of the encumbered self, where, as aforementioned, there is a sense of being “*obligated* to fulfill ends [one has] not chosen” (my emphasis). When Nussbaum says that it is “the faculty [of conscience], not its goal, that is the basis of political respect,” she does not mean that the goal of discovering ultimate meaning is not to be regarded as being of great importance for human life. Rather, she means we do not have to agree with a particulate understanding of ultimate meaning to regard someone’s faculty of conscience as respect-worthy. But clearly the reason why the faculty is so respect-worthy is because the goal of discovering ultimate meaning is seen as being of such great importance in human life in a way that mere preferences are not.

Now, one might question whether Nussbaum has adequately characterized these convictions of conscience. In their co-authored book *Secularism and Freedom of Conscience*, Jocelyn Maclure and Charles Taylor have criticized Nussbaum’s account as being “inflationist or insufficiently prosaic” since it “[excludes] from the field of freedom of conscience people who may come to identify with values but without engaging in profound contemplative, reflective, and systematic meditation directed toward the basic meaning and ends of human life” (96). Maclure and Taylor suggest instead that it is “the intensity of the person’s commitment to a given conviction or practice” that provides a more adequate basis for respect, whether made by those who are religious or non-religious (97). But is intensity of feeling really the right criterion? For instance, one can have very intense feelings about a particular sports team, say, the Nebraska Cornhuskers, but this hardly seems to qualify as a conviction of conscience and thereby to warrant our respect and perhaps require from us some sort of special accommodation, such as not having to work on game day (cf. Nussbaum: 167, 169).

What convictions of conscience seem to essentially involve is what Charles Taylor elsewhere calls “strong evaluation” (1985: 1-76; 1989: 3-110). In contrast to weak evaluation, where something is judged to be good – a weak good – simply in virtue of being desired (i.e., it is merely a personal preference), in strong evaluation something is judged to be good – a strong good – according to qualitative distinctions of value in terms of higher and lower, noble and base, admirable and contemptible, sacred and profane and so on that are seen as *normative for our desires* (i.e., as objective values). While certainly some intense feelings do involve strong evaluation, others, as in the case of the passionate Cornhuskers fan, seem to be merely weak evaluation. Earlier in their book, Maclure and Taylor in fact link “convictions of conscience,” or “core or meaning-giving beliefs and commitments,” with strong evaluation when they describe them as

. . . the reasons, evaluations, or grounds stemming from the conception of the world or of the good adopted by individuals that allow them to understand the world around them and to give a meaning and direction to their lives. It is in choosing values, hierarchizing or reconciling them, and

clarifying the projects based on them that human beings manage to structure their existence, to exercise their judgment, and to conduct their life – in short, to constitute a *moral* identity for themselves. Core beliefs and commitments, which we will also call “convictions of conscience,” include both deeply held religious *and* secular beliefs and are distinguished from the legitimate but less fundamental “preferences” we display as individuals (12-13; see Taylor 1989: 3-110).

I take it that when Maclure and Taylor speak of “choosing values,” they mean choosing among the objective values (or strong goods) we recognize those values towards which we are going to orient our life projects, rather than meaning a kind of value subjectivism, given they contrast convictions of conscience with mere preferences. What this passage does reveal is that their position is in fact fairly close to Nussbaum’s account. Although convictions of conscience may not always concern *ultimate* meaning – i.e., a sense of one’s place in the cosmos and its significance – they do concern the issue of meaning *in* life where such meaning involves a sense of what is *worthwhile* in life and where this is understood in strong evaluative terms: i.e., as a normatively higher, nobler, more meaningful mode of life. Thus, we are still referring here to our nature as meaning-seeking creatures, which we can now see is linked to our capacity for being strong evaluators.

At the most basic level, then, the thick conception of the person centers on the capacity for conscientious (i.e., strong evaluative) meaning-seeking, which makes possible an encumbered self, or what Maclure and Taylor call a “moral identity.” As Taylor fills out this idea of a moral identity in *Sources of the Self* and elsewhere, it can be understood broadly as a strong evaluative identity. We live in a certain strong evaluative space: we see ourselves as *moving* towards or away from what we understand to be the good, which connects up with a vision of spiritual/ethical fullness (see Taylor 1989: 25-52; 2007: 1-22). We achieve fullness (or fulfillment) to the extent that we realize the good in practice in our lives. Otherwise put, the degree of fullness in our lives corresponds to our “placement” relative to the good and its normative demands. Moreover, we define our identity or selfhood in terms of the direction of our lives with respect to the good and the degree to which we have realized it in our lives. Because this practical life-orientation and degree of achievement can change over the course of our lives, our identity will be understood in terms of an unfolding story, i.e., as a narrative identity.

This thick conception of the person, I contend, best grounds a sense of intrinsic human dignity that requires equal respect for persons. Human beings should be regarded as respect-worthy because of their capacity for living in accordance with what they conscientiously see to be a normatively higher, nobler, more meaningful mode of life, i.e., the good life (and this is true even where we do not accept a particular vision of the good life). We should also agree with Nussbaum that it is part of our human dignity that we are the kind of creatures who can become concerned, and often are concerned, with questions of *ultimate* meaning.³ I further contend that it is in light of this that human beings can be described as *homo religiosus*.

³ This aspect of human dignity is still there even where one does not take up the task of seeking ultimate meaning, since it is based on the fact that we are the kind of beings who are *capable* of this task.

I will return to offer support for this claim when discussing how religion is an especially important basic human good. For now I will merely indicate what I have in mind with this *homo religiosus* claim: I mean that human beings are naturally drawn – once they reach a certain level of self-consciousness and reflectiveness and are concerned to attain human fulfillment – to search after whether their lives have any ultimate meaning derived from a greater than human source, and they are also drawn to the particular strong evaluative category of the sacred (or the holy or the numinous).⁴ In contrast to the profane – understood in terms of the ordinary or the mundane – the sacred pertains to that which is *extraordinary* and which provokes feelings of reverence, awe, wonder, and the like. In other words, a sense of the sacred involves a sense of *transcendence*, as something set apart from ordinary, day-to-day modes of human experience (see Bellah: 1-43).⁵ It also makes especially strong normative demands upon us in our practical life-orientations: sacred goods *transcend in value* the other strong and weak goods that we recognize in our lives. I believe that our distinctive human capacity for a religious life orientated towards a greater than human source of ultimate meaning and towards the sacred should also be seen as constitutive of our dignity as human beings, whether or not we are religious ourselves.

Is Religion Special?

At this point we must now ask a crucial question: are the claims of religious identities *special* in comparison to other kinds of identities? The First Amendment of the U.S. Constitution does indeed seem to suggest that they are as it singles out religion for special protection in its first two clauses: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁶ There are of course historical reasons for why religion is singled out for special protection, but many find the conjunction of these two clauses – often referred to as the Establishment Clause and the Free Exercise Clause – to be problematic for a secular democratic society today. In particular, it might seem that the

⁴ My account of “religion” will be filled out more in the next section, but it should be clear here that I am operating with an expansive sense of the term that includes theistic and non-theistic views and also organized and non-organized forms. Also, to be clear, when I speak of being “naturally drawn,” I certainly do not mean that everyone will seek a religious life. Rather, I mean that insofar as we seek human fulfillment then it is natural to be drawn to religion since human fulfillment, at its best, requires a sense of ultimate meaning derived from a greater than human source and an orientation towards the sacred (see the discussion below on religion as an especially important basic human good). I fill out and defend this idea of our being *homo religiosus* in more detail in McPherson 2015.

⁵ It is important to note that we can of course come to experience the whole world as imbued with the sacred or the divine, but this is a *spiritual epiphany* rather than an ordinary mode of human experience.

⁶ Other important political documents also give special mention to freedom of religion (rather than simply including it under freedom of conscience), though they do not single it out as the U.S. Constitution does. For instance, Article 18 of the Universal Declaration of Human Rights states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” The Canadian Charter of Rights and Freedoms lists “freedom of conscience and religion” as the first of its four “Fundamental Freedoms.” Also, Article 4 of the Basic Law for the Federal Republic of Germany states: “Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable. . . . The undisturbed practice of religion shall be guaranteed.”

two clauses are in fact in conflict, as the point of the Establishment Clause is to ensure that no citizen is regarded as a second-class citizen due to religious belief or lack thereof (as could be the case if there is an established religion) and the special protection of religion afforded by the Free Exercise Clause on the face of it might seem to give unfair privilege to those who are religious and thus fail with regard to treating all citizens with equal respect. In practice, the First Amendment has provided some special protection for non-religious convictions of conscience (e.g., with respect to military service), provided they sufficiently resembled religious convictions of conscience.⁷ However, by and large the First Amendment has seemed to give priority to religious convictions.

Not surprisingly, a number of moral and political philosophers maintain that religion should not be treated as special. For instance, Maclure and Taylor write:

Within the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but, rather, all core beliefs that allow individuals to structure their moral identity. . . Freedom of religion must therefore be seen as a subcategory of freedom of conscience (89-90).

The idea here is that this is how we need to think if we are to avoid regarding non-religious citizens as second-class citizens (see 9, 13, 20). There are some who go even further in suggesting that religion is not only not special, it is not even in itself a good thing: religion is something to be *tolerated* (due to freedom of conscience) rather than respected (in the sense of being esteemed or even revered). This is the position of Brian Leiter in *Why Tolerate Religion?* For the purposes of inquiring into whether religion is deserving of special moral and legal solicitude, Leiter defines religion in terms of three components: (1) *categorical demands on action* (i.e., “demands that must be satisfied no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up”); (2) *insulation from evidence* (i.e., “Religious beliefs, in virtue of being based on ‘faith,’ are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science”); and (3) *existential consolation* (i.e., religion “renders intelligible and tolerable the basic existential facts about human life, such as suffering and death”) (34, 52).⁸ Since Leiter allows that (1) and (3) can be found in non-religious views, he ultimately regards *insulation from evidence* as the central defining feature of religion.⁹ It is because of this feature

⁷ Two famous cases of extending military exemptions to non-religious persons insofar as their views resemble religious views (the paradigm case for exemption) are *U.S. v. Seeger* (1965) and *Welsh v. U.S.* (1970). This “extensionist” approach of the U.S. legal tradition is defended in Nussbaum: 168-74.

⁸ Leiter lists (3) here as (4) because he also lists “a *metaphysics of ultimate reality*,” but he says that this “seems to be only a variation on the idea that religious belief is *insulated* from evidence” (47). Thus, I only list the components of the definition that he takes on-board in the book as a whole.

⁹ Leiter actually seems unclear on whether “categoricity” is distinctive of religion or not. He says that categoricity is a significant feature of “all claims of conscience, not only religious claims,” but later he says: “What is interesting and important about religion is that it is one of the few systems of belief that gives effect to this categoricity. Pure Kantian moral agents are few and far between . . . , but those who genuinely conduct their lives in accord with categoricity of the moral demands they recognize are overwhelmingly religious” (34, 38). In an endnote he says that he is “content to acknowledge that certain kinds of Kantian views and certain kinds of intuitionist views have quite a lot in common with religion” (153; cf. 49-51).

that he does not think religion is worthy of “affirmative respect” (i.e., the sort of respect that involves esteem or even reverence, as contrasted with “minimal respect,” which is “compatible with nothing more than toleration of religion”), as he contends that “religious belief is a *culpable* form of unwarranted belief” given “ordinary standards of reasons and evidence in common sense and the sciences” (68-91, especially at 68 and 81).

These are certainly controversial claims, and it must be said that Leiter offers very little in support of them. Indeed, he trades more in assertions than arguments.¹⁰ This gives one the impression that his book is written for a community of the like-minded (*viz.*, those who are already convinced non-religious persons) rather than to convince all citizens (religious and non-religious alike) with regard to how we should regard the claims of religious identities; and thus its moral and legal recommendations are questionable.¹¹ Most thoughtful religious people are not going to regard their views as being “insulated from evidence”; i.e., they are not complete fideists. Take theists, for example: many find reasons, even if not conclusive reasons, to affirm a theistic worldview in the facts that there is a universe at all, that the universe is intelligible and has given rise to life and to forms of conscious intelligence, among which are beings such as ourselves who have moral consciences and experiences of the sacred (or the transcendent), and so on (see Manson; Plantinga; MacIntyre 2011; Cottingham). Of course, thoughtful theists are also aware of objections to the theistic worldview, such as the problem of evil, and recognize the need to try to make such a worldview coherent, which may involve revising some beliefs. If it cannot be done, then they may need to abandon some or all of their religious beliefs. But the theist is not in any fundamentally different position than the non-theist or non-religious person. Surely all worldviews – including reductive naturalism – involve some measure of faith, but this does

¹⁰ Leiter acknowledges that there are “intellectualist” traditions of religious thought (he uses scare quotes), but he still maintains that they are insulated from evidence: “First, of course, it is dubious (to put the matter gently) that these positions are really serious about following the evidence where it leads, as opposed to manipulating it to fit preordained ends. Second, and relatedly, . . . in the intellectualist traditions in religious thought . . . , it never turns out that the fundamental beliefs are revised in light of new evidence. The whole exercise is one of post-hoc rationalization, as is no doubt obvious to those outside the sectarian tradition. Religious beliefs are *purportedly* supported by evidence, but they are still insulated from revision *in light of evidence*” (39-40). In his review of the book, Robert Adams counters: “The history of religious thought, in all religious traditions that I know about, is centrally a history of revision of more and less fundamental religious beliefs, in view of new experiences, new situations, new cultural developments, new knowledge about the world. Modern evolutionary biology, for example, has been rejected by some conservative Christians; but others, many of them quite conservative in other ways, have embraced it, revising their interpretations of Scripture in view of a new intellectual situation . . . *Why Tolerate Religion?* manifests little engagement with serious history of religious thought.” Later Leiter also acknowledges that there is a large literature in contemporary philosophy of religion that seeks to defend the rationality of religious belief. However, he refrains from engagement with this literature and merely says: “Suffice it to observe that its proponents are uniformly religious believers, and that much of it has the unpleasant appearance of post-hoc – sometimes desperately post-hoc – rationalizations” (80; cf. 81). This of course does not suffice. Not only is it uncharitable, it is question-begging with respect to his own non-religious position. Further on Leiter describes the positions of Thomistic (or Catholic) philosophy as “irrational and long-discredited” and like a mantra he says that the “dialectical bankruptcy of Thomism . . . is apparent to everyone outside the relevant sectarian group” (90). Again, no real arguments are offered here for these assertions.

¹¹ Adams writes: “I found these middle chapters of the book [which aim to show that religion is not special] disappointing, and was left wondering for what audience they were written.”

not mean that they are insulated from evidence.¹² Thus, it seems highly questionable to regard “insulation from evidence” as the central defining feature of religion.

How then should we understand religion, or what it is to have a *religious* identity? For the purposes of this essay (where we are concerned with what is especially respect-worthy in religion) and in keeping with what was said above, I maintain that what a religious identity paradigmatically involves is a framework of ultimate meaning derived from a “transcendent” or greater than human source that shapes one’s practical life-orientation towards certain strong, categorical normative demands, which typically involve a sense of the sacred.¹³ A perspective can be more or less religious then to the extent that it affirms a framework of ultimate meaning of this sort.

So what then can be said on behalf of the claim that religion is special and deserving of special moral and legal consideration? We can begin by questioning Maclure and Taylor’s view (which Leiter also shares) that religious claims of conscience are on par with any other claim of conscience. Maclure and Taylor already accept that there is a difference between mere preferences and convictions of conscience, so why should it not be possible to differentiate between convictions of conscience on the basis of their normative weight or significance?¹⁴ Religious convictions of conscience make particularly strong normative demands upon religious adherents: viz., the *demands of the sacred*, which carry with them a sense of *inviolability*.¹⁵ As aforementioned, sacred goods *transcend in value* the other strong and weak goods that we recognize. Sacred goods are thus a special kind of strong good, which we might call a “hypergood,” to use the terminology that Taylor develops in *Sources of the Self*. Hypergoods are “goods which not only are incomparably more important than others but provide the standpoint from which these must be weighed, judged, decided about” (63). We can say then that just as we make a distinction between weak and strong goods with respect to the importance of their role in one’s identity, we can also make a distinction *among* strong

¹² In other words, all worldviews must ultimately rely, at best, on what Taylor calls “anticipatory confidence,” where “our over-all sense of things anticipates or leaps ahead of the reasons we can muster for it” (2007: 550).

¹³ Compare Robert George’s definition: “In its fullest and most robust sense, religion is the human person’s being in right relation to the divine – the more than merely human source or sources, if there be such, of meaning and value” (118). I use the terms “the sacred” and “the transcendent” rather than “the divine,” since the latter can have stronger theistic connotations and I want to allow for both theistic and non-theistic forms of religion. Compare also Durkheim’s famous definition of religion as a “unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into one single moral community called a Church, all those who adhere to them” (34). The problem with this definition is that it makes religion necessarily communal. While religion is often communal, I do not think this must necessarily be the case.

¹⁴ Recall that Maclure and Taylor do allow distinctions between claims of conscience on the basis of their degree of intensity, though I argued that this does not seem to be the right criterion.

¹⁵ Nussbaum writes: “To impose an orthodoxy upon the conscience is nothing less than what Williams, in a memorable and oft-repeated image, called “Soul rape”” (37; cf. 52-54). This might seem overblown, but the image is fitting if a claim of conscience includes a strong sense of the sacred. Our sense of the wrong of rape, I believe, is or should be seen as connected to a strong sense of the sacred with respect to human sexuality such that the wrong of rape is not just that it violates consent (making it no worse than other violations of consent, such as a “health nut” forcing someone to eat an apple at gun point), but that it involves a defilement or desecration of something deeply intimate and precious (i.e., sacred) to a person (see Benatar; Scruton: 127-40).

goods and recognize the even greater importance of those that count as hypergoods for individuals such that they impose especially strong normative demands upon one's practical life-orientation.¹⁶ In other words, the higher the normative demand that is recognized, the deeper it goes in shaping one's moral identity and thus the more serious is the violation of the sense of integrity connected with it. For this reason, sincere convictions of conscience involving a sense of the sacred are deserving of special moral and legal consideration.¹⁷

To accord such importance to sacred goods does not undermine the value of equal respect for persons; just as recognizing a priority of strong goods (or claims of conscience) over weak goods (or mere preference) does not. This is because all human beings *qua* strong evaluators are equally *capable* of recognizing sacred goods (or something like them), whether or not they in fact do, and *any* human being who does recognize such a good in shaping his or her identity is deserving of special consideration in cases where there is impingement on this crucial aspect of his or her identity. As I suggested above, I think we can say that the capacity for recognizing sacred goods (as a kind of hypergood) – and for living what is seen to be a normatively higher, more meaningful mode of life in accordance with them – is constitutive of our human dignity, which is shared equally by all human beings simply in virtue of being human. While the recognition of sacred goods is characteristic of religious outlooks, it is also important to note that there are certainly many who recognize sacred goods or something resembling them (such as with regard to the value of human life) even without being “traditionally religious” (i.e., without belonging to any one of the widely recognized religions in the world). Insofar as they do, they deserve to be called religious or at least quasi-religious (as we see, e.g., with secular humanists who embrace a “religion of humanity”) and are worthy of special consideration.¹⁸

Another argument for the specialness of religion, which has been made by a number of scholars, involves advancing the claim that religion (i.e., leading a religious life) is a distinctive and especially important basic human good that is a constitutive component of human fulfillment and therefore – contra Leiter – is worthy of respect and should be

¹⁶ Leiter does respond to Durkheim's definition of religion in terms of the sacred (see note 13). He writes: “even if we suppose that this characterization was adequate to pick out religious beliefs and practices, it would leave mysterious why such beliefs and practices should command special moral and legal consideration. . . . [If] there is something morally important about religious belief and practice that demands legal solicitude, it is connected to the demands of conscience that religion imposes upon believers. Those may sometimes map onto what Durkheim calls the ‘apart and forbidden,’ but what gives them special moral standing is their etiology in conscience, not that they demand ‘standing apart’ and ‘respecting the forbidden’” (29-30). Leiter misses how claims of conscience can be of different types: some concern a special type of strong good, viz., a sacred good or some other kind of hypergood.

¹⁷ It should be noted that people could recognize a hypergood without it being a sacred good. But I take a sacred good to be the strongest kind of hypergood. The discussion in this paragraph, I believe, helps to explain the wide spread acknowledgement that religious convictions go especially deep in one's identity.

¹⁸ Roger Trigg writes: “Paradoxically, once respect for religious principles is seen as a species of a more general respect for conscience, conscientious stands of a more general kind are more easily dismissed . . . Many serious conscientious stands can be respected by analogy with the respect acknowledged due to religion. Yet the more that conscience merely replaces religion, the less specific is the area to be ring-fenced. More practices demand accommodation, and, inevitably, the limitations necessary on accommodation will grow” (2014: 174).

specially protected as a basic human right and even generally promoted (like other basic human goods such as life, friendship, knowledge, virtue, aesthetic appreciation, etc.) (see Finnis 1980: 89-90; 2009; George: 113, 118-21; McConnell: 42; Trigg 2012a: 17-26; 2012b: 46, 55-57; 2014: 60-76, 176-77).¹⁹ Certainly there are non-religious people who would disagree with the claim that religion is a basic human good, though they will need to provide a convincing debunking explanation for the prevalence throughout history of religion in human life as an apparently crucially important component of human wellbeing.²⁰ On the face of it, it does seem that there is good reason to affirm human beings are *homo religiosus*, i.e., naturally drawn to search after whether their lives have any ultimate meaning (derived from a human-transcending source) and also naturally drawn to the particular strong evaluative category of the sacred (or the holy or the numinous).²¹ Important evidence for this claim comes from a widespread experience of existential malaise or flatness of a life lived without any sense of ultimate meaning, the sacred, or the transcendent.²² Indeed, it is noteworthy that there are numerous thinkers who are not traditionally religious but nevertheless have recognized the religious needs of human beings and have tried to meet these needs in non-traditional ways (see Nagel; Dworkin; Ferry; Comte-Sponville; De Botton; Dreyfus and Kelly; Solomon).

¹⁹ Andrew Koppelman maintains that religion is a basic human good, but he does not want to claim that it is superior to other human goods involving strong evaluation (see 2006: 591-94; cf. 2013a, 2013b, 2015). But it is then unclear why he affirms the special protection given to religion in the U.S. Constitution. The appreciation of good art, e.g., is a basic human good, and it should be promoted, but it does not receive the same special protection as religion.

²⁰ Such debunking explanations have been offered; e.g., by Hume, Freud, and recent evolutionary psychologists. But for reasons I give in what follows, I do not think they have been successful in explaining away the apparent religious needs of human beings and their significance in human life.

²¹ John Cottingham describes a sense of the sacred that is found in common human experiences of natural beauty, great works of art, and the moral demand, and he remarks: “[These experiences] involve not so much a revelation of supernatural entities as a heightening, an intensification, that transforms the way in which we experience the world. Terms like ‘transfiguration’ or ‘epiphany’ come to mind here, but not in the sense that there is necessarily an explicit invocation of metaphysical objects that transcend ordinary experience, but rather because the categories of our mundane life undergo a radical shift: there is a sudden irradiation that discloses a beauty and goodness, a meaning, that was before occluded” (61-62). While theists might interpret such experiences as “intimations of the divine reality that is the source of all truth, beauty, and goodness,” non-theists can also have these experiences; they are part of “our ordinary human birthright” (63; see also McPherson 2015).

²² According to Taylor, our secular age suffers from a “malaise of immanence,” which refers to the feeling of emptiness, flatness, loss of meaning, disenchantment, or lack of deeper resonance that people can experience without a sense of transcendence (2007: 302-303, 307-20). For instance, many people today can feel an utter flatness in their everyday existence: they feel “[the] emptiness of the repeated, accelerating cycle of desire and fulfillment in consumer culture; the cardboard quality of bright supermarkets, or neat row housing in a clean suburb; the ugliness of slag heaps, or an aging industrial townscape” (309). This malaise of immanence is captured well in Nietzsche’s critique of the “last man,” who epitomizes modern, civilized culture. The “last man” is the person who is no longer able to “shoot the arrow of his longing beyond man,” and whose “soul” is “poverty and filth and wretched contentment” because he (or she) is concerned only with ordinary human satisfactions (Nietzsche: Prologue, §3 and 5; see Taylor 2007: 319-20). In several places Taylor expresses this malaise of immanence in the words of the famous song by Peggy Lee, “Is that all there is?” which he dubs the “Peggy Lee response” (2007: 311, 507, 509, 545).

If it is at least reasonable to think that human beings have religious needs and that a religious life is an especially important basic human good – as I think it is – then a secular government can be justified in specially protecting and even promoting religion in general (e.g., through tax exemptions and other special accommodations).²³ Religious freedom is rightly regarded as “the first freedom” of the freedoms to be protected in a free, democratic society (as it is in the U.S. Constitution), Robert George maintains, because

. . . it protects an aspect of our flourishing as human persons that is architectonic to the way we lead our lives. Religion concerns ultimate things. In the focal case, it represents our efforts to bring ourselves into a relationship of friendship with transcendent sources of meaning and value. Our religious questioning, understanding, judging, and practicing shape what we do not only in the specifically “religious” aspects of our lives (prayer, liturgy, fellowship, and so forth) but in every aspect of our lives. It helps us to view our lives as a whole and to direct our choices and activities in ways that have *integrity* – both in the moral sense of that term and in the broader sense of having a life that hangs together . . . [Religion] *is* an intrinsic and constitutive aspect of our integral flourishing as human persons and also a good that shapes and integrates all the other intrinsic and constitutive aspects of well-being and fulfillment (113).

We can also say that, at its best, the religious life is particularly admirable because it is a high-aspiring kind of life that recognizes a strong demand for a thoroughgoing self-transformation (or conversion) and so aims at sanctification (i.e., becoming saintly) through realizing a proper relationship in feeling and in action to what is seen as sacred. In his lectures on “Saintliness” in *The Varieties of Religious Experience*, William James writes:

[The] best fruits of religious experience are the best things that history has to show. They have always been esteemed so; here if anywhere is the genuinely strenuous life; and to call to mind a succession of such examples . . . is to feel encouraged and uplifted and washed in better moral air. The highest flights of charity, devotion, trust, patience, bravery to which the wings of human nature have spread themselves have been flown for religious ideals (230).

In short, there is something worth honoring and promoting in the human spirit that is expressed in the religious life at its best, and this should inform our sense of human dignity, i.e., our sense of the respect-worthiness of all human beings.

Similar to the preceding argument about the intrinsic goodness of religion, there are also arguments for the specialness of religion based on the *instrumental* goodness of religion for

²³ Koppelman writes: “American law’s neutrality is specifically neutrality *among* religions; the establishment clause of the First Amendment means, at its core, that the state may not endorse contested theological propositions . . . It still takes the controversial position that religion is good.” He thinks complete neutrality with respect to competing visions of the good life is highly problematic: “If the state can’t promote good lives, then citizens’ lives will be impoverished. If the state can’t support the arts, for example by teaching about them in the public schools, then many citizens will never learn about Mozart and Rembrandt” (2015; cf. 2006: 579-80, 591-92).

society. For instance, religion can be seen as important for inspiring civic engagement and humanitarian work (see Bellah et al.; Weithman; Taylor 1989: 515-521), for contributing to a better understanding of the common good and human flourishing (see Trigg 2014: 185-86), and for providing an important defense of the human rights upon which democracy depends (see Trigg 2012a: 27-29; 2012b: 46-47; 2014: 184, 187; Taylor 1989: 5-11, 515-21), and so on. Of course, religion has also been used for bad things (as can any worldview). But a secular state can still have reason for wanting to promote the good potential of religion, just as it has reason for seeking to limit any bad potential.

Finally, religion can be regarded as deserving special protection because it is especially vulnerable to political abuse. It is well-known that this is true of minority religious groups and their members (see Nussbaum: 24-29, 165-66; Eisgruber and Sager). However, it is true generally of *organized* religion since it is a key source of challenge or resistance to state power and thus something an oppressive state will have reason to want to control or eliminate (as seen in a number of totalitarian regimes throughout history). This is yet another reason for why freedom of religion can be rightly regarded as the “first freedom” of the freedoms to be protected in the best kind of free, democratic society (see Trigg 2012a: 29, 39-40; 2012b: 48-54; 2014: 176-77; George: 113-14). How a democratic society upholds the freedom of religion can thus be a kind of litmus test for the health of its democracy.

In summary, I have offered four main points in favor of regarding religion as special: (1) the specific nature of religious convictions of conscience as involving *demands of the sacred*; (2) the *intrinsic goodness* of religion as a distinctive and especially important basic human good; (3) the *instrumental goodness* of religion for society; and (4) the *special vulnerability* of religion to political abuse. (2)-(4) have been discussed in various ways in the literature, but I think (1) has been overlooked, even though it is of great importance. One of the main contributions of this essay is to call attention to the importance of (1). However, (1)-(4) can all work together to capture different aspects of why religious identity is deserving of special consideration and can be taken as the paradigm case to which other claims to special consideration can be compared. With these points in mind we can turn to consider two key issues in secular democratic societies with regard to the claims of religious identities: the issue of religious accommodations, and the issue of free speech and whether we should limit offensive or blasphemous speech.

Religious Accommodations

The issue of religious accommodations has been mentioned briefly in passing, but now it can be considered in more detail. There have been a number of well-known cases in which religious people have sought and/or have been granted special exemptions from laws of general applicability within secular democratic societies: e.g., Anabaptist sects asking for exemption from military service; various minority religious groups asking for work and school off for religious services and holidays that are not recognized by the state; Muslim women in France asking for the allowance to wear religious headscarves when serving in a public role (e.g., as a public school teacher); religious organizations being granted tax

exemption²⁴; religious organizations being allowed to hire for fit to a religious mission; and the recent cases of Catholic organizations (schools, hospital, charities, etc.) and other religious employers in the U.S. asking for exemption from the HHS Mandate that requires employers to provide coverage of “sterilization and abortion-inducing drugs and devices as well as contraception” (USCCB). The basic issue here is whether anyone should be exempted from generally applicable laws. If we allow that some can be, then clearly we are going to need to find a criterion by which we can distinguish legitimate from illegitimate cases, since we cannot have unlimited exemptions as this would be equivalent to having no law at all.

One might claim there should be no exemptions from generally applicable laws because allowing such exemptions would be unfair: some would have the burdens of following the law (e.g., with regard to military service, paying taxes, abiding by workplace expectations, etc.), while others would not. However, to not allow for exemptions would create significant burdens or disadvantages as well when a particular law violates a person’s conviction of conscience and thus undermines his or her moral or spiritual identity and the sense of integrity that is connected with it. This constitutes a significant moral or spiritual harm (see Maclure and Taylor: 76-77, 90-91). The harm will be even greater in cases where the conviction of conscience involves a sense of the sacred. So in order to treat citizens fairly and with equal respect we must weigh the benefits and harms for everyone who is affected by a particular law or the exemption from it.

It should be noted that there are some people who think that there should not be special religious accommodations because the relevant burdens are not so great. They regard religious commitments as merely “expensive tastes,” i.e., “voluntarily chosen costly or constraining personal preferences” (Maclure and Taylor: 71, though they contest the view). Religious commitments are regarded here as being on par with the Cornhuskers fan who wants work off on Saturday, or the person who wants to travel the world half the year and work the other half (Maclure and Taylor). Such individuals are certainly free to attempt to live out their life goals, but others are not obligated to accommodate their desires. This view of religious commitments implies the thin view of the person where, as discussed, “what is most essential to our personhood, is not the ends we choose but our capacity to choose them,” and this gives rise to the unencumbered self. But this view wrongly treats convictions of conscience as mere preferences and so overlooks the encumbered view of the self and fails in proper respect for persons.

If we consider the case of people asking for work or school off for religious services and holidays, we must first note that many societies are already structured in ways that accommodate the majority religion. For instance, in the U.S. most Christians are able to go to church on Sundays and attend Christmas and Easter services as the calendar and workweek have been largely shaped around the Christian calendar. However, this involves a form of indirect discrimination against non-Christian religions (and some Christian denominations like the Seventh-day Adventists). Thus, out of fairness and equal respect for

²⁴ Unlike the other cases mentioned, the concern here is not with avoiding a conflict with a conviction of conscience but with helping a religious organization to carry out its work by removing a financial burden.

conscientious convictions of non-Christian religious believers, such as observant Jews, it seems necessary to make accommodations for their religious services and special holidays. Certainly this may impose some burden on employers (or teachers in the school case), and on other employees who may have to cover for someone attending a religious service, but given the importance of these religious services and holidays in one's religious life and moral identity and given the moral and spiritual harm that would be caused by not allowing one to practice his or her religion, these seem like reasonable accommodations to make. It would also be unfair and failing in equal respect if one were to not hire someone because they were of a minority religion that had religious practices that required special accommodations. Hence, generally speaking, employers should not discriminate on the basis of religion beliefs.

However, in the case of religious organizations, such as churches, synagogues, and religious schools, it is perfectly reasonable to allow for exemptions from laws requiring employers not to hire on the basis of religious commitments.²⁵ Certainly it is reasonable for Catholics to want their priests to be Catholic, and for Jews to want their rabbis to be Jewish. Religious schools also have specific religious missions and it seems appropriate for them to hire on the basis of fit to mission. Allowing for these hiring practices within (not for profit) religious organizations seems appropriate in part as a matter of respect for the convictions of conscience that are constitutive of the nature of these communities and the goals that they pursue.²⁶ But it is also important, I think, to allow religious communities to be self-determining in this way because of the (previously discussed) intrinsic goodness of religion and the good work that religious organizations typically do (this is also the basis for what I think is the justified tax exempt status). Finally, allowing religious organizations to be self-determining in this way is, as I have contended, a key litmus test for the health of a free, democratic society, given the vulnerability of religion to political abuse and control in light of its potential challenge to state power.

Consider also the HHS Mandate that requires employers to provide coverage of “sterilization and abortion-inducing drugs and devices as well as contraception.” To force religious employers to assist others in doing something that they see as gravely wrong and thus against conscience is a grave harm to their moral and spiritual integrity. Indeed, it requires one to violate a sense of the sacred with respect to human life. This is in fact a case where we can have a standoff between the unencumbered, freely choosing self and the encumbered, morally bound self. Clearly one of the central aims of the Mandate is not only to allow people the freedom to live their sexual lives as they see fit (which can also be connected to protecting career aspirations), but also to positively assist them in doing so. However, to not positively assist someone in this case does not seem to be the same level of harm – if it is a kind of harm – as that which is involved in forcing someone to act against

²⁵ Parents' ability to choose religious schooling (or homeschooling) for their children can be another important area of religious accommodation. The choice of how best to educate one's children is something about which parents often have strong convictions of conscience.

²⁶ Obviously there is some complexity here as religious communities often have some internal disagreements. However, there needs to be enough shared values for the community to exist as a genuine community at all. If one is radically in disagreement with the defining values of a community, then it is not clear to what extent one is really a member of the community. This is a complicated issue that I cannot fully explore here.

conscience, especially when what is at stake is a sense of the sacred, which, as previously discussed, makes especially strong normative demands and thus is crucial for one's moral and spiritual identity. As Roger Trigg says: "At the heart of any idea of reasonable accommodation must be compromise, and in particular, a determination of not coercing a party in a dispute into doing something that seems deeply repugnant" (2014: 178).

It is important to emphasize that while I have been focusing on the case for religious accommodations, all convictions of conscience – whether religious or not – are candidates for accommodation since the violation of a conscientious conviction undermines one's moral or spiritual identity and the sense of integrity connected with it and thus constitutes a moral or spiritual harm. What needs to be determined is just how weighty the particular conviction of conscience is relative to other considerations. As I have argued, religious convictions of conscience can be taken as the paradigm case of a conviction of conscience that warrants special consideration given that religious convictions involve the especially strong demands of sacred goods. However, insofar as a non-religious conviction of conscience involves the recognition of something like a sacred good, it can be regarded as being quasi-religious and deserving of similar special consideration. This is also true insofar as they resemble religion in being concerned with questions of ultimate meaning. Thus, e.g., non-religious people are deserving of special consideration for exemption from military service if they have a conviction of conscience regarding the sanctity of human life (or something along these lines) that prohibits the killing of another human being, and this is even weightier when it is connected to their overall sense of the meaning of life.²⁷ It might be more difficult to test the sincerity of one's claim of conscience if he or she is not "affiliated" with a particular religious group, but we can consider each case and as long as the claims are indeed shown to be sincere then they deserve respect and consideration.

It also needs to be emphasized that respecting claims of conscience and the good of religion does not always entail accommodation, since the interests and rights of others also have to be taken into account. Recall that Nussbaum says: "we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the rights of others or comes up against some compelling state interest" (cf. Maclure and Taylor: 100-104).²⁸ The problem with the way she puts it here is that it sounds as if the rights of others and compelling state interests should always trump. However, religious freedom is itself a fundamental human right (of great significance, I have argued). What we may have then is a conflict between various rights and interests (with regard to benefits and harms) and so we need to engage in the task of weighing these competing rights and interests in order to come up with the best solution.

²⁷ There are some who think that non-religious beliefs in the sanctity of human life or ultimate meaning are incoherent (see, e.g., Jackson on non-religious claims about the sanctity of life; Jackson is herself non-religious). However, such debates are not relevant for acknowledging the actual convictions of conscience that people do hold.

²⁸ Maclure and Taylor write: "A request *may* be refused in cases where the requested accommodation measures would: (a) significantly hinder the institution from realizing its aims (education, care, provision of public services, profit); (b) lead to excessive costs or serious functional constraints; or (c) impinge on the rights and freedoms of others" (100-101, my emphasis).

In some cases this can be relatively easy. For instance, clearly from any humane standpoint we should not allow someone to kill other innocent human beings out of a religious conviction of conscience. It is also arguably the case – though I cannot take up this argument here – that we ought not to accommodate parents, who, because of their religious beliefs as Jehovah’s Witnesses, do not want their child to receive a life-saving blood transfusion. A trickier case is that of the Sikh boy who believes it is a religious duty to wear a *kirpan* (a dagger or sword) to school as a sign of his religious devotion (see Leiter: 1ff). Here we must consider the risk to the safety of others and how this should be balanced against the claim of conscience. Another case is whether polygamous relationships in religious groups that practice polygamy should be state recognized marriages. Here one must consider to what extent such relationships involve a core or particularly significant conviction of conscience and what the value of monogamy is for individuals, families, and societies. If there were no strong value of monogamy (I think it does have strong value), then to not recognize polygamous marriages while recognizing monogamous marriages would violate the right to non-discrimination. This right to non-discrimination is of course one of the key rights that can stand in tension with the right to religious freedom. For instance, we might ask (in light of the recent Supreme Court ruling on same-sex marriage): should a religious baker or florist be free to decline supporting a same-sex marriage ceremony if he or she holds strong convictions of conscience (e.g., about the nature and purpose of marriage) that are opposed to it? Should a Catholic priest or Evangelical Christian pastor be free to decline officiating such a marriage for the same reason? To not allow freedom of conscience here could itself be seen as a form of discrimination against such religious believers (see Trigg 2012b: 47). Moreover, it would also involve coercion, which we generally should seek to avoid if possible. Of course, many people find such moral objections to same-sex marriage themselves morally objectionable. However, Trigg writes:

Democracy is itself built on the free judgment of its members and would not be necessary if everyone always agreed. It is a system not just for making decisions, but for containing, and even respecting, disagreement. Without the possibility, and the fact of disagreement, there can be no political freedom. There can be no choice between alternative views. Democracy needs the free expression of the conscience of all its members . . . The right to religious freedom is designed to protect religious belief and its manifestation from any prevailing orthodoxy that may oppose it. Religious freedom is worthless if it is allowed only when it fits in with the prevailing assumptions, and current policy, of government . . . [The] right to follow one’s conscience has to be at the root of any democracy. It is what makes democratic consent possible in the first place (2012a: 7, 39, 96).

Free Speech and Its Limits

Another challenge of living in a pluralistic society is how we should think about the value of free speech and its possible limitations, which has become all the more pressing since the recent murders of workers at *Charlie Hebdo*, the aggressively atheistic magazine.²⁹

²⁹ This could be seen as another religious accommodation case given general laws protecting free speech. However, it warrants its own special discussion because, as will be seen, it has complex moral and legal aspects.

The question that arises here is whether there are reasons to limit – morally if not legally – offensive or blasphemous speech. There have been a number of well-known cases in recent memory that have also raised this question: e.g., the controversy and violence surrounding Salman Rushdie's novel *The Satanic Verses*, which contained passages that were offensive to Muslims; the controversy and violence surrounding the Danish cartoons that depicted Mohammed in an offensive manner (which were subsequently reprinted by *Charlie Hebdo*); the case of the neo-Nazis marching in Skokie, Illinois, where there were many Jews who were either Holocaust survivors or related to Holocaust survivors; and the case of the editor of the magazine *Gay News* who published an extremely sexually graphic poem about Christ and in fact was convicted of blasphemy in the UK (in 1977) and sentenced to nine months' suspended sentence and a 500 pound fine (see Warburton: 1-21, 42-58).

To the question of whether there are reasons to limit – morally if not legally – offensive or blasphemous speech, there are a growing number of aggressive atheists (like Richard Dawkins and the late Christopher Hitchens) who definitely answer “no.” Indeed, they believe that the convictions of religious people are deserving of contempt and ridicule rather than respect. The notion of blasphemous speech also strikes them as absurd since they do not accept the religious believer's sense of the sacred. However, at the very least, I think this is a failure to realize the value of equal respect for persons, which, as I have said, is integral to the good of a democratic way of life. Even if one does not accept another person's particular understanding of the meaning of life or sense of the sacred, nevertheless, he or she ought to respect the human capacity to be concerned with such things (a capacity that distinguishes us from all other animals). From a purely humanistic standpoint we can say that there is something worth honoring and even revering in the human spirit here, and to miss this either betrays a shallowness of perspective or an anti-humanistic attitude. Thus, speech that mocks what others hold dear and see as sacred can at least be regarded as blasphemous against what is worthy of reverence in the human spirit, and it can also cause real moral and spiritual harm to those whose identities are shaped by such a sense of the sacred.

In *Reverence: Renewing a Forgotten Virtue*, Paul Woodruff maintains that reverence (or piety) is a virtue for everyone (where a virtue is a quality that is needed in order to realize what is most admirable in our human potential and thereby achieve human fulfillment):

The reverent soul tries never to violate sacred things in any culture, out of respect for the people who hold those things sacred. Reverence . . . is not directly related to any particular faith . . . Reverence belongs to ethics . . . [Reverent] unbelievers see that sacred things make ethical demands on all of us, whether we are religious or not . . . The sacred often belongs to religion, but it always belongs to ethics . . . The ethics of a reverent culture forbid us from interfering with the sacred . . . To interfere with what is sacred is a failure of reverence – the ethical virtue that calls us to treat other people, and therefore the things that other people care about, with respect . . . One need not believe in anything divine or transcendent in order to recognize the ethical value of the sacred. All you need is the capacity for respect. When you are among people with hedging rules [in relation to sacred things] that are new to you, you should be able to recognize that these people are engaged in

a common human practice. They have goals very like your own. You can respect these people and their goals, and you ought to respect them with deep feeling . . . We are all engaged in the great project of human reverence. So I owe respect to their sacred things, respect as deep as what they feel, if I can manage it (159, 161, 163, 165-66).

In short, I think there is a strong *moral* case for limiting intentionally offensive or blasphemous speech. But is there also a case to be made for legal restrictions?

It is much more difficult to make this case because freedom of speech, like religious freedom, is a fundamental human right (both are protected in the First Amendment of the U.S. Constitution and in international human rights documents such as the Universal Declaration of Human Rights; see also Sandel: 71-90). Many regard free speech as worth defending even when one may think that the speech is morally reprehensible. Indeed, according to Nigel Warburton, “its protection is a mark of a civilized and tolerant society” (1). Warburton notes that there are two kinds of arguments in favor of free speech: *instrumental (or consequentialist) arguments* that claim that free speech is needed in order to achieve certain good consequences, such as discovering truth, fostering personal development, and engaging in genuine democratic debate (including protesting the government) so as to best shape shared life together, which also helps to avoid any slide towards totalitarianism; and *moral arguments* that are “based on a notion of the intrinsic value of free speech and its connection with a concept of human autonomy” or self-government (16-17; cf. Sandel: 79-80).

These are certainly important arguments. But almost everyone also acknowledges that there must be *some* legal limits on free speech. Candidates for kinds of speech (the term covers any form of human expression) that should not be allowed include: libel and slander; speech involving copyright infringement; false advertising; disclosure of government secrets; shouting “Fire!” in a crowded theater; incitement to violence; child pornography; violent pornography (and perhaps other kinds of pornography); Holocaust denial (in Germany); and hate speech directed at a particular person or group (see Warburton: 1-21). Some of these are widely agreed upon, while others are more contentious. One of the most contentious cases in fact is whether there should be legal limits on speech that is considered offensive or blasphemous to religious people. Warburton writes: “The most visible manifestations of intolerance to other people’s views and the loudest calls for censorship in recent years, have . . . come from those who feel their religion has in some way been insulted” (17). He goes on to discuss *The Satanic Verses* and the Danish cartoons cases and then remarks: “Religious intolerance of ideas perceived as sacrilegious is by no means restricted to Islam, but the ferocity of opposition to *The Satanic Verses* and to the Danish cartoons has brought questions about free speech into sharp focus” (21). Much of Warburton’s language here – e.g., “intolerance to other people’s views,” and “intolerance of ideas perceived as sacrilegious” – seems tendentious, misleading, and revealing of his own lack of sympathy for such religious perspectives. It is noteworthy that he says that religious people are responding to other people’s “views” or “ideas.” This is misleading because in most cases what religious believers are offended at is not merely some perspective different from their own but rather open shows of contempt and mockery of what they hold dear and regard as sacred (again,

consider the Danish cartoons that mock Mohammed and the extremely sexually graphic poem about Christ in *Gay News*).

Warburton does, however, later make a case for his position. He writes: “[most] defenders of free speech see all blasphemy laws as a historical relic of an earlier age and not particularly relevant to a largely secular society” (44). He acknowledges that there can be conflict between freedom of speech and freedom of religion, since free speech can interfere with the free exercise of religion. However, he thinks that if the protection from offense were fairly extended to all religious views, it would be completely unenforceable (46-47).³⁰ Of course, one could say that it should only apply to the most intemperate and deeply offensive ways of expressing hostility towards people’s religion. But Warburton responds: “there are some things that if uttered in the most temperate language will still inflame *some* religious fundamentalists and be considered blasphemous or an incitement to religious hatred” (47). He also notes that atheists like Richard Dawkins are “offended” by what they see as the harm caused by religion throughout human history and he then says:

It is not at all clear why only those with religious beliefs should have their views protected from offence . . . The idea that religious beliefs but not others should receive special protection is bizarre: all types of belief should be open to scrutiny, criticism, and parody, and potentially ridicule in a free society. Indeed, some views cry out for ridicule and we would be immoral to treat them seriously (47, 50).

Warburton thinks that ridicule can actually serve to advance knowledge, as he cites Oliver Kamm: “Free speech does indeed cause hurt – but there is nothing wrong with this. Knowledge advances through the destruction of bad ideas. Mockery and derision are among the most powerful tools in the process” (51). Along similar lines, he also cites Richard Posner: “People get upset when their way of life is challenged, yet that upset may be the beginning of doubt and lead eventually to change” (51). Warburton concludes: “The suggestion that . . . religious beliefs should be held as sacrosanct and immune from criticism is unacceptable in an open democracy” (54-55).

What should we make of Warburton’s case here against legal restrictions on speech that is offensive to religious believers? First, I think Warburton makes it seem more difficult than it really is to differentiate the degree of actual offensiveness in different cases.³¹ There is a big difference between someone who merely criticizes or argues against another person’s religious worldview (which it is hard to see as offensive at all) and someone who intentionally mocks and shows contempt for what another person regards as sacred and holds dear. We can also differentiate between the contemptuous attitude towards religion expressed in Richard Dawkin’s *The God Delusion* and the more deeply offensive intentional efforts to mock and profane (or desecrate) in the Danish cartoons and *Gay News* cases

³⁰ In this context Warburton creates a strawman when he writes: “And what of the difficulty that a monotheist might be offended every time a polytheist mentioned multiple gods and vice versa?” (46-47). Why should this be offensive? The real cases at issue involve some form of mockery or derision of what one regards as sacred.

³¹ Earlier he remarks that present-day advocates of a prohibition on blasphemy think that religion “should have special protection against verbal abuse of *any kind*” (44; my emphasis). This is surely another strawman.

(which also do not have the same level of intellectual content as *The God Delusion*). Second, when Warburton speaks of atheists like Richard Dawkins being “offended” at the baleful effects of religion, I think this confuses the issue. What “offended” means here is that one finds something morally reprehensible. But this is very different from the kind of offense that one feels when his or her mostly deeply cherished beliefs and sense of the sacred are intentionally ridiculed or regarded with contempt, which strikes at one’s very sense of self and thus can cause moral and spiritual harm.³² Can atheists also experience this kind of offense? Yes, to the extent that they resemble religious believers in having a strong sense of the sacred that deeply shapes their identity such that they can be regarded as being quasi-religious. But it is hard to find actual cases of religious believers intentionally mocking and showing contempt for what atheists regard as sacred or precious, especially in a manner that is on par with the Danish cartoons and *Gay News* cases. A final point in response Warburton’s view that ridicule can serve to advance knowledge: I think the advancement of knowledge is best served through argument rather than ridicule. While certainly ridicule can have a *rhetorical* and *manipulative* function, it cannot serve an *argumentative* function without being fallacious. If there is a case to be made against a particular worldview, then it should be able to be made without derision. Moreover, such derision is, as I have argued, a failure to realize the value of equal respect (which is integral to the good of a democratic way of life) and the human virtue of reverence.

But we are still left here with the question of whether there are points at which we should *legally* limit offensive or blasphemous speech. One possible point at which we might be justified in doing so, which Warburton does discuss, is when the speech can be classified as *hate speech*: i.e., an “expression that aims to cause extreme offense and to vilify its target audience” and “is so insulting that it is tantamount to a form of harm”; it typically attempts to degrade people on the basis of their membership in a particular class of people (e.g., a certain race, gender, sexual orientation, or religion) and it “may threaten individuals’ dignity and be so offensive as to interfere with their lives on a daily basis and at a significant level” (55-56). One of the most famous cases of religious and ethnic hate speech is that of the neo-Nazis marching in Skokie, Illinois, where, as aforementioned, there were many Jews who were either Holocaust survivors or related to Holocaust survivors. Warburton is not entirely clear on whether he thinks such hate speech should be legally tolerated, but he seems to side on the affirmative as he mentions that many people believe that the best way to combat hate speech is with counter-speech and there is also a slippery-slope concern that the prohibition of hate speech cases may lead to making further prohibitions easier (57). He then gives the last word to the liberal view that maintains that the harms of hate speech are “just part of the heavy cost of preserving free speech; but free speech brings greater overall rewards than censorship” (58).

I think there is certainly a strong presumption in favor of free speech given the important goods that are attached to it, and so we would need a pretty compelling reason to

³² Warburton also seems to miss this when he writes: “To liberal secularists religious believers’ persecution of plays, novels, and films may seem like an absence of a sense of humour as well as an unacceptable intervention in adults’ freedom to enjoy the entertainment of their choice just so long as no one was harmed in making it and it can’t be construed as an incitement to violence” (47).

limit it. Sometimes there are those compelling reasons, as already mentioned. But to determine which types of cases warrant legal restrictions will depend upon the good exercise of practical reason within a particular context. Take the *Gay News* case: while the extremely sexual graphic poem about Christ is certainly deeply offensive to Christians, it seems best for it to be tolerated and perhaps met in civil society with counter-speech that rebukes those who intended the offense. However, I think there is good reason not to allow someone to force a Christian to read or hear the poem (say in school), especially when the intent is to mock and offend. It is one thing to allow someone to publish the poem (where people are free to read it or not), and it is another thing to force people to read or hear it. If we consider the Danish cartoons case, this does seem like a case of hate speech, especially given the place of Muslims in European societies. I think outright censorship seems too strong here, though again we might want to publically rebuke those who published the cartoons (and we might think that they were not only lacking in morality but also in prudence). However, I think we would have good reason to legally prohibit someone from making a mural of the cartoons in a Muslim neighborhood. In the Skokie case, I think a case could be made for preventing the neo-Nazis from marching given the deep moral and spiritual harm that could be done to those who were Holocaust survivors or related to Holocaust survivors. However, lesser restrictions could also be made, such as restricting the time and place of the march and then notifying the Jewish community so that they could avoid observing it. A related case is that of Holocaust deniers: although those who publish Holocaust denial pieces might be tolerated in the U.S., in Germany this might not be wise.³³

My aim in this discussion of free speech and its possible limits, as well as in the preceding discussion of religious accommodations, is not so much to solve all of these difficult cases but rather to demonstrate the significance of the claims of religious identities within secular societies. This is a first step towards adequately addressing the issues that confront all of us who live in pluralistic democratic societies today.

Bibliography

Adams, Robert M.

- 2013 "Review of Brian Leiter's *Why Tolerate Religion?*" *Notre Dame Philosophical Reviews* (January 6). Available online at <http://ndpr.nd.edu/news/36599-why-tolerate-religion>

³³ In contrast to what I say here, Maclure and Taylor write: "Must we limit freedom of expression in the name of respect for what, in the view of some believers, belongs to the sphere of the sacred? We do not believe so. Except in flagrant cases of defamation or incitement to hatred, the state cannot restrict some people's freedom of expression on the pretext that ideas or representations have the effect of profaning what, for others, is considered sacred. The pluralist state can adopt neither the general ontology holding that the universe must be understood in terms of the dyad between sacred and profane nor a particular conception of the sacred" (108-109). But justified legal restrictions here do not require us to endorse a particular religious ontology. They only require us to recognize the importance of the sacred in someone's moral/spiritual identity and the moral/spiritual harm that can be done when this is profaned. It is strange that Maclure and Taylor overlook this point given what they say elsewhere about moral identity and moral harm (see 76-77, 90-91).

Bellah, Robert N.

2011 *Religion in Human Evolution: From the Paleolithic to the Axial Age*. Cambridge: The Belknap Press of Harvard University.

Bellah, Robert N., Richard Madsen, William M. Sullivan, Ann Swidler, and Steven M. Tipton

1996 *Habits of the Heart: Individualism and Commitment in American Life*. Updated edition with a new introduction. Berkeley: University of California Press.

Benatar, David

2002 "Two Views of Sexual Ethics: Promiscuity, Pedophilia, and Rape." *Public Affairs Quarterly* 16, 3: 191-201.

Comte-Sponville, André

2006 *The Little Book of Atheist Spirituality*. Translated by Nancy Huston. New York: Viking.

Cottingham, John

2014 *Philosophy of Religion: Towards a More Humane Approach*. New York: Cambridge University Press.

De Botton, Alain

2012 *Religion for Atheists: A Non-believer's Guide to the Uses of Religion*. New York: Vintage.

Dreyfus, Hubert, and Sean Dorrance Kelly

2011 *All Things Shining: Reading the Western Classics to Find Meaning in a Secular Age*. New York: Free Press.

Durkheim, Émile

1995 *The Elementary Forms of Religious Life*. Translated by Karen E. Fields. New York: Free Press.

Dworkin, Ronald

2013 *Religion without God*. Cambridge: Harvard University Press.

Eisgruber, Christopher L., and Lawrence G. Sager

1994 "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct." *The University of Chicago Law Review* 61, 4: 1245-1315.

Ferry, Luc

2002 *Man Made God: The Meaning of Life*, trans. David Pellauer. Chicago: University of Chicago Press.

Finnis, John

1980 *Natural Law and Natural Rights*. Oxford: Clarendon.

2009 "Does Free Exercise of Religion Deserve Constitutional Mention?" *The American Journal of Jurisprudence* 54: 41-66.

George, Robert P.

- 2013 *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism*. Wilmington: ISI Books.

Jackson, Emily

- 2008 "Secularism, Sanctity, and the Wrongness of Killing." *BioSocieties* 3: 125-45.

James, William

- 2004 *The Varieties of Religious Experience: A Study in Human Nature*. New York: Barnes & Noble Classics.

Koppelman, Andrew

- 2006 "Is It Fair to Give Religion Special Treatment?" *University of Illinois Law Review*: 571-603.
- 2013a "Religion's Specialized Specialness." *The University of Chicago Law Review Dialogue* 79: 71-83.
- 2013b "Keep It Vague: The Many Meanings of Religious Freedom." *Commonweal* 140 (November 4). Available online at <https://www.commonwealmagazine.org/keep-it-vague>
- 2015 "Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom." *Commonweal* 142 (March 27). Available online at <https://www.commonwealmagazine.org/nonexistent-irreplaceable>

Leiter, Brian

- 2013 *Why Tolerate Religion?* Princeton: Princeton University Press.

MacIntyre, Alasdair

- 1988 *Whose Justice? Which Rationality?* Notre Dame: University of Notre Dame Press.
- 2011 "On Being a Theistic Philosopher in a Secularized Culture." *Proceedings of the American Catholic Philosophical Association* 84: 23-32.

Manson, Neil A., editor

- 2003 *God and Design: The Teleological Argument and Modern Science*. New York: Routledge.

Maclure, Jocelyn, and Charles Taylor

- 2011 *Secularism and Freedom of Conscience*. Cambridge: Harvard University Press.

McConnell, Michael W.

- 2000 "The Problem of Singling Out Religion." *DePaul Law Review* 50, 1: 1-47.

McPherson, David

- 2015 "Homo Religiosus: Does Spirituality Have a Place in Neo-Aristotelian Virtue Ethics?" *Religious Studies: An International Journal for the Philosophy of Religion* 51, 3: 335-46.

McPherson, David, editor

forthc. *Spirituality and the Good Life: Philosophical Approaches*. New York: Cambridge University Press.

Nagel, Thomas

2010 *Secular Philosophy and the Religious Temperament: Essays 2002-2008*. New York: Oxford University Press.

Nietzsche, Friedrich

1995 *Thus Spoke Zarathustra*. Translated by Walter Kaufmann. New York: The Modern Library.

Nussbaum, Martha

2008 *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. New York: Basic Books.

Plantinga, Alvin

2011 *Where the Conflict Really Lies: Science, Religion, and Naturalism*. New York: Oxford University Press.

Rawls, John

1999 *A Theory of Justice*. Revised Edition. Cambridge: The Belknap Press of Harvard University.

Sacks, Jonathan

2011 *The Great Partnership: God, Science and the Search for Meaning*. London: Hodder & Stoughton.

Sandel, Michael J.

1996 *Democracy's Discontent: America in Search of a Public Philosophy*. Cambridge: The Belknap Press of Harvard University.

Scruton, Roger

1996 *An Intelligent Person's Guide to Philosophy*. New York: Penguin.

Solomon, Robert C.

2002 *Spirituality for Skeptics: The Thoughtful Love of Life*. New York: Oxford University Press.

Taylor, Charles

1985 *Human Agency and Language: Philosophical Papers 1*. New York: Cambridge University Press.

1989 *Sources of the Self: The Making of Modern Identity*. Cambridge: Harvard University Press.

1995 *Philosophical Arguments*. Cambridge: Harvard University Press.

2007 *A Secular Age*. Cambridge: The Belknap Press of Harvard University.

Trigg, Roger

- 2012a *Equality, Freedom, and Religion*. New York: Oxford University Press.
- 2012b “Religious Freedom in a Secular Society.” *International Journal for Religious Freedom* 5, 1: 45-57.
- 2014 *Religious Diversity: Philosophical and Political Dimensions*. New York: Cambridge University Press.

United States Conference of Catholic Bishops (USCCB)

- 2012 “Six Things Everyone Should Know About the HHS Mandate,” (February 6). Available online at <http://www.usccb.org/news/2012/12-021.cfm>.

Warburton, Nigel

- 2009 *Free Speech: A Very Short Introduction*. New York: Oxford University Press.

Weithman, Paul J.

- 2002 *Religion and the Obligations of Citizenship*. New York: Cambridge University Press.

Woodruff, Paul

- 2014 *Reverence: Renewing a Forgotten Virtue*. Second edition. Oxford: Oxford University Press.