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Accommodation of Religion  

Arguments for the permissibility and desirability of Accommodation of religion  

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Table of Contents

1. Introduction ......................................................................................................................... 4
2. Accommodation – In General and of Religion................................................................. 6
3. The Pervasive Nature of the Modern Liberal State ....................................................... 13
4. The Centrality of Convictions ......................................................................................... 18
5. The Value of Deliberative Isolation ............................................................................... 23
6. The Problem (?) of Equality and Neutrality ................................................................. 30
7. Conclusions ....................................................................................................................... 36
8. Bibliography ...................................................................................................................... 38
1. Introduction

This thesis concerns exceptions from general norms, or other forms of legislative measures that have the purpose to facilitate the exercise of religious belief - what I from now on will call *accommodation of religion*.

We are norm following creatures. Our actions and attitudes are at all times guided by, and evaluated in relation to, norms of different kinds. Some are perceived to have universal application, others are specific to various contexts; some are highly formalized, others have the character of unspoken agreements or intuitions; some are the result of elaborate processes, others seems to emerge spontaneously; some are part of comprehensive normative systems, others appears isolated; some have a clear authority behind them and are backed by sanctions, some aren’t. In this diverse normative landscape, one type of norms stands out, namely, legal norms. These are the universally applicable, highly formalized and systematized norms employed by the state in order to facilitate social coordination and control. They stand out because it is the only normative system that is backed by coercive sanctions; they are in other words, enforceable. Other systems may involve sanctions, but these are either unlawful or limited to social rejection, criticism or, perhaps most important, *a burden on one’s conscience*. Through this property of coercion, the system of legal norms effectively sets limits to other normative systems. When legal norms come into conflict with norms of other kinds, the latter usually has to yield. This is not to say, however, that non-coercive sanctions can’t be feared or be perceived as a strong reason to conform to whatever norm they are connected to. Depending on our beliefs and convictions, we might feel that some norms are so important to conform to that we will do so regardless if they conflict with legal norms.

Conflict between legal norms and conscience need not involve religion. For example, if a parent is forced to testify against their child, I believe many would agree that this person can be justified in refusing to testify or even lying, regardless if we think that legal norms should be followed as a general rule. Other examples could be the conscientious objector who’s motivated by pacifistic ideals or the activist who’s motivated by ideology. However, these conflicts often do involve religious norms. One explanation as to why could be that religious norms often both entail universal applicability and are part of a highly formalized and comprehensive normative system that involves specified sanctions, very much like secular law. The potential for overlap is therefore great.
Whatever the reasons, conflict between religious conscience and legal norms are present in contemporary societies and the question thus becomes whether or not religious norms should come to influence the content of legal norms. Should we accommodate religion?

The purpose of this thesis is to make sense of this question and present aspects of the issue that I believe are often left out of the discussion or not given due concern. First, I will try to illustrate why accommodation of religion might be thought of as problematic on the level of principle, and thus, a justificatory challenge (Section 2). I will do this by comparing accommodation of religion to other accommodative practices that are considered less controversial. Second, and most importantly, I will provide four arguments that supports the notion that a liberal state should at least seriously consider accommodative measures when the normative demands produced by people’s faith comes into conflict with legal norms (Section 3-6).

This is a rather limited claim. I will not attempt to speak decisively on the permissibility and desirability of accommodation of religion, nor will I try to provide a comprehensive justification of accommodation of religion. The claims would have required a more balanced approach where arguments against accommodation of religion would have been more thoroughly analyzed. Of course, the reasons presented might well be used as a basis for a comprehensive justification, but they are not presented as part of that here. The reason I have chosen this limited focus is that it allows me to focus on and develop various considerations that I believe are easily forgotten and often left out of the discussion, but nonetheless important to consider in order to properly evaluate the issue. Much discussion on accommodation of religion and other aspects of the proper relationship between the law and religion revolves tend to revolve around fairly abstract principle, such as state neutrality or separation between church and state. Such considerations are no doubt important - and, as we will see, they’re hard to avoid when dealing with the issue - however, I do believe one should also consider, for example, what it means to have your convictions questioned, how the experience of freedom is affected by the fact that some of our choices might not be accommodated by society or the extent to which, even the most liberal, state exercises control and influence over our life-choices.

There is something very unattractive to me with the idea that we should force people to act against their beliefs, or make some good conditional on them acting against conscience, with reference to abstract principle; no matter whether the beliefs or conscience in question is religious, whether or not those beliefs are held for good reasons,
and whether or not the abstract principles themselves are sound. We should seek to avoid such situations simply because it’s cruel not to.\textsuperscript{1} This is not always possible, and sometimes it is not desirable. Accommodating religion might go against some other valuable interests, and of course, sometimes the motivation behind an action is irrelevant because the action itself is wrong no matter what the motivation. As I have pointed out, I only aim to illustrate that there are good reasons that we should consider accommodating religion when conflicts arise. What this aspiration might lead to in practice is another matter; my point is only that claims for accommodation of religion should be decided on a case by case basis and not be rejected because of their religious character. In other words, the problems relating to application has to wait for another time.

I will begin by offering an account of accommodation and how such practices are usually justified. Through this, I will try highlight the problems that arise out of an attempt to justify accommodation of religion.

\section*{2. Accommodation – In General and of Religion}

Accommodation is a policy instrument employed by liberal states in order to relieve individuals within a designated group from a burden that arises out of some distinctive characteristic of that group. We can thus identify accommodative practices by identifying three features; first, its applicability is limited to individuals belonging to a certain \textit{category} within the general population; second, belonging to this category is associated with a \textit{burden} that the general population does not experience; and third, the practice is aimed at \textit{relieving} that burden. Relief can be achieved in many ways; by offering a benefit, an exception or a concession. The relevant factor is not form, but purpose. We might also add, as a fourth feature, that accommodative practices are employed not only to achieve individual relief but also to achieve some \textit{public good}.

We can find examples of accommodative practices in many areas of the law. For example, people with physical disabilities – congenital or acquired – are generally restricted in their movement. This amounts to a burden as participation in public life be-

comes harder as a result. Measures to ensure handicap accessibility relieves the individual of the burden of restricted movement and thus enables her to live a full life and society to benefit from the productive talents of the physically handicapped. We might also add that it’s a decent policy, which allows society to define itself as caring and inclusive. Another example, women are the only sex capable of child-bearing. This amounts to a burden because of the potentially negative economical implications of pregnancy. Welfare benefits related to pregnancy can compensate women for loss of income and thus – at least partially - relieve women from the burdens of child-bearing. Of course, reproduction is not only a public good, but a public necessity.

While the examples given are usually considered sound policy, some accommodative practices, such as affirmative action or accommodation of religion, are often considered controversial. Why is this? In order to find out, let’s establish why the measures aimed at achieving handicap accessibility and encourage reproduction are considered sound. The potential for controversy in any accommodative practice is rooted in the first feature of accommodation, namely, that some gain – an entitlement, benefit, exception, concession etc. - is reserved for a certain category within the general population. This seemingly violates one of the fundamental commitments of a liberal society; namely, equal treatment. Liberalism’s commitment to equality and the various principles that derive from this ideal - such as, equal access, equal concern or equal treatment - builds on the simple assumption that no individual or group should receive special treatment unless they can be justified by universally available reasons. Otherwise, reserving some gain for a certain category would just amount to impermissible privilege.

The basic justification for the departure from this fundamental principle is found in the second feature of accommodative practices; namely, that the burden is specific to a certain category. We could say that the first feature of accommodation - category – creates a justificatory demand with respect to the second feature – a specific burden. If we break it down, the justificatory rationale for accommodation could be summarized as follows: (a) Some general fact – e.g. the physical make up of public spaces or the reproductive differences between the sexes – (b) places a specific burden on certain categories of people – e.g. the physically handicapped and women – (c) by virtue of some characteristic of that category of people – e.g. restricted movement or the possibility of child-bearing. The pattern is quite clear; it is the unequal impact of these general facts on different categories in virtue of their characteristics that creates the basis for justification.
In the clear cases of permissible accommodation – such as the examples given – justification doesn’t present us with much of a problem. The truth of the general facts are undisputed; the burdens are in themselves easily comprehensible; and their connection to certain categories very clear. Further, we can easily identify and clearly understand the goods involved, both to those who directly benefit from the practice and to society as a whole. We can also add one more important factor: The burdens are involuntary which further strengthens the case for accommodation. Of course, the choice to procreate may be voluntary, but one’s ability to give birth is clearly not. Under such circumstances, solidarity and basic human compassion seem to demand accommodative efforts. Even equality, the principle that presented us with a justificatory challenge in the first place, seems to demand it. At least if we subscribe to a substantive definition of equality, according to which it is desirable to reduce the influence of involuntary factors such as sex and physical fitness on outcome. The fact that the costs of the accommodative practices in question are borne by the collective is not sufficient to present a credible case for other conclusions. At least, such an argument would have to rely on other considerations than the inherent flaws of accommodation for it to be credible, such as the desirability of a minimal state.

It seems, then, that there is no principled objection to accommodation in general. The reason that some accommodative practices might be controversial should instead be sought in the justifications given for those particular practices. Let’s therefore apply our conclusions regarding the justification of general accommodation on the case of accommodation of religion – which I have claimed can be a source of controversy – in order to identify possible problems or justificatory challenges. As we have noted, accommodative practices are identifiable by three features: First, limited applicability; second, a distinct burden; and third, the purpose of achieving individual relief. I have also mentioned, as a possible fourth feature, that the purpose also is to achieve some public good.

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2 This is not to say that all instances of accommodation where we can identify a comprehensible and involuntary burden; a clear connection to a certain category; and clearly identifiable individual and public goods are always enough to establish that a certain accommodative practice should be considered permissible. Consider affirmative action. It clearly fits into this scheme, however, one may still argue that it should not be considered permissible as it requires such a blatant disregard for individual merit; a standard that is itself derived from equality. In other words, the factors that I have suggested does not form an exhaustive list of criteria that decides the permissibility of a certain practice.
Accommodation of religion refers to the “government policies and laws that have the purpose or effect of removing a burden on, or facilitate the exercise of, a person’s or an institution’s religion”. An argument that seeks to establish that accommodation of religion fits neatly into the four part scheme might look something like this. First, the applicability is limited to those who structure their life and world-views in relation to some religious faith or tradition, or groups of such individuals with a common, religiously defined interest. As we have pointed out, this limitation is what creates the need for justification. Second, the burden that religious accommodation aims to relieve is the burden of choice; more specifically the choice between conflicting norms. Religion is, among other things, a source of normative demands that its adherents feel compelled or obligated to act on – or indeed, as a reason for inaction. The burden of choice presents itself when the normative demands that are given by a believer’s faith come into conflict with generally applicable laws, standards or rules – or less formal social norms for that matter. Third, these situations put the believer in a difficult position. Either she complies with the demands of society and do not act on her religious beliefs, or she risks some form of (secular) sanction or is forced to forego some desirable good. For example, let’s say that a company introduces a mandatory uniform requirement for their employees. The design of the uniform is such that is does not allow certain believers to comply with the dress codes of her faith; let’s say that the only variation available is that between male and female models. A general fact, that employers are by law invested with the right to decide what their employees should wear during work hours, creates a specific burden on those individuals who consider dress important, or even paramount for the observance of their faiths. A burden not felt, at least not to a comparable degree, by the general population. Accepting or continuing employment is important because of its financial implications; however, under the circumstances presented, this will come at

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3 Michael W. McConnell, “Accommodation of Religion: An Update And Response to Critics”, George Washington Law Review, Vol. 60 No. 685 (1991-1992), pp. 685-742, at p. 686. I might add that accommodation need not be a legislative product; in the absence of legislative efforts to relieve some perceived burden on the believer, courts can be faced with the question of whether specific burdens are consistent with prevailing notions of religious freedom found in constitutional traditions, or international human rights treatises, such as the ECHR. Courts also have to decide whether relieving the burden in question is possible with regards to other valuable interests. Also, when accommodations are made by the legislatures, courts can find themselves faced with the question of whether these violate notions of state neutrality, such as the establishment clause of the first amendment to the United States Constitution. The issue then is whether the accommodation may constitute undue discrimination towards other faiths or secular beliefs. It thus becomes very hard, and perhaps not even meaningful, to separate legislative and judicial efforts in this regard, as these processes interact in intricate ways to formulate the state’s response to religious diversity and liberty.
the price of compromising religious identity. Both options involve some form of sacrifice on the part of the believer. Introducing a policy that forces employers to accept limited variations in their uniforms based on religious preferences, which would be an exception from the general norm that employers decide on work-related issues motivated by religious reasons, will provide relief to believers as they will not have to choose between gainful employment and religious identity. As a matter of political and legal practice, accommodation is thus about modifying policy in order to avoid such conflicts or providing the legal means to challenge general norms in the absence of such efforts; typically by appeal to a court, claiming that an occurring burden is inconsistent with religious freedom. Fourth, apart from enabling individual relief, we might argue that the use of accommodation lets society define itself as tolerant and thus live up to its pluralistic self-image. It also removes an obstacle on productive participation in public and economic life.

There is a certain appeal to this rationale. At least, it renders accommodation of religion comparable to other, clearly permissible practices by identifying certain common traits. However, at the outset, I don’t find it as convincing as the case for handicap accessibility. Is there a reason for this intuitive reaction? One general explanation of the comparatively lesser appeal might be found in the fact that religious belief is less tangible than other grounds for accommodation: The burden of choice itself isn’t as easily comprehensible as the burden of restricted movement; its connection to a specifically religious category isn’t as clear as the connection to the physically handicapped, and the goods involved isn’t as easy to identify, understand or appreciate. Especially as the distress felt over not being able to conform to religious normative demands isn’t readily available to everyone. It certainly takes a higher degree of abstraction to fit accommodation of religion into the justificatory mold based on the clearly permissible cases. This, in itself, is of course not enough to reject accommodation of religion. At most, it might help to explain why religious accommodation might be less attractive intuitively, at least for non-believers. Given the immaterial nature of the subject matter, it shouldn’t come as a surprise that the justificatory argument seems less tangible than when it is applied to physical disability or pregnancy. However, it does raise the question of whether the “bullet point” approach of justification is fundamentally inappropriate given

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4 On legal means, see previous note.
the nature of the issue. We may miss valuable information that a deeper and more fine-grained approach to justification might provide.

One might argue that the application of this model of justification on accommodation of religion makes certain actual – not just seeming - deficiencies apparent. As I have pointed out, it is the distinctness of the burden and its connection to a defining characteristic of a certain category that creates the basic justification for deviating from equal treatment. The burden in question is the burden of choice between conflicting norms. But is this specific to religious belief; doesn’t everyone, regardless if we consider ourselves religious or not, have values, principles and ideals that provide us with normative demands that may from time to time diverge from general norms? The answer is of course, yes. The fact that we might feel obligated to act in accordance with our convictions does not provide individuals with a license to disregard general norms; regardless of the fact that freedom of conscience and religion is typically guaranteed as a basic right. Democracy, and more specifically majority rule, would be quite an empty notion if this was true. In other words, the burden of choice isn’t specific to the religious category; it may be a burden, but a general burden, not specific to the religious category. Consequently, it cannot serve as a basis for justification in the same way that the burden of restricted movement can with regards to the physically handicapped. We seem to be in need of some feature, unique to religious demands, which explains why the burden of choice weighs more heavily on believers.

Further, we might argue that the case for accommodation of religion doesn’t benefit from an attempt to identify what makes religious demands unique. Religious normative demands might often be more intensely felt than other normative demands. The experience of acting against such commands, one could argue, is more distressing than acting against general conscience and should therefore be treated differently than non-religious convictions. The reason why religious demands are more intensely felt is that religious belief issues *categorical demands*, that is, demands that must be “satisfied no matter what incentives or disincentives the world offers up”. ⁵ This quality is rooted in the fact that religious beliefs are based on faith, not evidence and reasons, and are therefore “insulated from ordinary standards of evidence and rational justification, the ones we em-

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ploy both in science and common sense. 6 Put differently, the perceived authority of religious commands does not follow from the quality of the reasons provided for a given command; it follows from the perceived authority of the source. This may be directly from God through revelation, or indirectly through holy texts or doctrine. Whatever the vehicle, and however far removed, the ultimate source remain the same; some notion of ultimate truth, beyond empirical reality. This is of course not to say that religious teachings can’t be rationalized to fit a specific time and social context. If we don’t recognize this feature of religion we show insensitivity to history; scholasticism, Islamic jurisprudence, Jewish Talmudic literature and modern theology are all efforts to make perceived timeless truth relevant and applicable to the changing dynamics of history and society. My point here is that religion can be perfectly rational within its domain of basic assumptions; however, these basic assumptions – such as the existence of an ultimate reality and the truth of its earthly manifestations – must be accepted on faith. The rational efforts must be done in relation to some set of basic principles whose truth are indisputable because of their source. The room for compromise and reconciliation with other – secular - norms is therefore limited and the burden of choice more problematic for believers. While this, if correct, may explain why religious people experience the burden of choice much more intensively, we might question whether it constitutes a good reason to justify accommodation. Why should these, arguably unhealthy epistemological standards, influence the content of legislation or the jurisprudence of courts?

Lastly, we might also question whether religious belief really can be considered involuntary; at least not compared to the case of physical disability. Of course, the issue of why, or why not, people come to define their lives in relation to religious beliefs and traditions is incredibly complex. The only thing certain in this regard is that no one factor is determinative in all cases; religious belief may in some cases be a matter of culture and tradition, it may be the result of an individual revelatory experience or the long and conscious search and rational evaluation of different alternatives. What I don’t think anyone accepts - recent claims of a “God-gene” notwithstanding - is that religion is reducible to an inherited character trait like handicap or sex is. To this end, we might argue that a greater degree of voluntariness should imply a greater reason to hold people responsible for their choices; regardless if those choices put the believer in an admittedly tough position.

Of course, this doesn’t settle anything. The three objections presented are just a way to explain why accommodation of religion is less likely to be justified in the same way as other accommodative practices. My main points thus far can be summarized as follows: First, accommodative practices are common in liberal societies; second, they can typically be justified by showing that a certain category experiences a specific burden as a result of some involuntary characteristic of that category; third, applying this justificatory scheme to religious accommodation presents us with some problems. These problems are related to the fact that the burden of choice is not specific to the religious category; that an attempt to find distinctive characteristics of religious belief may not be helpful in the effort to provide a justification; and it is doubtful whether religious belief is involuntary. I believe this goes to explain why some think that accommodation of religion is problematic or even impermissible for a liberal state.

As I have pointed out in the introduction, I will now present four arguments that provide additional reasons for accommodating religion by looking at a much broader set of circumstances. At various points in these arguments, I will address the three criticisms that the clear-case justification gives rise to.

3. The Pervasive Nature of the Modern Liberal State

Let’s start by considering the interplay between the two fundamental commitments of liberalism, individual freedom and equality, and the great regulatory ambitions and capacities of a modern state. I will argue that the existence of conflicting norms to a large extent is the product of the dynamics of a modern liberal polity and its complicity in creating these conflicts demands efforts on the part of the state to resolve them. As we have seen, accommodation can serve this purpose.

For those living in a reasonably just and well functioning society, it is easy to forget the extent to which the state exercises social control; this is at least true for those who consider themselves part of the majority culture within a polity. This perceived independence vis-à-vis the state is a product of the fact that regulation in a democracy by default is shaped with the majority culture, values and ideas of the good life in mind. Regulation that is in line with majority expectation becomes “invisible”, as opposed to regulation that deviates from expectations and as a consequence is experienced as coercive. In other words, it is easy to confuse the fact that most regulation converges with majority expectations with the perceived, but ultimately false, experience of independ-
ence in relation to the state. This is of course, by and large, a good thing. It’s a trademark of a responsive government.

If we scratch the surface we get a sense on how conditional the majority’s experience of freedom actually is. The regulatory functions of the modern liberal state pervade almost every aspect of the life of its citizens. The obvious, and most overtly felt, examples include behavioral control through the use of criminal law; control over the physical appearance of our surroundings through the use of zoning law and building codes; and control of the forms of interaction between citizens, economic and otherwise, through the use of private law. Of course, social control doesn’t end with the dos and don’ts. The state employs far more subtle instruments in order to facilitate social control. Compulsory school attendance and mandatory curriculums are employed to socialize children; our tax-codes are fashioned in order to create incentives for behavior deemed desirable by a plethora of standards, such as good health, sound personal finances, or environmental impact; interest rates are adjusted to stimulate or restrict private spending to fit the current state of the market; national symbols and holidays are used to further social cohesion, and so forth. Further, regardless if you live under a Scandinavian welfare state or its less comprehensive Anglo-Saxon counterparts, modern states are also characterized by a high level of dependency of the citizens on the state in terms of benefits, entitlements, services and permissions. For example, sickness, pregnancy or unemployment would be ruinous prospects for most people if it wasn’t for public support.

The realization of our life-projects and our experience of freedom is thus highly dependent on the benevolent participation of the state. Presumably, this reliance creates expectations of an active and responsive state on the part of the citizens. This is not to say that a pervasive-regulatory government is inherently good or bad; it has the potential to be either paternalistic, coercive or empowering. My point, rather, is this: Regardless if one find it ideologically satisfying or not, modern states are pervasive. As I have argued, this fact is less likely to be experienced as coercive by those who belong to the majority culture.

While having great regulatory ambition and capacity, modern liberal states are also characterized by their commitment to individual freedom and what follows from this, namely, pluralism of various kinds; such as, pluralism of beliefs, world-views and practices. This builds on the simple assumption that when people are free to choose, they choose differently. The choices made on these issues will often be conflicting and even
incommensurable and nevertheless be decent and reasonable.\textsuperscript{7} Obviously, there is tension between the commitment to individual freedom and the pervasive nature of the state; the greater the regulatory ambitions and capacities of the state, the greater the potential for conflict with individual choices. Again, this potential for conflict is less likely to be realized for those who belong to the majority culture.

To get the full picture, however, we must also consider how - that is, according to which principles – the liberal state exercises social control; we must consider equality.\textsuperscript{8} To paraphrase Rawls, the aim of the liberal project is to find the forms for fair cooperation between \textit{free} and \textit{equal} citizens.\textsuperscript{9} Among other things, equality entails certain restraints on the way liberal government exercises social control; more specifically, it entails the usage of generally applicable laws. As we have noted earlier, this is simply because all subjects of the state deserve equal concern. No individual or group should receive entitlements, benefits, exemptions or other forms of special treatment unless they can be justified by universally applicable reasons.

If we add up the three features I’ve discussed – the pervasive nature of the state, pluralism of beliefs, world-views and practices and generally applicable norms – we get a somewhat unstable equation: Modern states has a tendency to regulate; its citizens have different expectations of what that regulation will entail by virtue of their different beliefs, world-views and practices; and governments are, as a matter of principle, confined to work with the blunt instrument of general laws.\textsuperscript{10} The inherent instability in the relation between these facts pose liberal theory with a significant general problem: How should the commitments to normative diversity be reconciled with the states regulatory ambitions and its commitment to equality?\textsuperscript{11} This instability is of course more intensely felt by minorities who are more likely to experience conflict as the general norms are usually not shaped with their normative templates in mind.

\textsuperscript{8} Equality is a contested concept. For example, see: Peter Westen, “The Empty idea of Equality”, \textit{Harvard Law Review}, Vol. 95, no. 3, pp. 537-596 (1982).
\textsuperscript{9} Rawls, \textit{Political Liberalism}, p. 23.
\textsuperscript{10} With regards to general laws and standards we might also add that they might be preferable due to fiscal considerations, the rule of law and efficiency.
\textsuperscript{11} This general challenge roughly correspond to Rawls two fundamental questions of political justice in a democratic society; when combined they read: “How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines.” Rawls, \textit{Op. Cit.}, p. 4.
What are we to make of this? Should one argue that the only solution to the inherent instability is to minimize state ambition and reach in order to create less areas of conflict?\footnote{12 On minimal state solution to the problem of disagreement on political principles, see Raz, Disagreement In Politics, pp. 28-30.} This is of course, at least theoretically, viable. As we have noted, the greater the regulatory ambitions and reach of the state, the greater the potential for conflict with individual choices. I will dismiss the discussion of the desirability of a minimal state straight away just by virtue of the fact that redefining the ambition and capacity of state, to the extent that it actually would substantially improve the experience of freedom, isn’t a realistic prospect for liberal states in the foreseeable future. At the moment, it just isn’t politically viable.\footnote{13 This is not to say that efforts to scale back government spending aren’t politically viable. However, such efforts are marginal in the large scheme of things.} We have to make do, and present efforts to reduce the unappealing implications of the dynamics already in place.

The basic rationale behind such efforts should go something like this: (a) Because of its pervasive nature, the state is bound to take a central and active part in the realization of the life-projects of its citizens. (b) The states commitment to individual freedom means that the citizen body will be pluralistic with regards to beliefs, world-views and practices. This means that there will be a multitude of life-projects and ways that citizens want to structure their lives. (c) These two aspects of a liberal state are not only statements of fact, they also have normative implications. The potential for the state to be permissive or prohibitive in relation to the life projects of citizens and the way they want to structure their lives is in itself a reason for the state to aspire to be responsive and adaptive to the various needs of the citizens. This is, of course, further emphasized by the commitment to individual freedom which is a prominent feature of liberal states. Because the state is in these ways complicit in creating conflicts between general (legal) norms and other existing normative systems the state should aspire to resolve them.

What, then, about equality and what in practice follows from this ideal, that is, general norms? What I’m talking about is the desirability of an aspiration on the part of the state. General norms are absolutely essential to the idea of liberalism and should always be the preferred way of exercising social control and ensuring social coordination. This is not only because of its basic fairness; but also because it’s an important source of social cohesion within a polity. Different standards effectively remove one of the most important bonds between the citizens of a society: That all citizens are subjects to the
same restrictions and thus “in the same boat”; we are Swedes, Indians or Americans not only because of geographic proximity, but also because we have certain obligations and rights in common, as defined by law. For good and for ill, the modern European nation state has been an effective way to create, consolidate and manage collective identity which is a prerequisite for the facilitation of acts of solidarity on a national level. My point is that there should be no a priori assumption that general norms always should trump the commands of other normative systems. A liberal state should, to the extent possible, strive to fashion its general norms so that the impact of them on the various life-projects and wishes of its diverse population is minimized. This means that when general norms places a burden on a specific category of the population, we should consider exceptions, benefits or concessions directed towards and reserved for that category. This is not always possible as the purpose of the general norm might become compromised to an unacceptable degree, but the desirability of using general norms is not in itself a sufficient argument for rejecting claims for special treatment. Insistence of generality with regard to a certain norm should be the result of a case-by-case analysis. As I have pointed out, we pay homage to the principle of equality by demanding a sound justification for departures from this principle.

This aspiration is especially important with regard to minorities. Not only because general norms are more likely have coercive effects on minorities due to the fact that general norms by default are likely to be crafted with a majority normative template in mind; but also because an insistence on generality without exceptions will defeat one of the main purposes of general norms. Disregarding minority normative preferences in the shaping of public policy is likely to make general norms a source of social alienation rather than cohesion. If the state is unresponsive to the claims of certain groups there is a great likelihood these groups will turn to other sources of collective identity.

We should not approach claims for exceptions from general norms as something extraordinary. Given how many personal choices that are limited or otherwise affected by regulation, such claims are natural and may be a healthy response to excessive social control or unresponsive legislation; that is, legislation that doesn’t properly respond to the pluralism of convictions and life-projects that is present within the citizen body. Further, we shouldn’t think of exceptions from general norms as some grace or privilege bestowed upon certain groups by a magnanimous state, showing a not required but good-natured clemency. Given the great regulatory ambitions of the modern state, citizens can rightfully demand that norms are designed to avoid unintended or excessive
impacts of this kind. Lastly, as I have pointed out, putting these principles into practice in a pluralistic society demands a special attention to minorities as their convictions and life-projects is less likely to be entrenched in public consciousness.

4. The Centrality of Convictions

That convictions are important seems like a point too obvious to mention; however, I do believe that their function is easily underestimated. In this section I will examine what it actually means to be forced or expected to act against one’s convictions. I will argue that this presents us with further reasons to accommodate conscience. I will also argue that we, as human beings, are predisposed to disvalue the convictions of others which in turn makes it even more important that there are institutional safeguards against illiberal attitudes such as prejudice, suspicion of difference and plain ignorance.

In the previous section, I talked about how general norms may be experienced very differently depending on whether their content is based on our own normative template or someone else’s. If a general norm is a “codification” of our own convictions, chances are that its existence will go by unnoticed as we are not presented with any new reasons for action. If we do take note, it’s likely to be a positive experience. Elevation of our privately held convictions to generally applicable norms is likely to be experienced as an affirmation of the soundness of those convictions, and thus, our moral faculties. Such affirmation can also create and maintain bonds of trust and identification between the individual and society which, in turn, creates and maintains our sense of belonging. Thus, general norms have a great communicative potential; their meaning is not limited to being directives on how to act. Correspondingly, when a general norm instead deviates from our most dearly held convictions, it is not only experienced as coercive in the sense that we might be forced to change our behavior; it communicates that society questions the soundness of our normative convictions and thus the quality of our moral faculties. Of course, such communications has the potential to undermine those bonds of trust and identification that is necessary for our sense of belonging. Instead of approval, we get a message saying: not only do you need to change your behavior which might cause you inconvenience, you should also consider changing the basis of your moral reasoning if you want to be a full member of this community. The weight of the burden of choice is thus not only the actual anxiety we might feel when confronted with a tough choice between conscience and general norms, that choice is made in the con-
text of having your normative convictions questioned, and if this is a recurring thing, perhaps even your sense of belonging to society. To fully comprehend the potential severity of such an “attack”, let’s consider the central functions that normative convictions have in human lives. Sheffler, in an essay on the good of toleration, provides this explanation:14

First, our values, principles, and ideals determine our deliberative priorities, by defining the ends which ends we think worth pursuing and the means by which we believe it is acceptable to pursue those ends. In doing so they determine the kinds of consideration that we count as reasons for action. Second, our normative and evaluative convictions define commitments which, although not immutable, nevertheless endure over time and provide continuity amid the flux and contingency of daily experience. In this sense they help stabilize ourselves. Finally, these same convictions define what we count as success or failure in our lives, and in doing so they shape our self-assessments and our experience of attitudes such as shame and pride that depend on those self-assessments.15

It is hard to imagine anything more central to meaningful human existence than being able to act for the right reasons, to decide what’s worthy of emotional commitment or being able to distinguish between success and failure. If we think about it, the absence of any of these faculties would make human existence mechanical at best and unbearable at worst. The reasons for this should be sought in the role that meaning plays in human motivation. When we contemplate action, let’s say something as mundane as movement from point A to B, we are unable to evaluate the desirability of that movement just by contemplating the movement itself; without some point of reference it is meaningless, and as such, no ground or motivation for action. Available geographical data or knowledge about the physical terrain doesn’t change this as these are only subsidiary concerns. We will only be motivated to move if we assign meaning to that movement. Meaning is generated by the relation of this action to certain goals, such as, if I get to point B I will be able to perform this or that task; which in turn gets its meaning from some more general goal, such as, performance of assigned tasks makes me a reliable to significant others; which in turn gets it meaning from some even more general goal, such as, it’s good to be reliable, or it’s good to have significant others. Human action or attitude becomes meaningful only when it’s positioned in relation to reference points such as good-bad, success-failure, right-wrong or worthwhile-worthless; removing one pole from these dichotomies render actions and attitudes hard to evaluate for the human mind. This doesn’t mean that a given action or attitude can only be experienced

14 What i call convictions corresponds to values, principles and ideals.
as either good or bad, it means that nuance is a product of its relation to these poles. Convictions are what give these generic categories – such as right-wrong - substance, creating the individual convicational profiles which make up a big part of our personalities and identities; basically, our sense of self. Our convictions are thus very important to our basic functioning as highly conscious beings; both because they provides us with meaning, which is a prerequisite for action, and because it enables us to experience ourselves as a distinct entity, separable from others and our surroundings.

Thus, when general norms forces us to compromise our convictions or interferes with the way people organize their lives based on those convictions, it has the potential to be experienced as an attack on everything that makes life meaningful; an assault on the integrity of a person or an “assault on the self”.

“Depending on their severity and effectiveness, they (interferences) compromise the integrity of our deliberations and the exercises of our agency, threaten our capacity to lead lives that are successful by our own lights and, in extreme cases, they may even place in jeopardy the stability of our personalities over time.” 16

This is not to say, that every wish emanating from our convictions is a reason to re-shape policy; that would be ridiculous. That they have this basis cannot, alone, be a decisive for whether we create exceptions. All I’m saying is that convictions – religious or not – are central to everyone’s meaningful existence, and that we should share an interest in not needlessly compromising them; that would only amount to cruelty. Policy-making should be a process that is sensitive to the full range of the potentially negative implications of regulation; including the experience of alienation and assault on personal integrity. Seemingly insignificant consequences of regulation in terms of changes to behavior or the like can be experienced as very compromising. Again, this becomes more important with regards to minorities. As I have noted before, their particular convicational pallet is less likely to be entrenched in public consciousness which makes them a more likely target of compromising regulation, and their bonds to society is presumably less robust which makes alienation more dangerous. This is in itself a reason for a liberal state to aspire to let people live and structure their lives in accordance with their convictions. As we have seen, accommodation can do this.

Further, there’s another aspect of convictions which is relevant for us to consider. Our convictions are not only distinguished by their importance to us as individuals, their

16 Ibid., pp. 326-327. (My addition in parenthesis)
internal importance is mirrored by a perceived external authority. That is, the fact that convictions are perceived to be authoritative – that is, reasons for action - isn’t due to the fact that convictions are important to whoever holds them; they’re perceived to have an independent, external authority. More specifically, we rely on our convictions, not because they’re ours but because they are seen to represent things as they are; our convictions are, as we believe, true. This can help explain why convictions are a potential a source of conflict. When we express our convictions – expression can of course take many forms; verbalization, choice of life projects, rituals, other practices or by the use of symbols – we communicate that we consider whatever conviction we’re expressing as authoritative. As the authority is seen to be derived from the fact that our convictions are true, we are making a truth claim. In a free society, where peoples convictions are allowed, or even encouraged, to be reflected in the way people live their daily lives, these truth claims will be seen, heard or otherwise registered by others. Expression of our convictions is thus – or will at least be experienced - not only a manifestation of our private beliefs, but also, the communication of a public claim on what should be considered universally authoritative. Given the normative diversity of a liberal society, many such claims has the potential to offend, provoke or even hurt others.

The clearest example of such communication is perhaps the wearing of symbols of various kinds; religious, political or of more indefinable character. By wearing a crucifix, a star of David, a veil, a political pin or even a t-shirt with a band logo we communicate something about how we see the world and what we consider to be authoritative. For example, a socialist or libertarian pin communicates certain assumptions on the correct interpretation of the nature of justice; the crucifix communicates certain assumptions on the normative status of scripture, the divine nature of Christ or of the ontological status of God; and a t-shirt depicting the album cover for The Smiths “Meat is Murder” communicates certain assumptions on the moral status of killing non-human ani-

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17 Ibid., p. 325.
18 This quality of truth is necessary in order for convictions to fill their functions as a motivational and deliberative baseline. If we were to evaluate actions, attitudes or personal commitments conscious of the fact that our standards were subjective, and thus not necessarily true, it wouldn’t provide us with emotional responses robust enough to act on.
19 Formulation based on Raz in an article about the proper response to disagreement in politics. When answering this question we are “[…]inescapably, providing an answer from the perspective of one point of view, one that we hold because we believe it represents things as they are. That is the crucial point: we rely on our answer to the question not because it is our view, but because it is, as we believe, true.” See, Raz, “Disagreement in Politics”, p. 27.
20 If this manifestation takes place in a public context, the universality of the claim is emphasized.
mals for sustenance. This is not to say that all expressions or manifestations of convictions are employed with the purpose to proselytize or impose on others. I’m sure most symbols, religious and otherwise, are worn with the sole purpose of making ourselves feel safe, authentic, comfortable or true to ourselves. However, intent or purpose does not necessarily decide how communication is perceived. This is partly why conflicts that arise out of normative pluralism are so hard to resolve, or make sense of. A conflict does not presuppose an obvious aggressor, both sides are likely to experience themselves as attacked; and most importantly, there is some truth to both of these claims. If our convictions are compromised or questioned it is understandable that we feel attacked; however, if one accepts what I’ve said, the manifestation of convictions will always involve a truth claim which in itself can be a challenge with respect to the convictions of others. Especially if that manifestation is considered ostentatious or inconsiderate, that is, made in a social context where one should expect there to be a multitude of normative templates.

Following this line of thought usually leads to a discussion of the desirability of a secular or neutral public sphere. This is not my intention here. My point, rather, is to emphasize the need for institutional safe-guards to combat the potential for conflict or instability that is inherent in a pluralistic society. This potential for conflict can of course be overemphasized. We know from experience that most social interaction in ethnically, culturally and religiously diverse societies is peaceful and respectful. Reasonable pluralism is no obstacle to fraternity or social cohesion. If common convictions are lacking we are often quick to identify other common points of interests that can work as a foundation for social consensus. We are also good at fashioning informal social norms which makes us stay away from points of divergence. Just think of work

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21 We can actually think of this predisposition towards devaluing the convictions of others as quite reasonable. When we are faced with disagreement over values, principles, or ideals we are presented with an option; either we act in accordance with those reasons that our views supply us with – those we consider true - or we modify our behavior out of respect for the fact that someone else that we are interacting with do not consider the reasons that we contemplate acting on, as reasons for action. Modifying your behavior in such a situation – that is, seeing disagreement as reasons for restraint - is usually considered the nucleus of toleration. What makes toleration problematic, both conceptually and in practice is that it requires us to give normative force to reasons that we don’t consider authoritative in themselves, but only by virtue of being held by others. As I have mentioned earlier, treating source as determinative of authority is not a sound standard. The correct thing to do would rather be to objectively evaluate the merit of all occurring reasons and then act based on that, regardless of source. On the problem of toleration, see Sheffler, Op. Cit, pp. 314-329, see also, Raz, “Disagreement in Politics”, pp. 27-28.

22 In my view, value pluralism doesn’t mean that one always and unconditionally embrace the right to manifest ones convictions – regardless if these are political, moral or religious.
places. Further, most people in contemporary liberal societies see themselves, and want to be thought of, as tolerant; that is, they see themselves as open to and allowing towards the different values, ideals and principles found within a polity even though they do not themselves share them. They generally see disagreement on such issues as a reason for showing restraint and compromise.\(^{23}\) However, this aspiration might not always be easy to realize. As we have seen, we’re not able to value the convictions of others in the same way, or to the same extent, that we value our own. After all, we consider our own convictions to be true for a reason. The quality of those reasons may of course vary, but it doesn’t change the fact that those reasons may be perfectly convincing for the person who holds them. Put differently, we are predisposed to put greater value on our own convictions than the convictions of others. This predisposition can unfortunately manifest itself as various forms of anti-pluralistic currents and attitudes present in the most liberal of societies, such as, prejudice, suspicion of difference or just plain ignorance. In order to combat these attitudes, liberal states create and enforce anti-discrimination legislation and basic rights. Accommodation should, then, be a considered a natural compliment to these measures as it serves the same basic function, that is, to facilitate difference in the face of anti-pluralistic attitudes.

I have argued two main points here. First, convictions, religious or secular, are central to the functioning of human beings, and necessary for the experience of meaningful existence. This is in itself a reason for a liberal state to aspire to let people live and structure their lives in accordance with their convictions. Second, the nature of convictions, as being perceived to have external authority, makes us predisposed to disvalue, and as a consequence run the risk of compromising the convictions of others. This further emphasizes the need for institutional measures to protect normative diversity.

5. The Value of Deliberative Isolation

Most people agree that some choices should be left to the individual. What we don’t agree on is what to do when people choose options that is costly, or means sacrifices, for other people. I will argue that some choices should be protected from the in-

\(^{23}\) There is no room to elaborate on the intricacies of toleration. This loose definition will suffice here as I only want to make the point that we are prone to illiberal attitudes such as prejudice or suspicion of difference regardless of whether we see ourselves as tolerant. Which calls for institutional safe-guards such as accommodation.
fluence of others, regardless if they are indeed costly in some way. Accommodation can help provide this sort of “deliberative isolation”. This whole section addresses the criticism that religious practice is a choice and therefore shouldn’t be accommodated.

At the outset, I identified the fact that religious belief isn’t involuntary as a potential problem for the justification of accommodation of religion. The rationale for this is quite straightforward. One of the factors that make it easy to support accommodative efforts to ensure handicap accessibility or make pregnancy less of a financial burden is that reduced physical ability or the possibility of child-bearing is not the result of a choice. While religious affiliation certainly can be inherited or socially imposed, just like any other social affiliation, it most certainly isn’t beyond choice; the same goes for putting religious belief into practice. If we believe that choice implies personal responsibility, which most of us do, we should consequently deny accommodation of the burdens that people experience as a result of their religious choices, e. g. the burden of choice between faith and general norms. What we are doing here, is just restating the familiar egalitarian formula of “luck-insensitivity” and “choice-sensitivity”. This formula, while being open to interpretations, enjoys some degree of consensus among egalitarians as a fair distributive scheme. It can be summarized as follows:  

A fair scheme of distribution of resources and responsibility should be insensitive to factors of luck while being sensitive to choice. Thus, the state should, through the use of compensative measures “correct” differences in outcome that are due to morally arbitrary factors, such as class, gender, race, ethnicity, or disability etc. As choice is not morally arbitrary, there can be no legitimate demand from individuals on the state when difference in outcome can be attributed to choice; put differently, it’s desirable that people *internalize* the costs of their choices; that is, absorb or bear the costs created by their choices. For example, there is a much stronger case for helping children who are born into poverty than people who are poor as a consequence of taking calculated risks investing in financial instruments.

There is something very attractive with the notion of *cost-internalization*, at least as a general rule. Help should be reserved for those who haven’t taken part in the making

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of their own burden, especially when resources are scarce and we have to prioritize.\textsuperscript{25} This might in part be because the cost of correcting the different outcomes attributable to “luck-factors” is usually born by those who do not enjoy that benefit. Accommodation usually, though not always, involves burden shifting; that is, one group is alleviated from a burden through the redistribution of that burden unto some other, more or less defined, group.\textsuperscript{26} In the case of handicap accessibility and pregnancy related entitlement benefits, it’s the taxpayer collective who absorbs the costs; in the case of affirmative action, it’s those who are refused a job or college admission despite having equally good qualifications or grades. In cases that entail burden shifting, the scheme seems to strike a good balance between solidarity and legitimate self-interest; we want to help, sure, but we also want responsibility and accountability as our money, qualifications or other valued resources are limited and/or hard earned.\textsuperscript{27} One might argue, and not without merit, that accommodation of choice simply isn’t fair to those who have to absorb the burden, especially in instances where that group is relatively small and well defined, as with affirmative action; of course, a small group of absorbing agents means a bigger burden for each. An example of religious accommodation that involves burden shifting is a policy that forces employers to take the observance of religious holidays or prayer routines into consideration when coordinating work. Such a policy could mean additional costs for employers because of the need for hiring temp workers and/or perhaps less convenient work hours for other employees who has to fill in for their religious colleagues. Another example could be conscientious objection to military service.

However, I don’t think the attraction of the scheme is reducible to the fact that it puts a reasonable and practical limit on when we should act generously with our resources. Even in a state of infinite resources, where entitlement doesn’t need to involve redistribution, I believe we would feel attracted to this scheme. We might simply feel that the scheme is a good measure of when someone deserves special attention or concern in a society that is committed to equality. Departures from the principles of cost-internalization – that is, accommodation of burdens that are the result of choice - thus have the potential to offend our sense of ourselves as beings worthy of equal concern. It doesn’t matter that we’re not deprived of anything, nor denied some wish or request of

\textsuperscript{25} Another positive effect of the scheme is that it creates incentives for people to avoid behavior that is associated with burdens as they cannot expect help if burdens are realized.
\textsuperscript{26} Ibid., p. 275.
\textsuperscript{27} We might also support this distributive scheme because it creates incentives to


our own as a consequence; it’s a thing of principle. Examples of accommodation of religion that doesn’t involve burden shifting include various exemptions from legal requirements; e. g. ceremonial drug use, the wearing of non-conforming religious garments in the work place or military or male circumcision.\textsuperscript{28}

While choice-sensitivity/luck insensitivity seems sound as a general rule - both because it seems unreasonable to demand that others bear the costs of indulgent or otherwise irresponsible behavior of others and, in the absence of burden shifting, because it is a good mechanism to decide who deserves special concern when the state is committed to equality – I don’t think it’s a rule without some justifiable exceptions. In order to understand why, we need to consider under what circumstances free choice is meaningful.

As I have pointed out multiple times, the straight forward benefit of accommodation of religion is that it relieves the believer of the burden of choice between faith and general norms: such a choice may be distressing, and a source of anxiety both because the conflict itself means that our moral faculties are questioned and because we might have to negotiate our most valued convictions; weighing costs against benefits. Even without the existence of a general norm that conflicts with your faith, the choice to act in accordance with one’s faith might still be experienced as very distressing because of the fear of disapproval. The choice to practice your religion in the public sphere is also a choice to reveal your religious affiliation; and as we have said earlier, to make a certain truth claim. Antipathy towards religion in general, to the specific religion being manifested or just difference in general makes such disapproval a likely prospect in some contexts. What may be worse, the practice in question may actually entail a request for burden shifting. For example, daily prayer routines may be impossible to observe unless the routines in a work place are changed in order to accommodate the believer. This may cause some inconvenience for other workers who have to absorb the work that isn’t performed during prayer or to employers who have to facilitate this change. Of course, another source of worry could be that causing such inconvenience may have negative effects on career or job security. In the absence of accommodative practices, such requests have to be made by believers themselves; presumably, the social pressure that

\textsuperscript{28} Circumcision does this in the sense that doctors are generally prohibited to perform surgery that can’t be medically motivated; especially without consent.
emanates from that situation could affect how we choose, as well as the experience of that choice.

If we value conscience and free choice in the realm of values, ideals and principles, presumably we don’t want fear of disapproval to affect those choices. To the extent possible, we want such arguably important choices to be made without regard to considerations that have nothing to do with the actual question; which should be, according to which values, principles or ideals do I want to live my life? By removing the cost-benefit calculus aspect of choice, accommodation provides a form of “deliberative isolation”; a “place” where we can engage with our conscience without the “corrupting” influences of possible negative consequences. Of course, the absence of “corrupting” influences is all the more important when we choose on central issues of conscience such as adherence to faith. A related example could be that of voting. The political choices we make on Election Day are far more important than our choice of breakfast cereal which is why the sanctity of the voting-booth is protected in every democracy while no similar arrangements are present at the supermarket. The booth and the sealed ballot box are there to guarantee us a very direct form of “deliberative isolation”: it protects us in a situation where we are “especially vulnerable to considerations of cost of expressions of disapproval”. Just like these efforts to guarantee anonymity in a voting situation, religious accommodation can be viewed as a “license” to choose freely.

However sound cost-internalization may be as a general rule, the respect for the value of free choice regarding certain central issues of value, principles and ideals warrants certain exceptions, and accommodation of religion could be one of those. To recognize the value of deliberative isolation, and thereby accepting that we should sometimes be willing to absorb costs that are the consequence of other people’s life choices, is all the more important for societies marked by extremely high levels of social, eco-

29 Shiffrin sums it up perfectly: “We may think it important that a person’s deliberations about whether to be observant should not be clouded by considerations of whether she will lose her job or access to benefits, whether other will suffer inconvenience as a result of her, or whether other disapprove of her religious beliefs and practices.” Shiffrin, Op. Cit., p. 289.
30 Ibid., p. 291.
31 However, that conclusion is aimed at achieving “pure” results; that is, correct outcomes given our deliberative and motivational dispositions. Shiffrin’s main point, as I see it, is that accommodation has the potential of enhancing our actual deliberative and motivational processes with regards to choice. Meaningful freedom is not only the opportunity, but also the ability to react to reasons; and the ability to react and engage with reasons is central to freedom and autonomy. If we are allowed deliberative isolation with regard to certain central issues, we learn to engage with options, evaluate their significance and their relation to other central motivations; not only in order to respond appropriately to a set of options but to maintain and develop our autonomous faculties.
nomical and geographical interconnection between its citizens and normative diversity; such as contemporary liberal societies.

I suppose that everyone agrees that there are some choices that should be considered out of bounds from the influence of others, and those choices where outside influence should be considered permissible. The first category consists of those choices that concerns the private sphere, the second those of the public sphere. One indicative factor of whether a choice should be considered public, and by that open for review, opinion and influence by others, is whether or not our choices have other-regarding effects. If the choice affects the welfare, interests or rights of others, our decisions are usually considered public and we can’t expect others to respect any deliberative isolation.32 This is, by and large, perfectly reasonable as a greater degree of restraint and modesty is called for when our decisions have other-regarding effects. In a modern society, however, this criterion looses much of its meaning. Through an extensive superstructure – comprehensive legal, welfare and tax systems etc - the life projects and enterprises of individual citizens become so entangled that very few choices can be considered private in the sense that it doesn’t have noticeable other-regarding effects. Almost any choice has ramifications for others, however distant and diluted; even a highly self-regarding choice such as exchanging more productive employment for one that is otherwise more rewarding, means less tax-revenue and less wealth to distribute and use for other common purposes.33 As a consequence, many of those choices that may rightly be perceived as private become invested with public interest, which, in turn, may legitimize the creation of incentives to affect our choices. To continue our example, in order to encourage the choice of productive employment over a personally more rewarding occupation, government may lower marginal rates for upper incomes, thus making it more profitable to engage in highly productive labor.

The connection between seemingly self-regarding choices and other-regarding consequences creates a great number of instances where the interests of individuals collide. A regime of strict cost-internalization - that is, an order with few exceptions from the luck-sensitivity/choice-sensitivity scheme - provides an answer to the problem of overlapping interests by emphasizing restraint when the interests of others are involved. Such a regime supports peaceful coexistence by creating strong incentives – all costs

32 With the interesting exception of democratic elections.
33 Ibid., p. 293.
induced by us will be borne by us - not to create other-regarding effects. How can someone possibly object to that? Isn’t it reasonable and decent to exercise restraint when our interests are at odds with those of others; or when the price for our freedom must be paid for by others? This may well be true, however, living in a modern plural-istic society, where our interests are highly entangled also means that we ought to be, from time to time, prepared to accept and respect that people make choices that we are not comfortable with or that are costly for us in some way. Solidarity doesn’t go very far if it is reserved for those, who in our opinion are sensible, reasonable and modest.

Strict choice-sensitivity, in my view, expresses a view on citizenship that is at odds with the actual make-up of the modern, pluralistic state. This is especially true when we deal with issues of value, ideals and principles. Strict choice-sensitivity runs the risk of creating a “culture” of, for the lack of a better word, “nosiness”. We may feel entitled to opinions on other peoples choices that were we less interconnected - both physically, economically and socially - we would regard as none of our business. For example, I believe most people regard life-style choices as intrinsically private; however, legislation designed to affect those choices are commonplace. Recent, notorious examples include the soda-ban in New York and the legally imposed plain cigarette packaging of Australia. We may legitimate such legislative efforts by pointing to positive health effects; but I wonder if a big contributing factor isn’t the fact that few are interested in absorbing the costs induced by others choice to smoke, drink heavily, or eat unhealthily by contributing more to health care through higher taxes or premiums. These are unarguably bad choices, however, we can’t attack just these choices without attacking free choice itself and the autonomous capacities of those who choose “wrongly”.

I can’t speak decisively on the appropriateness of life-style regulation. However, I do think we should recognize that there is an ugly side to strict choice-sensitivity; especially with regard to less mundane issues, such as conscience. The “culture of nosiness” or “culture of entitlement of opinion” that it produces, reduces the thickness of skin that pluralism demands. One could argue that there is no a priori reason that conflicts that arise out of the dynamics of modern interconnectivity should be solved by limiting the room for difference. Complex social arrangements demands both conformity and indulgence.

34 Shiffrin discusses something similar; that accommodation may reduce what would otherwise be a form of an “exhausting civic anxiety”. Ibid. p. 293.
I have argued two things here. First, that some choices should be protected from the influence of others, regardless if they are costly in some way or if they in some sense offend some peoples sense of being worthy of equal concern. This is demanded of us with regards to solidarity. Second, that cost-internalization is not a sound ideal for a pluralistic society. Insistence on such a principle runs the risk of creating a culture “entitlement of opinion” that undermines free choice.

6. The Problem (?) of Equality and Neutrality

In this section I will examine what equality actually entails with regards to accommodation. I will also address the criticisms that the burden of choice isn’t specific to the religious category and that the unhealthy epistemology of religious commands shouldn’t influence legislation or the jurisprudence of courts.

Thus far, I have only discussed equality as an obstacle to accommodation of religion and argued that it might be desirable despite the liberal states commitment to equality. Consequently, my arguments have been presented as part of a justification for a departure from this principle. However, one might just as well say that concern for equality is sometimes supportive of accommodation of religion. It’s all matter of how equality is construed. If we think about the clearly permissible cases of accommodation, it’s pretty obvious that it is actually the concern for equality that warrants these measures. We don’t think that it’s fair that pregnancy should be more of a financial burden for women then for men, or that the physically handicapped shouldn’t have the same chances to participate in public life. In such instances, equal treatment – which in these cases would amount to no action at all - doesn’t create appealing results and consequently we shift emphasize from equal treatment to outcome. The commitment to equality isn’t violated through this operation, quite the opposite, it is honored by the shift to a more relevant emphasis given the circumstances in the particular cases.

This basic argument can of course be applied to accommodation of religion. When the impacts of general norms are unequally distributed along the lines of religious affiliation it is strange to argue that a measure that could correct this - that is, accommodation of religion - should be denied with regards to concern for equality. In such cases concern for equality is itself a reason to accommodate religion and not an obstacle that
might be overcome by reference to other considerations. Of course, one might argue that the fact that the argument for accommodation of religion can take the form of an appeal to equality, rather than justifying a departure from this principle doesn’t change anything. The relevant question is not whether the argument can be made as an appeal to equality, but under what circumstances a shift in emphasis, from equal treatment to outcome, is warranted. Earlier I have argued that it is the connection between a burden and certain category of the general population that constitute the sound basis for such a shift. With regards to the accommodation of religion, that basis would be the connection between the religious category and the burden of choice. In section two I suggested that this may be insufficient: Everyone, regardless if we consider ourselves religious or not, have convictions that, from time to time, will provide us with normative demands that will diverge from general norms. As everyone deserves equal concern and burdens of this kind can be experienced by all, it would therefore amount to undue privileging of the religious category to accommodate the conflicts produced by specifically religious convictions.

The fact that everyone can experience conflicts between conscience and general norms is of course true. It’s probably also true that such conflicts might be every bit as distressing, regardless of whether the conflict is produced by religious or secular conscience. The relevant question, however, is whether these facts are relevant reasons to prevent state efforts to relieve burdens in those particular cases where religious adherence is determinative of whether a burden is experienced. In my opinion, answering yes to this question isn’t insistence on equality, it’s petty and dogmatic. In order to illustrate this, let’s consider an example from another area.

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To reuse a couple of examples, labor law typically invests employers with the right to direct and coordinate work, this includes the right to, within limits, decide what days and hours employees work. Some of the burdens this norm creates will affect everyone the same way, for example, all will be required to work weekends or nights; however, those who feel compelled or obligated to observe prayer routines at various times during the day or celebrate religious holidays that aren’t recognized by the official calendar will, unless accommodated, experience a substantial extra burden; the burden of choice between conscience and gainful employment. The same goes for uniform clothing provisions. Depending on context, uniform clothing may serve the valuable purposes of strengthening professional appearance, creating unity or trust, conveying valuable information, meeting certain functional demands of the workplace or minimizing the economic consequences of schooling. On the surface, it impacts everyone in exactly the same way; if we look just an inch below the surface, however, it’s pretty obvious that this is not the case. To some it is of absolutely no concern, to those who consider wearing a Muslim veil, Jewish kippah or a Sikh turban a duty to God, it may function as a major restriction on participation in public life.
The challenge for a state committed to equality very much resembles that of parents of multiple children; if the state’s commitment to equality entails a ban on privilege and discrimination, I would argue that good parenting entails a corresponding ban on favoritism. It’s the ambition of most parents to provide the same amount of concern, attention, love and care for all of their children. At the same time, we know that this ambition cannot be realized just simply by treating all children the same all the time or to reserve the same amount of resources for every child. For the most part equal treatment does the trick, sure, but sometimes it leads to absurd results. As we all know, children have different needs, interests and talents and will consequently demand very different amounts of a parent’s time, money or other resources. For example, we might think that it’s important that children get a chance to cultivate their talents. A child with a gift for drawing will demand very little from a parent while a child with a gift for horse riding will cost substantial amounts of money and/or require the sacrifice of many hours of the parent’s time. While completely different activities, both can be equally rewarding for the child. The question is, then, should a desire to ride horses be refused with reference to the cheap price of a sketch pad? To make the case even clearer, shouldn’t a parent spend more time doing homework with a brother that has a harder time in school than his sister who excels in every subject? To me the answer is obvious. To do so wouldn’t mean that a parent shows favoritism. The choice to spend more money on, or time with, a particular child may be the proper response to the ambition to give all children equal concern.

Correspondingly, a commitment to equality shouldn’t be understood as a ban on reserving a certain benefit for a certain group at various times; it should be understood as an obligation to do the same to other groups under analogous circumstances; for example, when a comparable burden is experienced by another group.\(^{37}\) Of course, the permissibility of accommodating religion doesn’t mean that accommodation of secular concerns is impermissible. That would indeed amount to undue privilege. This is an important point. If accommodation is reserved for situations when religious people, in

\(^{37}\) See, Christopher L. Eisgruber & Lawrence G. Sager, “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct”, The University of Chicago Law Review 61 (1994), pp. 1245-1315, at 1245. The main point of the Sagers article that the constitutional basis for protecting religious conduct should be formulated in terms of “Equal regard” which they see as a protection-principle, as opposed to “Unimpaired Flourishing” which is a privilege-principle. “Unimpaired flourishing” is basically a “hands off” principle which restricts government meddling in religious affairs or burdening exercise.
the absence of accommodation, would be put at a serious disadvantage, then it doesn’t amount to privilege, but protection.38

The argument presented here – and probably the whole thesis - basically builds on the assumption that religion should be considered one potential source of burdens among others. Put differently, a claim for accommodation shouldn’t be refused just because of the nature of the source, what is important is the existence of a burden and a connection between that burden and a particular category within the general population. I believe many would reject this assumption and argue that the religion isn’t just one potential source of burdens among others; it’s special because religion is one kind of world view. The rationale behind such an assumption is not without merit. World views, as opposed to handicap or sex, usually entail ideas on normative issues, such as, the nature of justice or how society should be organized. Reserving exceptions or shaping policy based on reasons specific to one, or one type, of world view – that is, reasons that can only be accepted through assumptions of faith – means that those reasons gains legal status, and thus, becomes official dogma of the state. This is, of course, principally problematic.

Further, we might argue that accommodating religion is dangerous for social cohesion. Religion isn’t physical handicap. While the latter cuts through various categories of belonging – that is, affects everyone regardless of beliefs, ethnicity, class, religion, political or philosophical views - religion is itself one of those. If having any effect at all in this regard, providing a benefit to the physically handicapped will further social cohesion among these various groups as it lies the interests of all. We can all, regardless of religious, political or philosophical belonging, understand the burden and what good comes out of relieving it. Religion is another matter. When it comes to matters of fundamental importance the potential for social division is great.

For both these reasons, we might argue that the state should be considered more restricted or not even allowed, to act on reasons specific to one, or one type of, world view. This is what is usually referred to as the doctrine of state neutrality – a ban on the privilege or discrimination of certain world views.39

38 See also, McConnell, Op. Cit.,
39 Neutrality is a close relative to equality. We might say that neutrality is derivative of equality. While equality is more abstract and is used generally to refer to sameness of status, neutrality is used specifically to refer to the non-allegiance of the state to any sectarian interest. However, both are, essentially, a ban on privilege and discrimination. Equality, then, entails neutrality. For a good overview of what Neutrality entails, See Charles Taylor, "Why We Need a Radical Redefinition of Secularism", Eduardo
Just as with equality, everyone agrees with the basic premise. The relevant question is what constitutes privilege or discrimination. Some would say that accommodation of religion should be considered impermissible just by virtue of the fact that religion is used as a basis for classification. According to this view, which is usually called formal neutrality, neutrality is best achieved by an insistence on the generality of norms; if norms are general, and thus applies to all relevant categories, they can’t privilege or discriminate.\(^{40}\) If the burdens of a general norm are distributed unequally, there’s a good, neutral, reason, for this, as it can be formulated without any reference to world views. The neutrality of a given norm can thus be decided by an analysis of the norm, all relevant information for this operation is contained within the norm itself.

I do agree that it probably is more important that the state does not privilege certain world-views than the privileging of “incidental” categories like the physically handicapped. However, echoing my discussion on equality, I believe this is best achieved through an analysis of the impact of the norm. Neutrality, then, should not be understood formally, as a ban on governmental use of religion as a standard for action or inaction, but rather substantially, as a requirement on government to “minimize the extent to which it either encourages or discourages religious belief, practice or non-practice, observance or nonobservance”.\(^{41}\) This form of neutrality will generally entail the usage of general norms as equal treatment usually is what minimizes encouragement or discouragement. In some cases, however, when application of the same norm burdens some group disproportionately, minimized encouragement or discouragement is best achieved by introducing, for example, exceptions. In other words, the neutrality of a norm cannot be determined by analysis of the norm itself, it needs to be analyzed in relation to the normative landscape of the society it is meant to regulate.\(^{42}\) If a norm creates substantial additional burdens for believers, because of commitment to their faith, concern for equality warrants that accommodative measures are considered.\(^{43}\) In other words, the purpose behind neutrality is best achieved by action rather than insistence on inaction.


\(^{42}\) This means that the neutrality of a given norm is relative to the situation in the society it occurs in.

\(^{43}\) The appropriateness of an approach that allows for exceptions on religious ground in order to honor the liberal states commitment to equality and neutrality are emphasized by our earlier observations on the great regulatory ambition and capacity of the modern state, as well as the particular dangers for
Putting substantive neutrality into practice may well lead to a situation where religion appears privileged in the sense that a disproportionate amount of accommodative measures will be directed at relieving religious conscience. This is, then, not because religion is seen as more important to protect than secular world-views but rather because convictions formulated in relation to religious worldviews may be stronger and less likely to be reconciled with secular norms. Put differently: If we, within limits, want to prevent people from acting against their conscience of all kinds, simply because this is cruel if it can be avoided, we might have to accept that a disproportionate amount of the instances protected will be accommodation of religion as religious activity tends to create categorical commands.

The categorical character of religious normative commands was also a point that I brought up as a potential problem for a justification. Should the fact that the perceived authority of religious commands does not follow from the quality of the reasons provided for a given command, but from the perceived authority of the source be a reason not to accommodate religion? One could argue that these, arguably unhealthy epistemological standards, shouldn’t influence the content of legislation or the jurisprudence of courts. Even if this characterization of religious belief and the normative commands that it produces is true, I would argue that it is an irrelevant point. State evaluation of the epistemological quality of the reasoning behind conceptions of the good, comprehensive doctrines or deep commitments is completely foreign to liberal societies. It may be a relevant discussion in other contexts, but not with regard to what qualifies as a reason for state action. The only relevant concern for a liberal state is whether the wishes, claims or demands that emanate from various conceptions of the good, comprehensive doctrines or deep commitments, are reasonable with regards to other valuable interests. Whether one embraces the formal or substantive variety, I think everyone agrees that
neutrality entails this focus on result rather than process. Any other order would be practically and principally untenable.

7. Conclusions

Above, I have provided an account of why accommodation of religion may be thought of as controversial and four arguments that I believe speak to the permissibility and desirability of accommodation of religion in a contemporary liberal society. My conclusions can be summarized as follows.

Accommodative practices can usually be justified by reference to the fact that some general fact imposes a burden on a certain category of the general population. In the absence of a specific burden, benefits, such as exceptions from general norms, constitute impermissible privilege, in violation of the state’s commitment to equality. The controversial nature of accommodation of religion stems from the fact that the burden that such efforts seeks to relieve - that is, the burden of choice between general norms and conscience - isn’t specific, that is, experienced exclusively by, the religious category. I have also argued that an attempt to find some distinctive characteristics of religious belief, which might explain why conflicts produced by religious belief would be experienced as more distressing than conflict between general conscience and legal norms, might not be helpful to the case for accommodation of religion. Rather, it reveals some unhealthy epistemological features of religious belief. Lastly, I argued that the voluntary nature of religion contributes to the controversial status of accommodation of religion.

I have also offered four arguments that supports the notion that a liberal state should at least seriously consider accommodative measures when the normative demands produced by people’s faith comes into conflict with legal norms.

First, I argued that conflicts between conscience and general norms might often be the result of the fact that modern states have great regulatory ambition and reach. The state is thus complicit in the creation of conflicts and should therefore aspire to resolve them. This is especially important with regards to minorities as general norms are less likely to be based on their normative templates.

Second, I argued that being able to live in accordance with one’s convictions is central to the functioning of human beings and necessary for the experience of meaningful freedom. The fact that we value our own convictions does also mean that we are predisposed to disvalue the convictions of others. We are in other words prone to illiberal atti-
tudes such as, suspicions of difference. Both these points emphasize the need for institutional measures to protect normative diversity, such as accommodation of religion.

Third, I argued that the fact that religious affiliation and practice isn’t involuntary shouldn’t be taken as a reason not to accommodate religion. This rationale builds on the assumption that choice implies personal responsibility. Accommodation should be reserved for those instances where the reason why we experience a burden is not freely chosen, such as handicap or sex. However, I have argued that central choices of conscience should be taken in “deliberative isolation”; that is, to the farthest extent possible, without regard to irrelevant consequences, such as, the disapproval of others or negative financial implications. Accommodation can contribute to that.

Fourth, I argued that concern for equality and state neutrality should constitute reasons to support accommodation of religion. Equal treatment, i.e. the usage of general norms, is sound as a general rule. However, when the impacts of general norms are unevenly distributed along religious lines, exceptions or other forms of accommodation should be employed to correct the unequal distribution of the regulatory burden.
8. Bibliography

Books

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Articles