

Solving Religious Freedom

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INTRODUCTION

Our topic is religious freedom as a matter of political morality. That is, we want to understand to what extent morality includes a right of religious freedom. This discussion will have implications for law, and in particular for American constitutional law, but our primary interest is with the more fundamental moral question.

On a common understanding of religious freedom, government must neither burden, nor favor religion. Any account of religious freedom that accepts such an understanding of religious freedom must face two familiar problems. The first concerns the scope of religious freedom. Which activities must be exempted from government regulation and must not be favored by government policy? The second problem is that there is a tension inherent in the idea that government must not burden religion, yet cannot favor it. We discuss each in turn.

The scope of religious freedom cannot be limited to traditional theistic religions because the considerations that best justify special protection for religion apply just as strongly to ethical convictions that are not based on beliefs in a deity as they do to beliefs that have their basis in traditional religions. In response to this kind of problem, theorists have tried two different kinds of approaches to defining religion. One possibility is to define religion functionally, i.e., by the role that it plays in people's lives. For example, a person's religious convictions might be

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understood to be those that are fundamental to the person's life. The other possibility is to define religion substantively, as encompassing particular types of decisions or topics. For example, religious convictions might be understood to be ones that concern what gives life meaning or value.

Both approaches encounter a central problem. The most natural and plausible functional and substantive definitions would encompass beliefs and activities that it would be both unworkable and unattractive to protect. For example, racist beliefs and practices based on them could qualify for religious liberty protection on both functional and substantive approaches. Racist beliefs could play a fundamental role in the life of a white supremacist. And racist doctrines could hold that, say, protecting the purity of the race is what gives life meaning or value. If religious practices must be exempted from government regulation, then the consequence of substantive or functional definitions would be that committed racists would have to be exempted from antidiscrimination laws. If the government may not sponsor programs to eradicate religious beliefs, then the government would not be able to try to educate people against racist beliefs.

The problem is very general. All sorts of evil or dangerous beliefs can play a fundamental role in people's lives (or whatever other role a functional view takes to be constitutive of religion). Similarly, there is no limit to the misguided beliefs that people can have about what gives life value (or whatever other topic a substantive view takes to be definitive).

The converse difficulty is less often noticed. Knowledge or peace or some other important value could play a fundamental role in the life of a person or group. And people can take knowledge or peace (or the like) to be what makes life valuable. If the pursuit of knowledge

or peace therefore qualified as a religious activity and the government may not promote religious beliefs or practices, then the government would be barred from promoting knowledge or peace.

In sum, restricting religious freedom to traditional theistic religion is unprincipled. But expanding it along functional or substantive lines leaves no principled way of excluding beliefs and activities that must be excluded in order for religious freedom to be attractive and workable.

The second problem derives from a basic tension in the common idea that religion must not be burdened or benefited. As one of us has argued elsewhere, exempting religious activities from burdens that other activities must bear constitutes benefiting religious activities over other activities.³ For example, if religious organizations are exempted from property taxes, then they are favored over nonreligious organizations that must pay property taxes. Conversely, banning religious organizations from obtaining government benefits that are available to other organizations constitutes burdening religion. For example, if the government makes funds available to providers of certain kinds of social services, but, in adherence to the proscription on benefiting religion, denies such funds to religious providers, the government is thereby burdening those providers on the basis of their religion. In sum, if the proscription on burdening or benefiting religion is understood in the standard way as requiring religion to be exempted from otherwise applicable regulations and requiring religion to be ineligible for otherwise available benefits, then that proscription contains a severe internal tension. A closely related problem is one of unfairness, for it is unfair for religious activities to be exempted from generally applicable regulation and to be ineligible for otherwise available benefits.

³ Note to Eisgruber and Sager discussion early in the book. Dworkin describes the internal tension in a somewhat different way. According to his characterization, exempting religious activities discriminates against the other activities on religious grounds. For example, exempting religious peyote users from the ban on peyote discriminates against those who want to use religion for nonreligious reasons.

DWORKIN'S ETHICAL INDEPENDENCE APPROACH

In *Religion Without God* (RWG), Ronald Dworkin uses the two problems that we have just described to motivate a new approach to religious liberty.⁴ He draws a distinction within the general category of political liberty between a very general right of ethical independence and special rights. With respect to special rights, such as the right to free speech or the right to a trial, the government must have a compelling justification to restrict them. By contrast, with respect to the general right of ethical independence, the government can restrict them as long as it does not do so because it assumes that one way for people to live is intrinsically better. (130). Dworkin's proposal is that the two familiar problems derive from treating religious freedom as a special right. He argues that if, instead, religious freedom is treated as part of the general right of ethical independence, the appropriate protections will follow and the problems will be avoided.

The basic move here is to avoid specifying what counts as religious and therefore as entitled to special protection or special disabilities. Instead of looking at the activity to be regulated or favored, the focus is on the government's reasons for action. The government may not restrict freedom *of any kind* for banned reasons, and may restrict freedom for any other reason (assuming that the restriction does not implicate a special right). On Dworkin's account,

⁴ Dworkin's discussion of the problems differs from ours in certain respects. We think that his discussion has several flaws, so we have given what we take to be the best characterization of the problems. For example, Dworkin suggests that the basic problem with substantive ways of defining the scope of religious freedom is that "their plausibility relies on the assumption that it lies within the power of government to choose among sincere convictions to decide which are worthy of special protection and which not. That assumption seems itself to contradict the basic principle that questions of fundamental value are matter of individual, not collective, choice." 123. But the idea behind substantive definitions of religion is not that the government gets to choose which beliefs, decisions, or practices are worthy of protection. Rather, the idea is that that political morality, properly understood, protects beliefs, decisions, or practices concerning certain substantive issues. The problem that we spell out in the text – that substantive (as well as functional) definitions of religion would encompass beliefs that are not worthy of protection and could not workably be protected – is also found in Dworkin. 117-118.

therefore, everything depends on the government's reasons for acting. As he explains, the government cannot ban drugs because it deems drug use shameful, and it cannot ban logging "just because it thinks the people who do not value great forests are despicable." 130. But the government *can* ban drugs "to protect the community from the social costs of addiction," and it can ban logging "because forests are in fact wonderful."

Dworkin adds that ethical independence includes a requirement of "equal concern."⁵ Equal concern requires a legislature that is imposing restrictions on an activity to provide an exemption to any group that regards the activity as "a sacred duty" if allowing such an exemption would not undermine the point of the legislation. In the case of bans on the use of peyote, for example, such an exemption need not be allowed because "an exemption would put people at serious risk that it is the purpose of the law to avoid." This example shows that Dworkin does not intend the question of whether an exemption would undermine the point of the legislation to be a question of degree – i.e., of whether the amount of harm is relatively small. Rather, the idea is that it is precisely the point of the legislation to prevent this type of harm – people taking a dangerous drug –, even if it is only a relatively small amount of that harm.

In sum, Dworkin takes the problems with the standard understanding of religious freedom to motivate abandoning the attempt to delineate which activities count as religious and instead to try to recover religious freedom by restricting the reasons or justifications that the

⁵ 136-37. The status of the requirement of equal concern in Dworkin's account is unclear. He introduces it apparently as a gloss on the account of ethical independence, not an additional independent requirement. Dworkin may have believed that the requirement of equal concern follows from the basic requirement that the government not act on a bad reason. The idea would be that, if an exemption is feasible without undermining the point of the legislation, then not allowing such an exemption would show that the legislature judges the relevant religious group's views about how to live to be worse than other such views. It's not clear that this argument works i.e., it's not clear that the requirement of equal concern follows from the basic requirement that the government not act on a bad reason. For one thing, the legislature might simply have been unaware that the relevant group considers engaging in the activity to be a sacred duty. Another possibility is that Dworkin intended the requirement of equal concern to be an independent requirement.

government can use for restricting liberty. In addition, the government must provide exemptions when a group regards an activity as a sacred duty and the exemption would not result in the harm that it is the point of the regulation to prevent. Does this ethical independence approach in fact solve or avoid the problems that motivated it?

DIFFICULTIES WITH DWORKIN'S ACCOUNT

The central idea of Dworkin's account is that "government must never restrict freedom just because it assumes that one way for people to live their lives – one idea about what lives are most worth living just in themselves – is intrinsically better than another, not because its consequences are better but because people who live that way are better people."⁶ It is important to see that, on Dworkin's view, it is permissible for governments to restrict freedom based on a view about intrinsic value as long as it is not a view about the intrinsic value of a way of living. As noted above, he maintains that government "may protect forests because forests are in fact wonderful," though not on the ground that a way of life involving forests is a good way of life. 131. Presumably Dworkin makes this distinction because he sees that governments must be able to base policies on views about what is valuable, for example, on the view that education or wildlife or peace is valuable.

Dworkin's ethical independence approach founders on two serious problems. First, the approach makes everything depend on the government's true reasons for acting, as opposed to

This passage itself contains several formulations of the idea that are not obviously equivalent. One idea is that government must not restrict freedom based on a view about which ways of life are intrinsically better than others. A different idea is that government must not restrict freedom based on a view about which ways of life make people better people.⁶ Subsequent discussion seems to introduce further variations. For example, we are told that "government may not forbid drug use just because it deems drug use shameful." 130. But it is not obvious that deeming drug use shameful is the same as assuming that people who use drugs are worse people or that a way of life that involves using drugs is intrinsically worse than others. For example, drug use might be deemed shameful because of its consequences.

mere rationalizations. Unfortunately, the notion of the government's true reasons for a statute or policy presents severe practical and theoretical problems. While such determinations may well be unavoidable for some purposes, it would be unfortunate to make all questions of religious freedom turn on this issue. When Dworkin talks of the government's reasons, some of his discussion suggests that he means actual, subjective mental states (whether of individuals or of collectives). For example, he gives as an example of an appropriate application of his ethical independence approach, a judge "who declared unconstitutional a requirement to teach intelligent design in public schools." According to Dworkin, "the judge held that the histories, practices, and statements of the majority members of the school board suggested that they were acting not primarily for purely academic motives but in the spirit of that national campaign." (143.)⁷

Despite this kind of talk, however, Dworkin's talk of government's real reasons is best understood as referring to a constructed justification, not an actual psychological state. In response to the worry that it is often difficult to determine the government's reasons, he says that it is "often an interpretive question, and sometimes a difficult one, whether a policy does reflect" the assumption that one way of life is better than others. 141. And the subsequent discussion repeatedly uses the language of "interpretation." Given Dworkin's extensive and well known discussion of interpretation in *Law's Empire* and *Justice for Hedgehogs*, he must be understood as saying that the question of what a government's reasons are is an interpretive question in the specific sense of interpretation that he develops a great length in those works. The discussion in

⁷ More examples: "A state may invent other justifications for such prohibitions that are not on the face violations of ethical independence..." 139. "A moment of silence satisfies ethical independence "unless the legislative record displays an intention specifically to benefit theistic religion" 140. A school board's decision to mandate the teaching of intelligent design "does not wish simply to restore balance to an academic subject." "Whether that decision reflects an ambition to persuade students away from theistic religion." 143

Law's Empire is especially relevant because that discussion is focused on interpreting the practices of legal systems. (By contrast, in *JH*, the focus is on interpretation of moral and ethical concepts.)

One of the central ideas of *LE* (and some of Dworkin's important earlier work leading up to that book) is that the idea of the government's actual psychological intentions is problematic. Instead, we must understand talk of, e.g., the legislature's intention, to concern a constructed content – the set of principles that best fit and justify the legislature's action. Given this background, we should not put much weight on the fact that some of the discussion in *RWG* seems suggestive of actual, psychological motivations. Presumably, this is just a casual way of talking for purposes of that short book intended for a general readership. We should understand the relevant motivations not to be actual psychological motivations, but rather to be the set of principles that best fit and justify the relevant government action.

The problem, however, is that it is clear from Dworkin's earlier work that Dworkinian interpretation will never yield a justification that assumes that one way of living is intrinsically better than others. On Dworkin's view, a principle cannot be the correct interpretation of government action unless it would have some tendency to justify that action. But, according to Dworkin's account of ethical independence, the government must never act on the ground that one way of living is intrinsically better than others. A government assumption that one way of living is intrinsically better than others can have no tendency to justify government action.

Therefore, an interpretation that attributes such an assumption to the government cannot be a correct Dworkinian interpretation.⁸

Moreover, on Dworkin's approach, for each bad reason according to which a way of life is intrinsically better than others, there will in general be a closely related, permissible reason according to which the object of the relevant way of life is intrinsically valuable. For example, corresponding to the bad reason of preferring a way of life involving trees, there is the permissible justification that trees are wonderful. Given the similarity of the two reasons, an candidate interpretation that attributes the reason that trees are wonderful will probably fit nearly as well as a candidate interpretation that attributes a you reason that a way of life involving trees is better than others. And the former interpretation will justify the government action, while the latter will not. Therefore, the former interpretation will be a better interpretation all things considered.

Thus far, we've seen that Dworkinian interpretation seems like an inappropriate tool for determining whether the government has acted on a prohibited reason. More generally, there are severe practical difficulties with determining what reasons the government actually acted on. And there are deep theoretical problems with how to understand the notion of the government's actual reasons.

The second, and even more serious, problem is that the ethical independence approach does not offer adequate protection to religious freedom. On the approach, the government is

⁸ The dimension of fit (which one of us has elsewhere argued is best understood as procedural justice) will not solve the problem. First, again, no candidate can be the correct interpretation unless has some tendency to justify the government action. Second, anyway, the relevant set of principles must fit the official actions of the government, not their hidden motivations. It will therefore often be the case that, even when there were actual bad motivations on the part of many individual government officials, the set of principles that best justifies (i.e., fits and justifies) the relevant actions will be legitimate.

permitted to ban or regulate religious activity without restriction if the government is acting on reasons that are not based on assumptions about the intrinsic value of ways of life. The government is permitted to treat particular religions worse than others, as long as it does not do so because it thinks that those religions' ways of life are worse. Dworkin's logging example illustrates the point. As noted, Dworkin maintains that it is not permissible to ban logging because people who do not value great forests are despicable, but it is permissible to ban logging because forests are in fact wonderful. Accordingly, a government may ban practices that are important to particular religions – for example, particular kinds of prayer or ritual or clothing – on the ground that those practices were aesthetically bad or that the prayers or rituals in question lead to bad consequences (as long as it was not merely a pretext for denigrating the people's way of life). A government could ban faith based doctrines or teaching on the ground that they tends to undermine experimentally-based reasoning with bad consequences for society. Or the government could ban religions entirely on the ground that they have a tendency to lead to violent conflict. Indeed, on Dworkin's approach, it would even be a permissible rationale that a world in which there is no prayer or no religion is intrinsically a better world (as opposed to that a way of life not involving prayer is a better way of life).

The ethical independence approach not only does not give adequate protection to religion as traditionally understood; it also does not protect other activities that Dworkin believes are protected by the right to religious freedom. In RWG, Dworkin repeats the suggestion he developed in earlier work that religious freedom protects the right to abortion. But on the ethical independence approach as developed in RWG, as far as religious freedom goes, there would be

no barrier to banning abortion for the reason that babies are wonderful or for the reason that the society needs more people.⁹

THE THICK UNDERSTANDING OF ETHICAL INDEPENDENCE

In *Justice for Hedgehogs*, Dworkin developed a very different understanding of ethical independence that avoids both of the problems just discussed. It does not make the permissibility of government action depend entirely on the government's reasons for acting, and it offers much more robust protection for religious liberty.¹⁰ According to the earlier account, in addition to the prohibition on bad motivations, "government may not constrain foundational independence for any reason except when this is necessary to protect the life, security, or liberty of others." 369.¹¹ We can call the hedgehogs account, the *thick* understanding of ethical independence, as opposed to the *thin* understanding of RWG.

The thick understanding brings back the first of the two problems that we began with – the problem of delineating the scope of religious freedom. On this approach, the government cannot interfere with certain fundamental decisions except in order to protect the life, security, or liberty of others. Therefore, if the account is not to be unworkable, the scope of the protected activities must be limited. The notion of "fundamental decisions" might sound like a functional limitation. On closer inspection, however, it is plausibly a substantive one as Dworkin develops it. That is, what matters is not whether the group treats the issue as especially important. Rather, certain kinds of decisions – ones "about matters of ethical foundation" – which include "choices

⁹ We discuss below the very different understanding of ethical independence developed in his earlier work.

¹⁰ When Dworkin introduces the ethical independence approach, he cites his earlier discussion of ethical independence in *Justice for Hedgehogs*. He makes no mention of the large difference between the account of ethical independence in RWG in the account in hedgehogs.

¹¹ The prohibition on bad motivations is also somewhat differently characterized in hedgehogs.

in religion and personal commitments of intimacy and to ethical, moral, and political ideals" are foundational. 368-369. (Thus, it seems that even if a group regarded accumulating money as of central importance, decisions about investments would not count as fundamental. Dworkin says, for example, that though many people claim that a life that courts danger is attractive, "seat-belt convictions are not foundational.")

Because the thick account depends on a substantive definition of religion, it is unattractive and unworkable for the reasons discussed above. It would make the government unable to regulate activities that were based on "ethical, moral, and political ideals." On the thick account, for example, the government would not be able to regulate racist actions that were based on white supremacists' ethical and political ideals.

Remember that Dworkin motivates his ethical independence account in RWG with the problems encountered by substantive and functional accounts of the scope of religious freedom. Presumably, then, it is because of such problems, that Dworkin replaced the thick understanding of ethical independence with the thin understanding.

WHERE DWORKIN'S ACCOUNT GOES WRONG

It is worth pausing to ask where things went wrong with Dworkin's proposal in RWG. Dworkin introduces the proposal in response to the two familiar problems – the "great difficulty in defining the scope of [the] supposed moral right" to freedom of choice about religious and the "conflict" between two ideas "that government may not burden the exercise of religion but also must not discriminate in favor of any religion." 129. Why would Dworkin think that his (thin) ethical independence approach would solve these two problems? He introduces the (thin) ethical independence approach as follows:

"government must never restrict freedom just because it assumes that one way for people to live their lives ... is intrinsically better than another, not because its consequences are better but because people who live that way are better people. *In a state that prizes freedom, it must be left to individual citizens, one by one, to decide such questions for themselves, not up to government to impose one view on everyone.*" 130. (Emphasis added).

So his idea seems to be that preventing government from restricting freedom on the basis of the wrong reasons will leave it to individual citizens to decide how to live their lives. In other words, he seems to be suggesting that rather than specifying particular activities that are protected, we can achieve the same result by restricting what reasons government may act on. If such restriction would in fact achieve the same result, then we would have avoided the need to define the scope of the moral right. And, with respect to the second problem, perhaps his idea is that if we are no longer prohibiting government from burdening particular activities and from discriminating in favor of particular activities, then we will not need to worry about the conflict between such prohibitions.

But is it true that, by preventing government from acting on assumptions about which ways of life are intrinsically better than others, we can ensure that individual citizens will have the freedom to decide how to live their lives? We need as a preliminary matter to distinguish two different ways to understand "the freedom to decide". On the first understanding, the freedom to decide is a purely mental freedom. One is free to decide as long as one can make up one's own mind, regardless of whether one has the freedom to act on one's decision. On the second understanding, by contrast, to be free to decide how to live is to be free to act on one's decisions about how to live.

It should be obvious that the first understanding of the freedom to decide cannot be the relevant one. A purely mental freedom to decide would not protect freedom of religion as standardly understood. Moreover, in order to protect a purely mental freedom to decide, the right of ethical independence is not necessary. For example, it would not be necessary to hold that "government may not forbid drug use just because it deems drug use shameful" or "may not levy highly progressive taxes just because it thinks that materialism is evil." 130. Thus, the relevant freedom to decide how to live is the freedom to act on one's decisions about how to live.

But Dworkin's ethical independence approach would not in fact protect this freedom. As noted above, Dworkin seems to suggest that the prohibition on acting on assumptions about which ways of life are intrinsically better would have the result that it is "left to individual citizens, one by one, to decide such questions for themselves, not up to government to impose one view on everyone." 130. It is a mistake, however, to think that the restriction on what reasons the government can act on has the effect of allowing citizens to act on their decisions about how to live. In other words, it is false that without specifying particular activities that are protected, we can achieve the same result by restricting what reasons government may act on. That the government may not levy highly progressive taxes based on a view about how to live does not protect citizens from paying highly progressive taxes. The government may impose such taxes for a wide range of other reasons. Similarly, that the government may not ban prayer or abortion based on assumptions about what ways of life are intrinsically better than others does not ensure that citizens are free to decide to pray or to obtain an abortion.

With respect to the second problem – the tension between the requirement that government not burden religion and the requirement that it not favor religion – Dworkin's approach makes it go away only by in effect removing the requirements. As noted, on Dworkin's

approach, the government can burden or favor religion as long as it does not do so for a narrow range of prohibited reasons.

The two problems thus do not motivate Dworkin's approach. They do, however, point the way to the equality-based approach we favor. The first problem is that of specifying the scope of religion. Our approach maintains that religion is not to be treated worse or better than other activities. For this reason, we will argue, it does not require a specification of the scope of religion. The second problem involves the tension within the requirement that government may neither burden or favor religion – is solved by reinterpreting that requirement. We have seen that if the requirement is understood to mean that religion is exempt from otherwise applicable laws and cannot be given benefits available to similarly situated claimants, then it suffers from a strong internal tension. On our equality-based approach, by contrast, the idea that religion must not be burdened is understood to mean that religion must not be treated worse than other activities, and the idea that religion must not be favored is understood to mean that religion must not be treated better than other activities. Thus understood, there is no internal tension.

DWORKIN'S REQUIREMENT OF EQUAL CONCERN

We have not yet said much about Dworkin's "requirement of equal concern." Remember that Dworkin's approach incorporates a requirement that exemptions must be granted for activities that groups regard as sacred duties " if allowing such an exemption would not undermine the point of the legislation ." One problem is how to understand the notion of a sacred duty.¹² The natural understanding is that for a group to regard a duty as sacred is for the

¹² In *Life's Dominion*, Dworkin has a discussion of the sacred (chapter 3). According to that discussion, the sacred is one category of the intrinsically valuable. Incrementally valuable things are ones such that the more we have of

group to regard it as an especially important religious duty. On this understanding, sacred duties are a subset of religious duties, so it looks as if we have brought back the need to distinguish between the religious and the nonreligious after all. Matters are complicated however because the issue is now whether the group regards the duty as sacred, not whether it is sacred. There are two possibilities. First, the question could be simply whether the group designates the duty as sacred. It would seem that this test is not workable – any group could simply designate any activity as a sacred duty in order to come within the protection. Second, the question could be whether the way in which the activity is in fact is treated by the group qualifies as sacred. This would indeed put the courts in the position of having to determine what qualifies as religious (given that the sacred is a subset of the religious). In particular, it would seem to reinstate a form of functional test for religion – i.e., what role the activity plays in the life of the group in question. It therefore encounters the problem that exemptions will be required for groups that treat the acquisition of money or the promotion of racism as sacred duties, whenever the exemption would not undermine the point of the legislation.

In practice, however, the condition that the exemption not undermine the point of the legislation would likely have the consequence that exemptions would rarely be required for traditional religious activities or anything else. As explained above, the question of whether an exemption would undermine the point of the legislation is not the question of whether the amount of harm is relatively small. Rather, the idea is that exemptions are not required if the resulting harm is that which it is the point of the legislation to prevent -- even if it is only a relatively small amount of that harm. As a result, exemptions will only be required in the special

them the better. By contrast, with respect to sacred things, it is not true that the more we have of them the better. (70). It is not at all clear that Dworkin's use of "sacred duty" in *Religion without God* is intended to express the same notion.

situation where the exemption does not in fact produce the type of harm that the legislation was designed to prevent.

Another problem is that the exemptions required by Dworkin's account have the consequence that Dworkin does not escape the self-defeatingness problem. If one group must be allowed to engage in an activity because it regards the activity as a religious duty, but another group is not permitted to engage in the activity despite the fact that it regards the activity as extremely important, then the second group is being discriminated against on a religious ground.

By contrast, on our approach, whether an exemption is required does not depend on whether the group regards the activity as a sacred duty. Rather, the issue is the equality-based one of whether not allowing an exemption results in a violation of the requirement of equal regard. Because our approach does not ask whether the activity is a sacred duty, it avoids the need to define the sacred. Similarly, it avoids the self-defeatingness problem that Dworkin's approach encounters because it denies exemptions to groups that do not treat the relevant activity as sacred.

AN EQUALITY-CENTERED APPROACH TO RELIGIOUS FREEDOM

We share (and in some of our work, have anticipated) Dworkin's view that religious freedom -- understood as some form of entitlement, without more, to act in defiance of laws that interfere with actions based on religious convictions -- runs into insurmountable problems of scope and fairness. And we share Dworkin's sense that this circumstance should motivate a new understanding, an understanding that accounts for the general appeal of the idea of religious freedom but avoids these problems. But for the reasons we have set out, we do not think that Dworkin's invocation of a general right of ethical independence -- on either the RWG

thin version of that right or the JFH thick version -- can unravel the conundrum of religious freedom. Nor do we think that Dworkin's secondary claim, requiring exemptions for those acting out of "sacred duty" when such exemptions would do no harm to the government's regulatory aims, can offer a satisfactory account of religious freedom.

EISGRUBER AND SAGER

Eisgruber and Sager offer an equality-centered view of religious freedom, drawing on the constitutional experience of the United States. Their goal is to establish “fair terms of cooperation for a religiously diverse people.” Their normative touchstone is the obligation of a political community to treat its members with equal regard, understood in the generally familiar way as requiring that all persons are entitled to be treated as equals. With regard to exemptions — the problem that we are focusing on here — Eisgruber and Sager set out to show that a concern with “equal liberty” of the sort they endorse can justify an appropriately robust regime of religious freedom, one that would support, and indeed expand upon, the most attractive features of the United States constitutional experience.

The general approach taken by Eisgruber and Sager does not “privilege” religious beliefs, commitments and interests over their secular counterparts; rather, it “protects” them from discrimination. So the entitlement of a Saturday Sabbath observer to qualify for unemployment insurance notwithstanding her refusal to accept a job that required her to work on Saturday is not a free-standing liberty, but rather derives from a claim of fair treatment, based on the fact that her state fully protects traditional sabbath observers from ever having to work on Sunday in order to so qualify. Similarly, the entitlement of a committed pacifist, whose opposition to war is underwritten by his studied secular moral judgments, to conscientious objector status derives from the statutory availability of CO status to religious pacifists, whose opposition to war is founded on a belief in a Supreme Being.

Writing before Dworkin, Eisgruber and Sager anticipated the conceptual difficulties that prompted Dworkin to turn to ethical independence to explain and populate the right to religious

freedom. But while “equal concern” presents itself late and in a somewhat unexplained way in *Religion Without God*, equal regard is at the normative core of Eisgruber and Sager. They offer their equality-centered view as one that accounts for a recognizable corpus of religious freedom while avoiding the problems that beset a claim to a distinct right of autonomy for acts prompted by religious belief.

We see equal regard and an equality centered understanding of religious freedom as promising, and use it as our point of departure in the discussion that follows. But there is, we believe, a good deal more to be said. Even cases that were straight-forward for Eisgruber and Sager — like the Saturday Sabbath observer claim — strike us as more challenging. In substantial part, this is because our project is a different one. While Eisgruber and Sager were seeking a normatively attractive and coherent account of religious freedom as it figures in constitutional law in the United States, our concerns are in the domain of political morality. On the one hand, that means that presumptions, prophylaxes, and conceptual boundaries that are available in constitutional theory are not available to us. On the other hand, the law has to worry about what may be very difficult evidentiary questions and the costs of fair and effective administration. There are always questions about how the law would ascertain the truth of certain matters in a reliable way. We, in contrast, can stipulate facts and consider how morality treats those facts.

EQUAL REGARD AND RELATED CONCEPTUAL MATTERS

We can begin with a brief and general description of equal regard. For our purposes, Equal Regard is the moral requirement that a political community treat its members as equals. To fail to treat someone as an equal is to subject them to a disadvantage because they — and with them, their interests, projects, and beliefs — are unjustifiably devalued. To regard others with hostility or disrespect is certainly to devalue them. But there are less active and less conscious forms of devaluation that are just as significant. We can also recognize in ourselves a tendency to be indifferent to, or at least insufficiently attentive to, some matters of great concern to others, because those concerns are outside the compass of our own experience. This can be true, for example, if we allow our own ability to navigate the built world obscure the obstacles it may

present to those with disabilities. It is a special problem in the context of religion, where idiosyncratic commitments create concerns that may seem mysterious and arbitrary—even frivolous—from the outside. This creates a tone-deafness to the concerns of persons with outlying religious beliefs and commitments.

This understanding of what constitutes a failure of equal regard raises some questions that we can address at the outset. The first concerns what it means for a public, governmental decision to unjustly devalue some persons within the political community. Consider a case where a municipal Sports Authority, whose members are appointed by an elected City Council, oversees a high school basketball league. By order of the Sports Authority, Players with vision problems are permitted to wear well-tethered glasses, as an exception to the leagues strict uniform rules. But orthodox Jewish claimants are not permitted to wear safely-secured yarmulkes, and, given their religious commitment to wearing yarmulkes, cannot participate.

If, in order to determine whether the decision by the Sports Authority to yarmulkes, constituted or flowed from an unjust devaluation of the orthodox Jewish claimants, we had to assign a state of mind to the Authority, we would be in some trouble. Groups certainly can have states of mind: Consider two people who have a plan, or a family can have a goal. But even in a situation as simple as the decision by the Sports Authority, we face not only the question of the Authority and its members, but of the City Council which appointed the Authority, the community that elected the City Council, and the broader, regional and national cultures in which the community is situated. And we are concerned not merely with active hostility and disrespect, but with the more subtle but no less undermining influence of indifference. To characterize the aggregate state of mind of large, disparate, overlapping, disunified groups, where individual members have conflicting mental states—even in the relatively straight-forward case of our yarmulke basketball claimants seems conceptually controversial and practically impossible.

But we do not have to assign a state of mind to the yarmulke-banning community. We can conclude that there has been a failure of equal regard when three sometimes closely-related conditions are satisfied: First, a group or individual has been subject to disparate and

disadvantageous governmental treatment without good reason; in this case the claim would be that there were not good reasons to permit vision-impaired players to wear glasses, but prohibit orthodox Jewish players from wearing well-secured yarmulkes. Second, there exist in the community devaluative attitudes and tendencies. And third, the best explanation for the disparate and disadvantageous treatment is the influence of the devaluative attitudes and tendencies.

Judgments about equal regard may be controversial or difficult. The basketball/yarmulke case itself may not be a slam dunk...we'll consider it in some detail, below. But the failure of equal regard is a coherent concept, and political morality has good reason to worry about such failures.

These observations are immediately adjacent to another preliminary matter, namely, the relationship between failures of equal regard and what is sometimes characterized as *structural injustice* or *subordination*. (We will favor the use the term structural injustice in this paper, but, for our purposes, the terms are interchangeable). Structural injustice refers to a state of affairs in which members of a group suffer a pattern of disrespect and discrimination that is enduring, pervasive and tentacular. The circumstance of African-Americans in the United States is the burning example. When a public entity makes a decision that disadvantages members of a group who are victims of structural injustice, the harm of that disadvantage is magnified in several ways: 1) Members of the victim group chronically find themselves at the losing end of public decisions, so the harm and injustice is cumulative; 2) members of the group experience not only the disadvantage itself, but the added harm of the bitter understanding that their disadvantage flows from their being devalued by the members of their community; and 3) the decision disadvantaging members of the group carries with it the social meaning of devaluation, and reinforces the pattern of disrespect and discrimination from which it emerged. Structural injustice plainly constitutes a great affront to equal regard. It constitutes an appalling failure to treat persons as equals. But there is a further question, namely, whether public decisions can fail to treat persons as equals — can flunk the requirement of equal regard — without reaching the extreme dimensions of structural injustice.

The devaluation that is at the heart of a failure of equal regard cannot be instantaneous or one-off. It is to some degree and in some way wrought into the members of a community. But it doesn't follow that it must be pervasive, surfacing regularly and inhabiting many of the nooks and crannies of community interaction. It might be considerably more narrow. Imagine that a state has recently changed its unemployment insurance regime, as well as various other regulations, and, for the first time, the state unemployment insurance board is confronted with a Seventh Day Adventist, Saturday Sabbath observer, who refuses to work on Saturday and is for that reason fired. And suppose, further, that Sunday Sabbath observers are protected by state law from being fired for refusing to work on Sunday. The state board finds that Saturday Sabbath observance is not good cause to forfeit employment and denies the claimant unemployment insurance. (For these purposes of this hypothetical state of affairs, we are ignoring extant United States constitutional law.) We will look at this case in greater detail, below. But for the moment, the point we wish to make is that, while there is almost surely a failure of equal regard here, the vulnerability of the claimant to disadvantage might be far more limited than the patterns of disrespect and discrimination we characterize as structural injustice. Seventh Day Adventists and Orthodox Jews might in some times and places suffer structural injustice; but in other times and places, while they may be the victims of hostility or callous indifference on questions of the Sabbath, much of their interaction with their community — public and private — may include general respect, fair treatment, and possibly even warmth. That doesn't excuse or make any more just the failure of equal regard likely involved in treating Sunday observers so much more favorably. But neither does it qualify as structural injustice or subordination. Some of what sharpens the sting of structural injustice may well be in the picture: The accumulation of disadvantage, the harm of understanding one's disadvantage to flow from devaluation, and the possibility that a public act that exhibits devaluation may serve to reaffirm and thereby reinforce devaluative attitudes in the community, might all be present, albeit in the narrowed context of Sabbath observance. Indeed, a failure of equal regard of this sort may not be different in kind but rather in degree from structural injustice. But it is important to observe the possibility of failures of equal regard which fall considerably short of structural injustice, as they are an important feature of an equality-centered approach to religious freedom.

One final preliminary matter concerns what we could call *the objective value principle*. As our discussion to this point reflects, the failures of equal regard with which we are concerned involve unjustifiable disadvantages. Frequently, this will take the form of extending an accommodation or exemption to one group, while withholding it from another. The justification of this distinction in treatment, has to turn on a matter of objective value

Below, we consider a state policy that mandates vaccinations for everyone, except those for whom vaccinations pose extreme health risks, and babies, who receive no benefit from vaccinations. The state has ample justification for this policy: the overwhelming medical consensus is that measles vaccinations are safe and effective, and that the community is greatly advantaged by widespread vaccinations. Some religious believers, however, are convinced that vaccinations pose a deep threat to their souls and the souls of their children, throughout eternity. And some “anti-vaxxers” believe that children who are vaccinated are at serious risk of developing autism. Each of these two groups believes that they are profoundly harmed by the state policy. But while the state can take account of the feelings of the religious and anti-vaxxer objectors, as *feelings*, it cannot regard them as true; and it can and should override those feelings in the interest of the well-being of the community in general and the special danger measles poses to the medically vulnerable in particular. Equal regard is not equal credulity; to the contrary, it depends on objective evaluation. This is what we designate as the principle of objective value.

RELIGIOUS FAULT-LINES AND FOUNDATIONAL ETHICAL AUTONOMY — CONSCIENTIOUS OBJECTORS AND CONSCIENTIOUS COOKS

Clear instances of the failure of equal regard are provided by cases where governments grant exemptions to one group, but withhold them from another, where each group is motivated by comparable claims of conscience, and where the only salient difference between the two groups is the normative foundation of their judgments of conscience.

Here are three examples. The first involves two cases decided by the United States Supreme Court. Both involved a provision of the Selective Service Act, which granted conscientious objector status to men who opposed all war on the basis of their religious beliefs in the commands of a “Supreme Being.” The act went on to make clear that this requirement of a traditional religious basis for a strong commitment to pacifism disqualified applicants for CO status whose commitment rested, in the end, on moral judgment and secular impulse, however studied and deep. In each of the two cases the CO claimant pretty clearly fell into the disfavored category. The second example concerns an attempt by Hialeah, Florida, to ban animal sacrifice by members of the Santeria faith, which also made its way to the Supreme Court. The facts are slightly messy, but the Court was clearly right to conclude that what Hialeah undertook to do was to ban Santeria sacrifice, while permitting both Kosher and ordinary animal slaughter for food, and hunting. A third example is a hypothetical case offered by Eisgruber and Sager that — cute names aside — is entirely plausible given the actual vagaries of municipal zoning restrictions. Two Mrs. Campbells live across the street from each other in, say, a suburban part of Richmond, Virginia. Each of them wants to run a soup kitchen to feed the homeless. One Mrs. Campbell does so out of intense religious commitment; the other Mrs. Campbell won’t discuss her religious beliefs, but offers her moral views about what each of us owes to those who are worse off, as well as her judgment that it is indecent for children and adults to go hungry in a prosperous nation. Zoning ordinances and/or administrative zoning variance practices might in the end permit one of the Mrs. Campbells to run a soup kitchen, while prohibiting the other, on the grounds of the secular/religious divide between them.

These three examples share a structure that makes them especially vulnerable to the conclusion that they are failures of equal regard. Consider the conscientious objector cases, with a classically religious, god-following, pacifist claimant considered side-by-side with a secular claimant, whose pacifism is grounded in studied moral judgment. We can divide the substantive profile of each claimant and his claim into three parts. At the base of each is the *source* of the claimant’s pertinent commitment — in one case, the core beliefs of, say, the Quaker faith; in the other, studied moral judgment. In the middle of each is the *content* of the claimant’s pertinent commitment — in both cases, an abiding opposition to all war and all participation in killing. At

the top of each is the *exemptive claim* — in both cases, the opportunity to do non-violent national service in lieu of being a conscripted military combatant.

Were it the case that the *content* of a conscientious claimant's pertinent commitment differed from the core case of the Quaker pacifist, the government *might* be justified in treating the alternate claimant differently. Suppose, for example, that the claimant is a deeply faithful member of a religion that insists that serving god requires that one's survival as a creature of god is one's greatest single obligation; accordingly, to participate in a war is to commit the sin of mortal risk. A government might have grounds for valuing the abhorrence of intentionally harming other persons more highly than the abhorrence of putting oneself in harm's way. Or were it the case that the *exemptive claim* of the secular claimant differed from the core religious case, the government might be justified in treating the claimant differently. Suppose, for example, that the *content* of the alternate claimant's beliefs makes one who engages in national service in lieu of militarily combat morally complicit in the deep injustice of intentional killing of war; accordingly, the claimant seeks exemption from national service as well as from military combat. Differences of these sorts would not end the worry that the disadvantageous treatment of the secular claimant constituted a failure of equal regard, but they complicate the inquiry. We will look at cases with this structure below, in the section on Saturday Observers.

But, in the conscientious objector cases that came to the United States Supreme Court, and draw our attention here, it is only the *source* of the claimants' conscientious commitments that vary. The same can be said of the Santeria animal sacrifice case—factual messiness aside—and to the plausible but fictive two Mrs. Campbells case. Cases of this sort all but certainly constitute failures of equal regard, and it useful to understand why.

Most importantly, when government unequally distributes accommodation for matters of conscience across religious fault-lines, it will almost certainly be doing so against a backdrop of an abundance of devaluative attitudes. When members of one faith are accommodated but members of another are not, when religiously-motivated persons are benefitted but secularly-motivated persons are not, or when secularly-motivated persons are benefitted but religiously-motivated not, brute facts about the sociology of religion come into play. These include hostility,

indifference, and under them both, a root sense of valorization of one's chosen beliefs among a variety of often strictly competitive normative systems.

In the cases we are considering in this section, there is a second reason that equal regard is at great hazard. As we have observed, it is only what we have roughly characterized as the source of normative judgment that separates favored from disfavored claims of conscience in these cases. In such cases, there is no objective value upon which to ground a difference in treatment. There is, for example, no justifiable grounds for treating a claimant's devout commitment to Quaker teachings different than a studied and abiding moral abhorrence of the intentional killing involved in war and military combat.

Distinctions in the accommodation of conscience across religious fault-lines where the only difference is in the normative source of conscientious commitment are almost certainly cases where the best explanation for the unjustified difference in treatment is the prevalence devaluative attitudes and tendencies. Such actions by government cry out for this understanding. Consider the selective service cases once again: What other possible explanation is there for Congress carefully sculpting the right to conscientious objector status, confining it to individuals whose opposition to war stem from a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code" ? Cases of this sort are all but certainly failures of equal regard.

As an aside, it is interesting to note that our reflections in this section may help to understand the normative impulse that sparked Dworkin's idea of ethical independence, at least in the form it assumed in *Religion Without God*. Somewhat puzzlingly, remember, Dworkin argued that government "may protect forests because forests are in fact wonderful," though not on the ground that a way of life involving forests is a good way of life. As we have argued, this is a puzzling idea and a puzzling example. What use is it to someone whose deep normative commitments include an abhorrence of war to be assured that the government cannot act on its disapproval of pacifism as a way of life, but that it can send the claimant and tens of thousands of

other to war because it can decide that the war in question is the best thing for the country, or even that war is an effective instrument of foreign policy, to be deployed frequently?

The idea that government can not set out to oppose itself to chosen ways of life, but can that it can block behaviors upon which those ways of life depend, makes better sense if understood in light of cases like the three examples we have been considering in this section. Their appropriate disposition turns in part on the thought that the foundational elements of ethical commitment is outside the reach of state valuation and response. That thought may be what sparked Dworkin's attraction to what he calls ethical independence. And that thought has consequences in cases where equal regard is at obvious hazard. Dworkin's somewhat unexplained invocation of equal concern and respect as a kind of afterthought in his discussion of ethical independence makes much more sense if we see the argument from the outset as equality-centered.

MEASLES VACCINE

Suppose a state is considering its policy with regard to the MMR vaccine. The vaccine has proven to be safe and effective protection against measles for almost everyone. If a high percentage of the members of a community are vaccinated, the community as a whole benefits from "herd immunity", and measles is as a practical matter eliminated as a health risk for all. If the percentage of vaccinated persons drops to a certain point, measles returns, and epidemics are possible. Measles is relatively dangerous, even to healthy persons who are unvaccinated: Something like one person in five who contracts measles in the United States will be hospitalized; children in particular may suffer severe complications; and three children in 1000 will die. Babies who are too young to benefit from the vaccine are especially vulnerable, and persons with badly compromised immune systems are both unable to be safely vaccinated and at especially great risk from measles itself.

The state has good reason to aim at a high vaccination rate; and we can assume for our purposes that some form of a mandatory vaccination policy is the best chance the state has of achieving a high rate. The question is who should be exempt from the vaccination requirement.

Persons in the *vulnerable group* – those with badly compromised immune systems for whom the vaccine could be fatal– have very strong claims to exemption. Two other groups are contenders for exemption: those who hold religious beliefs that bar this form of medical intervention as sinful; and those who on secular grounds strongly resist being vaccinated or having their children vaccinated. (The secular grounds are likely to center on an unreasonable but passionately held view that the vaccine is dangerous; they might include a strong naturopathic view of the good life as one free from medical intervention on some combination of ethical, psychological and prudential grounds...Who knows? Religion doesn't have a monopoly on the irrational.) Let us suppose – as unhappily, we are discovering – that, if all three groups are granted exemptions, the percentage of vaccinated persons will drop below the point of herd immunity and measles will become a serious health problem.

Suppose the state exempts only babies and persons in the vulnerable group from its vaccination requirements. Are religious objectors to vaccinations being treated unjustly? Not on the equal regard centered view of religious liberty we are exploring. To be sure, the policy involves a choice across religious fault-lines, with potentially strong religious interests being denied an exemption while weighty health interests are granted an exemption. This gives us reason to look closely. But the question of whether the state is failing to treat those who object to vaccinations on religious grounds as equals in light of the medical exemptions is of course not the same as whether it is treating them equally

This is a vivid – unfortunately, but necessarily harsh – example of the objective value principle. It is not the case that physical interests can or should always be valued more highly than feeling of religious necessity. But neither is it the case that feelings of religious necessity have to be valued as infinitely high, or as high as the holder of those feelings would subjectively place them. And the state has reason to value the life-and-death interests of those in the vulnerable group more highly than even the most intense feelings of the religiously-motivated (or the health-scare motivated) anti-vaccine group members.

From the vantage of the religious believer, it might be a sin to accept medical intervention in one's own well-being; under the most extreme view, the sin might threaten the

loss of salvation. It should matter to the state that some of its citizens feel strongly about medical intervention, but it matters, in effect, from the outside. We can put the position of the state with regard to medical care and the salvation of the soul in one of two ways. If we think about the religious parent as making a factual claim about her potential fate, the state has no available support for that claim; just for example, as it has no available support for the health claims of the parents who believe that vaccinations cause autism. If, instead, we think about the religious parent as having a transcendental claim about matters that do not purport to be factual and are inherently unknowable, then too the state has no available support for the claim. Either way, the substance of the religious parent's anti-vaccination beliefs gives the state no grounds sounding in objective value for giving special weight to her claim for an exemption from the vaccination policy.

It is easy to call to mind cases where a Christian Scientist has refused treatment, even if the treatment could have rescued the unwilling patient from an all but certain and painful death. But competent adults can refuse treatment on any grounds. This is a view of bodily autonomy that has nothing to do with religious freedom or freedom of conscience. In contrast, when a parent wishes on religious grounds to refuse treatment for her child, the public response changes sharply, even if the parent is in terror of eternal torment for herself and her child, should she accept the treatment, and even if the parent believes intensely that God will fully protect her child from the harm of the physical condition in question. Medical science provides the state with the facts upon which it acts. That the mother has the feelings she has is a fact as well; but respecting those feelings has less importance than the child's well-being. This is another example of the state making a determination about what has objective value.

In the measles vaccine case, the state has good reason to exempt persons with drastically impaired immune systems; their lives are at stake, and their numbers are such that herd immunity can be maintained without putting them at risk. This is an instance of a situation where in general the claim for an exemption is strong. The claimants would, as a matter of objective value, suffer a severe burden if they were not exempted, and granting the exemption does minimal damage to the state's interest. Were an exemption not granted, we would have good

reason to worry that the persons impaired immune systems were not being treated with equal regard. The picture is different as to those who object to vaccinations on religious grounds. Their numbers may be such that they are putting not just themselves and their children at risk, but also babies in the community who are too young to vaccinated, as well as persons with drastically impaired immune systems. Their lives are not at stake, only their feelings, however dire the beliefs upon which those feelings are based. There is no failure of equal regard, no unfairness involved in granting the vulnerable group exemptions from the vaccine mandate but denying such exemptions to religious objectors.

Could the state justly grant exemptions from a vaccination requirement to religious objectors but withhold them from secular objectors? As a practical matter, the state might conclude that it would be unable to administer a program that prevented secular vaccination objectors from recasting their claims in religious terms; but suppose we assume away these practical problems. Could a state exempt religious objectors but not secular health-scare objectors?

In this setting, there are no grounds for objectively valuing the concerns of the religious objectors more highly than those of the secular objectors. We can divide the question of the objective value of the concerns of these two groups between their *source*, and their *content*. Consider the difference in source: The state cannot choose to care more for the religious needs of Protestants more than the religious needs of Catholics just because they emanate from the Protestant faith; and it cannot choose to care more for the concerns of parents who don't want to vaccinate their children on religious grounds than the concerns of parents who deeply fear for the well-being of their children just because they emanate from religious as opposed to secular belief. The objective value of insisting on compliance or the objective cost of permitting exemptions by one of these two groups of objectors or the other does not vary with the difference in the sources of the group's objection. That is the lesson of the cases we considered in the religious fault-lines section, and the basis for our conclusion that differences in the state's willingness to draw distinctions in exemptive entitlement across religious fault-lines raised doubts on equal regard grounds.

It is true that here, unlike the cases we considered in the fault-lines section, the *content* of the two groups of vaccinations objectors' concerns is different as well their source. To simplify (and possibly exaggerate): the religious objectors see themselves as betraying and undermining their community of faith, and risking the forfeit of salvation; the secular objectors see the well-being -- possibly even the lives -- of their children as being at stake, and possibly as well, a deeply disturbing compromise of the naturopathic principles to which they are committed. Does this difference in content give the state grounds for favoring the concerns of the religious objectors?

One possibility suggests itself: The state has objective reasons, based on medical science, for treating the secular parents' worry about the health of their children as decisively wrong. In the case of the worries of the religious parents, it either has to treat those worries as decisively wrong or as unknowable. Does it follow that the state is entitled to discount the underlying content of the secular parents' concerns to zero, but has to treat the underlying content of the religious parents' concerns as having some weight, however indeterminate; and does it follow that the state has grounds for favoring the religious objectors? The answer has to be no. There is no objective value lying behind either claim for exemption, save only the intense feelings of the parents in both cases. And were the state to distribute exemptions across religious fault-lines without any objective justification, it would plainly be failing to treat the losing group as equals.

This is not to say that the state never has grounds for favoring religious claims to accommodation over broadly parallel secular claims. There might be grounds for valuing religious claims more highly than secular claims in some settings -- not because of the intrinsic value of religion but because of circumstances that incidentally attach to the religious claims. It's possible, for example, that a community could objectively value the need for orthodox Jews to wear yarmulkes in a municipal basketball league more highly than a secular desire to wear some other form of headgear, like a bandana. If a prohibition of all headgear including yarmulkes would prevent orthodox Jews from participating in the league, the community might have reason to value the social inclusion of orthodox Jews that did not apply to the secular claimants. So too, a community might choose to waive the requirement that members of the police department be cleanly shaven for Sikhs, and African-Americans, but not for other persons

deeply attached to their beards; they might do so on the special grounds of the need for an ethnically and culturally inclusive police force.

For our present purposes just here, what is important are the requirements of equal regard, the objective value principle that accompanies that demand, and the conclusions to which it can lead: In the context of vaccination policy, a state could justly grant exemptions to persons with compromised immune systems and babies, but decline to grant exemptions to persons with religious beliefs that make receiving a vaccination or permitting ones children to receive a vaccination a sin. A state could not, however, justly provide vaccination exemptions to religious objectors while declining to provide exemptions to secular objectors.

SATURDAY OBSERVERS

Adele Sherbert left her job because she was required to work on Saturday, which violated a fundamental tenet of her faith as a Seventh Day Adventist. Unable to find any other work, she applied for unemployment benefits in South Carolina, her home. Under South Carolina law, the question for the state Employment Security Commission was whether her sabbath beliefs constituted “good cause” for declining available employment. The Commission held it did not. In South Carolina, Sunday sabbath observers are protected by law from ever being required to work on their designated day of rest.

This case — which actually came before the United States Supreme Court — raises a strong equal regard claim. It seems all but certain that the distinct disadvantage to which Adele Sherbert was subject was not justified by legitimate policy concerns. Further, there is good reason to suppose that Adele Sherbert’s sabbath observance claim was not fairly valued. Sunday sabbath observance is a weighty tenet of the Christian faith, and was, in a sense, enshrined in South Carolina law. The Seventh Day Adventists, who have delineated their faith in part with reference to Saturday observance, and named themselves accordingly, have been a theologically aggressive outlying sect; in turn, they have been the object of the special sort of hostility that orthodox belief systems often display toward heretics that share many of their core beliefs.

That said, this is not as simple a case as those we have considered above, in the religious fault-lines section, where the only distinction between or among exemption claimants was the source of their conscientious commitment. To be sure this is a religious fault-line case, with the State of South Carolina respecting the Sabbath observance claims of a largely Christian population with laws that protected any Sunday sabbath observer from having to work on Sunday, but refusing to treat Saturday Sabbath observance as good cause for refusing employment. Like the earlier fault-line cases, this is hazardous territory for equal regard, in part because of the sociology of religious difference generally, and in no small additional part because of the special circumstances surrounding what is in effect a schism within Christian believers about what some take to be a crucial tenet of their faith, the day of rest. In the *Selective Service* and *Mrs. Campbells* fault line cases, however, the exemptive claims are identical. Here, Ms. Sherbert was asking to be excused from Saturday rather than Sunday employment. There are minor policy differences implicated by the change in weekend-days. In South Carolina in 1967, it may have the case that there were a non-trivial number of jobs that required Saturday availability, and few if any with Sunday requirements. But this would be a sharp difference in treatment, about a matter of established importance to the claimants, with only a minor difference in policy consequences, and made under circumstances redolent with devaluative attitudes.. This is almost certainly a failure of equal regard.

The more complex structure of Adele Sherbert's claim, however, could matter under different circumstances. Suppose we had a different sabbath observer, whose religion insisted on a mandatory Thursday sabbath observance, or, more markedly, on a mandatory two-day sabbath on Wednesday and Thursday. The state has a legitimate interest in resisting unemployment benefit awards to persons whose religions make them hard to employ, and these variations on sabbath requirements pressing strongly in that direction. A decision denying benefits to an unemployment insurance claimant who could not work on Wednesday and Thursday well could be consistent with equal regard. It could be objected that the structure of the contemporary work calendar, with weekdays, a weekend, and a labor expectation of five days of work — at least in the South Carolina in the 1960s — has been shaped over time by a dominant Judeo-Christian ethos. But, for these purposes, arguably, government is entitled to take long since settled aspects of the the contemporary world and its calendar conventions as it finds them.

Equal regard, however, requires that Adele Sherbert and other Saturday sabbath observers be treated equally with Sunday sabbath observers. Where traditional sabbatarians were protected from being put to the choice between the command of their faith and unemployment benefits in South Carolina, so too should have been Saturday observers. But interesting questions remain, concerning other demands that equal regard imposes on a state that is accommodating sabbath observers.

We can begin with a relatively clear and unsurprising example of the reach of equal regard under these circumstances. Suppose time has passed and South Carolina's unemployment regime is now accommodating the employment concerns of both Sunday and Saturday observers, by finding weekend-day sabbath observance good cause for refusing available employment. Now a new claimant comes before the Board. She is one of a relatively small, but growing group in the state who observe "Sacrifice Saturday". A word of (fictive) history: *In the wake of 9/11, a small but visible group of New Yorkers agree among themselves to set Saturdays aside in remembrance of the first responders who gave their lives saving others trapped in the World Trade Center towers. They agree not to work at ordinary jobs, and not to play, on Saturdays, but rather to devote themselves to volunteer work, conversations and coordinated action on behalf of others in need of help. This practice spreads, and group structures emerge that support conversations, speakers and coordinated projects. Sacrifice Saturday becomes a durable and valued feature of the lives of persons throughout the country.* South Carolina's Employment Security Commission, however, finds that a committed practice of Sacrifice Saturday observance does not constitute good cause for refusing employment.

It is hard to see how South Carolina could justify the different treatment of the Sacrifice Saturday claimant and a Saturday sabbath observer. (It is not important to our analysis that South Carolina has come to recognize Saturday sabbath observers. Had the state not done so, we would be considering the claim in light of the protection of the state's accommodation of Sunday observers, as we have just done with regard to Saturday observance.) Unless there is some difference in objective value between day-of-rest sabbath observance and Sacrifice Saturday commitments, the only difference is in the source of these to Saturday practices; and it is hard to

see what added objective value there could be in committing to the sabbath as opposed to Sacrifice Saturday. Both are acts of solidarity, which are inflexible as to the choice of day. Saturday Sacrifice involves activities — learning about the needs of others; joining in coordinated activities aimed at helping others in need; marking the sacrifice of 9/11 first responders — that the state has good reason to value. If, as certainly seems to be the case, the difference between the cases turns, in the end, on the religious versus secular source of the respective practices, then we are looking at a source-driven choice across religious fault-lines. Such choices, we have concluded, almost always fail to treat people as equals, and thus are inconsistent with equal regard.

But now we get to the case that has worried us from the time we began to think and talk about the question of the Saturday sabbath observer, the football fanatic. Suppose the South Carolina Employment Security Commission has yet another Saturday observer on its hands. This claimant observes college football with intense passion every Saturday during the season. He has always had the largest available consumer television (now a whopping 72”), and every available subscription to college football. For decades, the claimant has never missed spending a substantial block of time on every in-season Saturday...sometimes alone, sometimes with friends. He studies college football, writes about college football in an informal newsletter, and sees in college football “the excitement, drama, teamwork, strategy, and heroics that make life worth living.” As you have no doubt anticipated, he declines the only employment now available to him, because it requires him to work on Saturday. The Saturday sabbath observer is entitled to decline Saturday employment in South Carolina, given that state’s accommodation of Sunday observers. So too is the Sacrifice Saturday observer. What about the Saturday football observer?

The football claimant’s exemptive claim is the same as these other Saturday observers: He seeks to be able to decline Saturday unemployment but remain eligible for unemployment benefits. Given the vagaries of human nature, it is as possible that Saturday football watching matters as much to him as say, Adele Sherbert’s ability to observe the sabbath mattered to her. But it is not the football observer’s valuation of his opportunity that matters. This is a point at which the principle of objective value makes a critical entrance. The state is not hostage to the intensity of feeling of a football fan — with or without the suffix “atic”. The state is entitled to

make a reasonable judgment about the objective value of watching college football on Saturday, as opposed, for example, to the other-directed activity of doing good works and memorializing national heroes. More subtly, the state may be able to objectively value a commitment to the sabbath differently than Saturday football watching. Not, it must be emphasized, because of the fact of a god who will be pleased or displeased by sabbath observation. Rather, the sabbath might be valued from the outside, as it were, as an symbolic act of solidarity with one's co-religionists, an act often regarded as one of sacrifice, or inhibition. Think of the Scottish runner Eric Liddell, whose refusal to run in the 100 meter heats in the Paris Olympics of 1924 because they were on Sunday was memorialized in movie *Chariots of Fire*. Many would find Liddell's firm refusal entirely admirable, without any belief whatsoever in a sabbath-demanding god, or any god at all. The state is entitled to observe the special values associated with group solidarity and personal sacrifice, and also the special constraints of group solidarity: Sacrifice Saturday cannot be observed on Sunday or any other day than Saturday; and likewise, sabbath observance comes packaged with day-specific obligation. In contrast, the football fan could record the games and watch them at any other time than the work day, or on any other day than Saturday. The state is entitled to worry about administering the unemployment benefits program under circumstances where good cause for declining employment can include most any passion if it is held in a sufficiently deep and durable matter. In all, a fair-minded Commission might well approve the South Carolina Employment Security Commission's decision that the committed football fan does not have good cause to decline Saturday employment.

But we are not finished with Saturday football observance, Suppose we remake the story to strengthen to the claim on behalf of football. Suppose the claimant, her father, and her grandfather, have attended every single home game of the University of South Carolina Gamecocks together since the claimant was eight years old. Rain or shine, sickness or health, winning season or embarrassment, hot weather or cold, the three have spent those many Saturdays together in the stands, cheering the Gamecocks on. The claimant regards those games as a joy and as an unwavering obligation to her father and grandfather. The claimant works for a company that was recently be bought by a large, national concern, and she was told that henceforth she would have to work on Saturdays. Football season arrived, and the claimant refused to work on home game Saturdays; she was fired. You know the rest: unable to find other

work, she applied for unemployment benefits, and the Commission found that her family tradition did not constitute good cause for refusing employment.

This is a much harder case. Two things have significantly increased the force of the football claimant's argument: First, deep family connections — something the state has likely accorded value to in a variety of settings — have entered the picture. Second, the day-specific urgency of the sabbath and Sacrifice Saturday cases is present in this case as well. On about eight Saturdays every fall, the South Carolina Gamecocks play at home, and the unbroken, three-generation tradition is centered on the experience of being there. There is good reason to think that that, in some combination, the unorthodox content of the claimant's commitment, on the one hand, and the secular source of that commitment, on the other, are being unjustifiably devalued.

We might try to come to the aid of the state, by suggesting that if the facts were different, and the claimant's religion somehow demanded her attendance at home games with her father and grandfather, the Commission still would have found that attendance at football games does not constitute good cause to decline Saturday employment. Accordingly, the argument would go, there is no discrimination across religious fault-lines involved in the Commission's action. But suppose that really were the case. Suppose the Employment Security Commission had two claimants before it: One was Adele Sherbert, Seventh Day Adventist, whose church is committed to maintaining Saturday as a day of rest; and the other was our claimant, who belongs to religious denomination whose beliefs dictate that 1) Saturday be a day away from work, and other specified activities; and that 2) Saturdays be spent in rich involvement with one's family. This second claimant has, in the name of her faith, joined her grandfather and father at every home game of the South Carolina Gamecocks during the football season since she was 8; her father and grandfather too, understand themselves to be complying with a religious imperative in so doing. If the Commission were to find that Adele Sherbert had good cause to decline Saturday employment, but not our claimant, that would be very strange indeed. More to the point, it would seem to be an indefensible failure of equal regard, since the second claimant claim must have been devalued on grounds that do not connect with any distinction in objective value to which the Commission could point.

Which brings us back to our original home-game-with- father-and-grandfather claimant. If, as we have just concluded, South Carolina is morally obliged to find good cause in the religious variant of her claim, so too is it morally obliged to find good cause in her case.

We close this section with an important reminder: These obligations of the State of South Carolina all flow from its initial protection of traditional Sunday sabbath observance. Nothing obliges the state to extend that protection. But treating people as equals— the principle of equal regard — requires the fair extension of the state’s accommodation of traditional sabbath observers.

TWO FINAL CASES

We can close by taking up two cases of considerable importance to our project:

Case 1: The Orthodox Basketball Player. We have already encountered this case— A high school basketball league has a rules excluding the wearing of anything other than the obvious minimal uniforms for play. A provision is made permitting the addition of appropriately secured eyewear for those with impaired vision; but permission is denied to orthodox Jews who feel obliged by their religion to wear Yarmulkes.

Case 2: The Bearded Policeman. A police department has a general rule requiring that members of the police department be clean-shaven. It makes exemptions for medical reasons (typically because of a skin condition called pseudo folliculitis barbae), but refuses to make exemptions for Sikh officers whose religious beliefs prohibit them from shaving their beards.

These are important cases because we have hoped to show by pursuing an equality-centered approach to religious liberty we can avoid the problems that Dworkin set out to avoid in RWG. Further, we have hoped to show that, while Dworkin’s moral integrity approach offers results that are thin to the vanishing point, equal regard can generate a recognizable, robust set of outcomes that can underwrite an attractive account of religious liberty. In order for equal regard

to account for an attractive jurisprudence of religious freedom, it will need to be the case that the appeal of the claims of the religious believers in cases like the Orthodox Basketball Player and the Bearded Policeman can be understood as drawing on underlying failures of equal regard.

Up to this point, most of the cases we have considered as failures of equal regard — the selective service cases, the two Mrs. Campbells, and Adele Sherbert. — have been relatively easy. The framework we have offered finds a failure of equal regard where there is a difference in treatment that is unwarranted, where there are devaluing attitudes in the community that align with the difference in treatment, and where those attitudes best explain that difference. In these relatively easy cases, there is little or no plausible justification for the difference in treatment and attributing that difference to devaluative attitudes present in the community is all but irresistible.

The Orthodox Basketball Player and Bearded Policeman cases, however, are a bit more challenging. In each, the governmental decisionmaker has chosen to accommodate a known medical condition — impaired vision, or hypersensitive skin — but has declined to grant a nearly identical accommodation to persons whose needs turn on the substance of their religious obligations. In so doing, it has distributed the benefit of accommodative exemptions across religious fault lines. In cases that have this structure, it is natural to doubt that the difference in treatment is warranted, and natural to worry that the reason for the difference in treatment is the existence of devaluative attitudes that — along with an unwarranted difference in treatment — constitute a failure of equal regard.

But in *some* cases of this sort, the accommodation of medical needs and the refusal to accommodate religious needs plainly will be warranted. The measles vaccination problem, which we considered earlier, is a good example. In our discussion, we concluded that it would be morally appropriate for the government to adopt a policy of mandatory measles vaccinations, with exemptions only for babies and the medically vulnerable. The state could deny exemptions

to religious parents who believe their salvation is at stake, just as it can deny exemptions to parents who have unwarranted fears of the medical effects on their children of vaccinations. Indeed, any other policy seems wrong-headed.

This analysis may seem to cast a shadow over the Orthodox Basketball Player and Bearded Policeman cases. In each of these cases, after all, while the state has distributed exemptions across religious fault-lines, it has done so under circumstances where it is favoring persons with acknowledged physical needs or vulnerabilities over persons with felt religious needs. In the measles case, when the chips were down, we had little trouble supporting a state choice to favor physical vulnerabilities. In these two cases, the government has made the same choice, in each instance treating physical needs or vulnerabilities as more exemption-worthy than religious feelings. Does our conclusion about the measles vaccine case undercut the argument that these cases constitute failures of equal regard?

We can confidently answer no, for a straight-forward reason. A concern for the failure of equal regard begins with the conclusion that government is treating claimants for exemptive accommodation differently without a good reason for doing so. In the measles vaccine case, government has a very good reason for its different treatment of babies and the medically vulnerable claimants on the one hand, and religious and medically-misinformed claimants on the other. Mandatory vaccinations without any exemptions put the medically vulnerable at great risk, and babies at risk without any gain to them or the general population. Mandatory vaccinations with exemptions for these two groups leaves the community able to maintain herd immunity without exposing either group to medical risk. Mandatory vaccinations with exemptions that include religious exemptions, however, as a practical matter, will let the vaccination rate fall below the level of herd immunity and invite the return of measles, with significant risk to all unvaccinated persons, and in particular, to babies and the medically vulnerable. That problem is if anything exacerbated because it would constitute a failure of equal regard to provide

exemption to religious objectors to vaccinations but not to medically-misinformed objectors. Governments have very good reasons to adopt a policy of measles vaccination exemptions that excludes religious objectors and medically-misinformed objectors. There are very important government interests at stake in the mandatory vaccination regime that includes exemptions for babies and the medically vulnerable; and extending the exemption to religious objectors and/or the medically-misinformed would drastically conflict with those interests. Accordingly, disadvantageous treatment of those two groups is warranted. The strong reasons for the difference in treatment, combined with the fact that *both* groups are denied exemptions, undermines the inference that members of either of these groups have been devalued, notwithstanding the fact that there is a difference in treatment across religious fault-lines.

In contrast, in our basketball and police cases, the cost of extending the exemptions is low. In neither case are the underlying interests in the general rule — no additions to the basketball uniform; no facial hair for policemen — of great importance; and in neither case would extending the exemption to the religious claimants undermine those interests to any serious degree if at all. There is every reason to suppose that the basketball league can permit Orthodox Jews to wear well-secured yarmulkes without any serious cost; likewise the municipal police department can presumably permit Sikhs to wear beards without any significant costs...if we were somehow wrong about this, we would revise our judgment. But as things stand, the difference in treatment between eyeglass wearers and yarmulke wearers, and so too the difference in treatment between bearded applicants for police positions with medically-sensitive faces and bearded applicants with religious commitments to wearing beards, are not warranted by the cost of extending exemptions to the religious claimants. The decisions in each of these cases not to grant exemptions were made to the detriment of minority faiths, under circumstances where there are likely an abundance of devaluative attitudes and tendencies in the communities where these decisions were made. In the end, these cases join what we have characterized as

easy cases — those involving the conscientious objectors to war, the two Mrs. Campbell's, and Adele Sherbert — as instances of the failure of equal regard.

We could stop our analysis of the Orthodox Basketball Player and the Bearded Policeman cases just here: Notwithstanding our analysis of the Measles Vaccination case, they offer examples of the force of equal regard as the backbone religious freedom. But there is more to say. Minority religious faiths will very often figure in claims of religious freedom that turn on failures of equal regard, for it is their interests and concerns that are likely to be met with hostility or indifference. Indeed, minority faiths are vulnerable to what we have called structural injustice — the entrenched patterns of disrespect and discrimination to which the members of some groups are prey. Religion has been a fertile site for structural injustice. In some times and places, of course, Jews have been the victims; so too have Catholics; and so too have been the members of apostate faiths like the Seventh Day Adventists; and lest we forget, Atheists. Muslims are prominent victims at the moment; Mormons surely once were....Unhappily, the list goes on and on.

The Orthodox Basketball Player case and the Bearded Policeman cases — both of which echo real world events — involve claimants who are members of groups that have been the victims of structural injustice, and quite possibly were at the time and in the place these cases took place. To say as much, of course, is to see as rampant the presence of devaluative attitudes and tendencies. But it has other implications for the moral standing of these cases as well. The consequences of adverse decisions like those of the Sports Authority or the municipal police department are especially troubling in terms of equal regard. In each of these cases, the decision not to exempt the religious claimants has the practical effect of barring the group from high school sports or civic employment, which can only exacerbate the isolation and disregard of the group. In each instance, members of the group are likely to understand the denial of the exemption as prompted by the disrespect they bear; and in each instance, members of the community at large may see in the denial of the exemption affirmation of the disrespect they harbor. Where structural injustice of this sort exists, the government may well be morally

obliged to do more than what fairness would otherwise require, it may well be morally obliged to bend over backwards in the interest of inclusiveness. Where — as in circumstances like these — the stakes in the coin of equal regard of refusing the extension of the exemptions would be especially high, a governmental interest that offered justification for that refusal would in turn need to be very high.

There is another, less dramatic consequence of the structural injustice that is likely serving as a backdrop to these cases. Think back for a moment to Adele Sherbert's case, and how the generosity of a state could lead to a cascade of exemptive obligations: Protect Sunday sabbath observers, and you may find yourself required to protect football fans from having to work on Saturdays! The threat of a cascade of obligations could be offered by the governments involved in the Orthodox Basketball Player case or the Beaded Policeman case. If we permit yarmulkes, what about bandanas? Or if we permit Sikhs, what about persons who claim that their beards are crucial expressions of their inner selves? Here, concerns with structural injustice come to the aid of governments that are willing to make accommodative concessions to groups that are the victims of such injustice. The weighty concern that any government should have for ameliorating rather than exacerbating structural injustice gives governments good reason to dismantle barriers to the social inclusion of excluded groups. The concern with overcoming structural injustice would give a high school basketball league good reason to permit yarmulkes but not bandanas; and give a police department good reason to exempt Sikhs from a no-facial-hair policy, but not those who cultivate beards as an aspect of self-expression. .

CONCLUSION

If we approach religious freedom in a conventional way, expecting religious belief to confer special rights of autonomy on the one hand, and impose special disabilities with regard to the receipt of public support on the other, we will find ourselves in a conceptual quagmire. The question of what counts as religion becomes critical under any such view, and, as we have shown, there is no satisfactory way of answering that question. Moreover, the twinned stipulation that religion is neither to be burdened or aided is contradictory to the point of incoherence. Even if we could somehow work our way through these problems, we would find no moral

justification for favoring or disfavoring religion as against other human beliefs and commitments.

In *Religion Without God*, Ronald Dworkin responds to these problems by offering a view of religious freedom grounded in the general right of ethical independence. The general right of ethical independence permits government broad license to regulate, but prohibits it from undertaking to restrict anyone's activity just because it believes that one way for people to live is intrinsically better than other.. Thus, government cannot ban drugs because it deems drug use shameful, and it cannot ban logging "just because it thinks the people who do not value great forests are despicable." 130. But the government *can* ban drugs "to protect the community from the social costs of addiction," and it can ban logging "because forests are in fact wonderful."

The right of ethical independence makes everything turn on a government's actual or constructed reasons for acting, and, as Dworkin's examples of drug and logging bans themselves indicate, for most — quite possibly all — prohibited reasons for acting there will be perfectly permissible reasons adjacent, reasons sounding in social benefit available to justify the behavioral restriction. The general right of ethical independence may protect mental freedom — a freedom of belief — but it offers no serious protection of behavior. It falls far short of what Dworkin himself seems to have wanted, namely a coherent and defensible grounds for a robust and broadly recognizable freedom of religion.

In this essay, we offer an equality-centered view of religious freedom, It's touchstone is equal regard, the obligation of a government to treat members of its political community as equals. The obligation to treat persons as equals is basic to political justice. It is not surprising to find it playing an important role in our understanding of religious freedom. Religious difference has all too often been the spark of hostility and indifference. When governments selectively distribute the benefits of legal exemptions across what we have called religious fault lines, the risk is significant that the unequal treatment is unwarranted, and further, that devaluative attitudes and tendencies among members of the relevant political community best explain that treatment. The risk is significant, in other words, that there has been a failure of equal regards. A

focus on equal regard can supply what Dworkin's right of ethical independence can not, namely, a coherent and useful understanding of religious freedom.