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RESEARCH ARTICLE

Defending Religious Freedom as Equality

Mark Greenberg[1] and Lawrence Sager[2]

[1]Michael H. Schill Endowed Chair in Law and Professor of Philosophy, University of California, Los Angeles, United States
[2]Alice Jane Drysdale Sheffield Regents Chair in Law, University of Texas at Austin, United States
Corresponding author: Lawrence Sager; lsager@law.utexas.edu

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Abstract

In a separate essay, we argue that a right to freedom of religion as it is standardly understood is morally indefensible. In this article, we sharpen this proposition, arguing that there is no account of religion on which there is even a pro tanto right for activities to be exempted from generally applicable regulations—or otherwise privileged over other human projects, commitments, and passions—in virtue of their being religiously motivated. Beyond largely uncontroversial invocations of freedoms of thought, speech, and association, what remains of a pre-theoretical embrace of a right to freedom of religion is best explained by the principle of equal regard. Along the way, we respond to the work of Cécile Laborde and Alan Patten, who both maintain that an equality-centered view of religious freedom cannot adequately protect religion unless religious exercise is understood to be elevated in value over other human projects. In our response, we review our account of equal regard and its application to the kinds of cases that worry Laborde and Patten, showing that equal regard can account for the sense of injustice elicited by those cases. We also briefly address the positive views of Laborde and Patten and suggest that their accounts, and others with the same structure, inherit the problems of more straightforward accounts of freedom of religion.

Keywords: freedom of religion; equality; equal regard; religious liberty; religious objectors to vaccine mandates; religious exemptions

A Special Right to Freedom of Religion?

It is a common view that freedom of religion is a fundamental human right. In a separate, companion essay, we argue that such a right is morally indefensible and that the principle that the government must treat all its citizens with equal regard can explain intuitions that seem to call for such a right.[1] We then develop a detailed account of the principle of equal regard that yields an attractive explanation of when exemptions from legal regulation must be granted and when they need not be. This contribution to the *festschrift* for Douglas Laycock provides an opportunity to sharpen the proposition that a right to freedom of religion of the sort celebrated by the common view is morally indefensible. Throughout

[1] See Mark Greenberg and Lawrence Sager, *Religious Freedom: A Moral Theory of Mandatory Exemptions*, in Discrimination by and Against Religion (Cécile Laborde, Micah Schwartzman & Nelson Tebbe, eds., Oxford University Press, forthcoming).

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Laycock's career, much of his formidable work has concerned the protection of religion from predations by the state. He would no doubt take issue with our claim that a well-tuned equality-based approach can adequately protect religion, but we are honored to use this occasion to defend and develop our approach.

We argue here that there is no account of religion on which there is even a pro tanto right for activities to be exempted from generally applicable regulations—or otherwise privileged over other human projects, commitments, and passions—in virtue of their being religiously motivated. Beyond largely uncontroversial invocations of freedoms of thought, speech, and association, what remains of a pre-theoretical embrace of a right to freedom of religion is best explained by the principle of equal regard.

A common response to equality-centered views of religious freedom concedes the relevance of equality concerns to an understanding of religious freedom but insists that these concerns cannot be the whole story. Something more, turning on the distinctive features of religion and religious exercise must be involved. On this common view, religion plays a role in people's lives that entitles it to an elevated status; and only that status, it is argued, can justify the protections to which religious believers are entitled.

Two careful and subtle scholars who hold the view that religion must be elevated in this way are Cécile Laborde and Alan Patten. They have very different approaches to religious freedom, but they converge on the view that an equality-centered approach that does not recognize the special role that religion plays in the lives of believers cannot adequately protect religious exercise. To that end, they each offer examples that they take to illustrate the failed reach of equality standing alone. Grappling with their examples here gives us the opportunity to underscore important details of our equal-regard view and to show that it does a good job of handling cases of the sort that concern them.

The theories of Laborde and Patten have a common abstract structure, a structure that may seem to promise a defense of something like a right to religious liberty. Each theorist takes religion to be a focal instance of a more general category of human experience or activity, a category that has special value and importance and is thereby entitled to special protection. Each therefore must develop an account of the relevant category of human experience and show that it is entitled to special protection. By contrast, our view has the theoretical advantage of simplicity, as it accounts for the relevant common intuitions with no machinery beyond the well-established principle of equal regard. Moreover, while we do not defend this proposition at length here, there is good reason to suspect that Laborde's and Patten's theories, along with others that share the familiar structure of privileging a particular category encompassing but more general than traditional religion, inherit the problems of more straightforward accounts of the right to freedom of religion.

The Role of Freedom of Expression, Thought, and Association

Why should freedom of religion be fundamental in the way that freedom of speech and thought are? Consider what freedom of religion is supposed to protect. When we think of why freedom of religion is important, a particularly salient set of examples involve cases in which people have been forced to affirm certain beliefs or have been punished for expressing heresies. The persecution of Roman Catholics by Protestants and vice versa are familiar historical examples. But the freedoms threatened in such cases are protected by moral rights to freedom of speech and thought. Forcing someone to express their adherence to the doctrine of immaculate conception or punishing Galileo for believing that the earth revolves around the sun is a straightforward violation of these rights. Contrary to initial appearances, salient examples in which religious speech or thought is at stake provide no support for a distinct right to freedom of religion. Similar points apply to the idea that a distinct religious

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right is needed to protect the freedom to gather with other members of their religion. The freedom to do so is protected by the moral right to freedom of association.

In sum, there is no need to appeal to a special right to freedom of religion to protect religious speech, thought, and association. What work is left for such a special right? In other words, what remains of what is intuitively protected by freedom of religion once we take into account what is protected by freedom of speech, thought, and association?

The answer is religiously motivated activities. To what extent are such activities—beyond mere belief, expression, and association—deserving of special moral protection? For example, what about the freedom to follow the dictates of one's religion by engaging in particular rituals, wearing particular clothes, following particular diets, or refusing to engage in activities such as serving in the military or working on the sabbath? If the activities (or abstentions) are ones that are generally permitted, it would typically be a violation of both the principle of equal regard and freedom of thought and expression to penalize people for engaging in those activities *for religious reasons.* For example, if the law in a particular jurisdiction permits the drinking of wine, to penalize people for drinking wine in a religious ceremony would probably violate both the principle of equal regard and the freedom of thought and expression. It would violate freedom of thought and expression because the drinking of wine was being punished because of the thoughts that motivated it or because it expressed those thoughts. (We explain below our account of the principle of equal regard, but it should not be surprising that it often violates equal regard to penalize people for engaging in an activity that is generally permitted to others simply because their participation in the activity is motivated by their religion.) Thus, again, no special right to religious freedom is justified by the need to protect religiously motivated activities that are otherwise permissible.

We come, finally, to activities that are generally *prohibited*—in other words, to the question of religious exemptions from otherwise applicable laws. To what extent are activities that are motivated by religion exempt from otherwise applicable legal restrictions? This question has become especially contentious in recent years in the United States with, for example, high-profile cases involving religiously motivated claimants requesting exemptions from COVID-19 related restrictions and anti-discrimination laws.[2]

A Right to Exemptions from Otherwise Applicable Regulation?

What could support a right for religiously motivated activities to be exempted from otherwise applicable regulations? It is fundamental to freedom of religion that it cannot be the truth of the doctrines or the objective value of the activities or way of life that the religion promotes, for example, that the religion promotes peace; it is part of the very idea of freedom of religion that every religion is entitled to protection regardless of its creed. And religions with contrary doctrines or views about how to live are equally protected, though both sets of beliefs cannot be true. For example, it would be a violation of freedom of religion to protect only those Christian sects that accept the doctrine of the immaculate conception. Or to protect only those religions that are monotheistic. One manifestation of the general point is that it is widely thought to be part of freedom of religion that the government may not inquire into the truth or value of the relevant doctrines.[3]

[2] *See, e.g.*, Tandon v. Newsom, 593 U.S. 61 (2021); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[3] *See, e.g.*, John Locke, A Letter Concerning Toleration and Other Writings 21 (David Womersley ed. 2010) ("[T]he Controvers[y] between these Churches about the Truth of their Doctrines … is on both sides equal; nor is there any Judg[e anywhere] upon Earth, by whose Sentence it can be determined."); United States v. Ballard, 322 U.S. 78, 85–88 (1944) (holding that the First Amendment forbids allowing a jury to decide the truth or falsehood of a religious belief).

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Are there features of religion other than the truth of the doctrines (or objective value of the activities) that could justify protecting religiously motivated activities over others? Many traditional religions are associated with belief in a deity. But being motivated by belief in a deity (or by the belief that a deity had commanded one to act in a certain way) could not justify exemptions from otherwise applicable laws. To begin with, there are traditional religions that are nontheistic.[4] Again, it would violate a basic tenet of freedom of religion to treat religions differently on this ground. More importantly, how could it be morally required to exempt someone from a requirement, for example to serve in the military, because their motivation involves belief in a deity, but permissible not to exempt those whose motivations involves, say, deep moral convictions (or adherence to a nontheistic religious doctrine)?[5]

Another common feature of traditional religion is the acceptance of the religion's doctrine based on faith rather than reason. Again, however, it could not be morally required to exempt those whose scruples were based on faith but not those whose scruples were based on reason. Similar points apply to other ways of characterizing what is distinctive about traditional religion.

These are obvious objections to the view that traditional religious believers have a right, in virtue of their religious motivations, to immunity from laws that others must obey. Some theorists have attempted to find an account of what is distinctive about religion that is not so clearly a defective basis for a morally important distinction. Such an account can be understood either as an account of religion or, alternatively, as an account of a more general category to which religion belongs and in virtue of so belonging deserves special protection. (For expository simplicity, we generally write simply of accounts of *religion* and avoid repeating this qualification, but it should be understood.)

The most promising accounts are what we have elsewhere called substantive and functional.[6] On a substantive account, religion is characterized by the subject matter to which it addresses itself. For example, religion could be understood as a view about how to live, about what has objective value, or about what gives life meaning. On a functional account, religion is characterized by the role in which it plays in a person's life or system of beliefs. For example, religion could be understood as a set of beliefs that are central to a person's identity. In a nutshell, on a substantive account, what is distinctive about religious beliefs are what they are *about*; while, on a functional account, what is distinctive is the *role* that the beliefs play in the life or cosmology of the believer, regardless of what they are about.

Such views no longer fall to the immediate concern that they exclude systems of belief that cannot plausibly be excluded. But as we have argued elsewhere, on substantive or functional accounts of religion, it is not plausible that there is a right that religious activities be exempted from otherwise applicable regulations.

[4] Some Hindus, Buddhists, and Confucianists, for example, are nontheists. *See, e.g.*, Andrew Nicholson, *Hindu Disproofs of God: Refuting Vedantic Theism in the Samkhya Sutra, in* The Oxford Handbook of Indian Philosophy (2017) (discussing atheist strains of the Samkhya school of Hindu philosophy); Martin Southwold, *Buddhism and the Definition of Religion*, 13 Man 362, 369 (1978) (characterizing Buddhism as a "non-theistic religious phenomen[on]"); Kevin Schilbrack, *What Isn't Religion?*, 93 Journal of Religion 291, 314 (2013) (offering Confucianism as an example of a nontheistic religion).

[5] *See* United States v. Seeger, 380 U.S. 163, 165–66 (1965).

[6] *See* Greenberg and Sager, *supra* note 1; Lawrence Sager, *In the Name of God: Structural Injustice and Religious Faith*, 60 St. Louis University Law Journal 585, 595 (2016) (contrasting substantive and functional approaches to defining religion). Ronald Dworkin used this terminology in *Religion Without God.* Ronald Dworkin, Religion Without God, 118 (2013). And he used it to much the same end as our argument here. *See* Dworkin, *supra*, at 118-124. For our critique of Dworkin's constructive or positive view of religious freedom, see Greenberg and Sager, *supra* note 1.

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Begin with substantive accounts. On a substantive account of religion, all kinds of misguided or simply evil doctrines qualify as religious if they have the right subject matter. For example, if religion is understood as a set of views about what is of fundamental importance to human life, a view that attributes fundamental importance to the pursuit of wealth or of self-interest or of racial supremacy qualifies for protection by the right to religious freedom. But it cannot be right that the single-minded pursuit of one of these goals deserves elevated treatment.

Similarly, on a functional account of religion, diverse wrongheaded and immoral doctrines will qualify as religious if they play the designated role in the adherent's life. For example, if religion is understood as beliefs that are central to one's identity, then racist beliefs that are central to one's identity are religious.

It might be objected that there is a right, but the right is merely pro tanto, and is outweighed by the reasons for preventing harm. We do not think that intuition supports this suggestion. It does not seem right to say that the hypothetical white supremacist has a pro tanto right to an exemption from antidiscrimination laws that is outweighed by other factors. For one thing, the denial of the exemption would leave no moral regret in its wake.

Further intuitive support comes from cases not involving evil. Suppose there are some people for whom dining out in high-end New York restaurants is at the center of what they value in life or central to their identity. Do they, in virtue of this feature, have a pro tanto right to exemptions from COVID-19 restrictions that apply to other people who simply think it is important or valuable to eat in restaurants? Or what about the football fanatic for whom being able to be at home and watch college games on her state-of-the art screen on Saturdays and Sundays is what makes her life worthwhile? Does she have even a pro tanto moral entitlement to receive unemployment insurance despite her unwillingness to work on either weekend day? Substantive and functional accounts of religion embrace attractive projects and commitments, wretched projects and commitments, and curiously eccentric projects and commitments. We think that the examples in the last few paragraphs strongly suggest that such accounts of religion do not help the case for even a pro tanto right to be exempted from the law. But we also offer a more theoretical argument.

One might interpret the argument thus far as showing merely that more traditional understandings of religion are underinclusive, while the more expansive accounts are overinclusive. If the right to religious liberty is confined to traditional religions, the right is arbitrary and unfair because of the claimants it excludes; on the other hand, if we try to repair this defect by turning to substantive or functional accounts of religion, we have no principled way of excluding claimants to whom it is not morally justified to give elevated status. On this interpretation of the argument, the problem is our apparent inability to find suitable boundaries for the right of religious freedom. If the argument is understood in this way, it might seem that the problem is a line-drawing one.

The point is deeper than this interpretation suggests, however. The problems we have seen so far are symptoms of a more fundamental failing: no category of the relevant sort is entitled to privileged treatment. We started by pointing out that religious exemptions cannot be justified on objective grounds, that is, because the relevant doctrines are true or the corresponding activities are objectively valuable.

Given this point, what could be the basis for exemptions? It has to be that *the way the person cares* about the relevant activity (or the doctrine that underwrites it), for example, that their attachment to the activity is based on faith rather than reason or that the activity is central to their identity or that they feel that they are compelled by conscience. We sometimes refer to such ways of caring as *motivations*, for short.

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There are all sorts of reasons why people who lack an objective basis for an exemption could feel strongly that they are inappropriately thwarted by a law.[7] Some of them have already emerged: The conduct in question could be motivated by belief in a deity, by faith rather than reason, or by beliefs about what gives life meaning. From this perspective, substantive and functional accounts illustrate salient types of motivations.

But there are other kinds of reasons, as well, which we can illustrate by example: Suppose the parents of school-age children strongly and mistakenly believe that vaccines pose an intolerably high risk to their children's health. Suppose an individual or group sees climate change as a looming catastrophe and therefore wishes to take preventive action that violates the law. Or suppose a group takes paying taxes and obeying other laws to violate a critical aesthetic norm. These examples do not fall within the proposed categories, and we could provide countless such examples of motivations grounded in morality, emotions, aesthetics, or prudence.

The problem is that, without objective reasons for valuing an activity, privileging any particular motivations over others is unjustified. Suppose that we privilege, for example, reasons that people take to be central to their identity. And suppose one group takes it to be central to their identity that they not be vaccinated. There are others, however, who feel equally strongly that it is crucial that they not be vaccinated, though not for reasons central to their identity. It might be, instead, reasons of conscience, emotional reasons, or misguided health concerns. We think it is clear that it cannot be morally justified to privilege the former group over the latter. Indeed, we think it is not merely unjustified, but specifically a violation of freedom of religion itself to give exemptions to the first group and not to the second. In sum, just as elevating one religious sect over others or traditional religious motivations over secular moral ones violates religious freedom, so too does elevating what a person takes to be central to their identity over, say, what a person simply feels compelled to do—perhaps under the name of *conscience*—or what a person is motivated to do by aesthetic or emotional rather than moral reasons.

So here is the central puzzle: it seems intuitively right, in some cases, that people should be granted exemptions for broadly religious reasons. But whichever set of reasons we select as the relevant ones, privileging activities based on these motivations would seem to violate freedom of religion. What could be the underlying ground of freedom of religion that would explain this dilemma? In other words, how could it be that freedom of religion seems to require something—exemptions for religiously motivated activities—yet any way of specifying which class of motivations should receive the privileged treatment is itself a violation of freedom of religion?

Our proposal solves this puzzle. The true justification for what are intuitively taken to be exemptions justified by religious freedom is equality—specifically the equal regard that the state owes to all citizens. This account explains, first, why some exemptions are required: Exemptions are required when not giving one would violate the principle of equal regard. And, at the same time, the account explains the puzzling feature that any specification of which motivations are entitled to protection may seem to violate freedom of religion. The explanation is that privileging some motivations over others threatens to violate equal

[7] There can be objective reasons, such as health or safety reasons, why a government should grant exemptions from legal regulations. So, for example, the fact that a person with a compromised immune system would risk damage to their health by complying with a vaccine requirement is something that a government should take into account. But an exemption on such a ground would not be ordinarily be understood as sounding in religious liberty. By contrast, an exemption for Sunday sabbath observance or for religious dietary observance is not based on the objective value of those practices. Setting aside objective reasons, on our account, the fact that people care deeply about something is not irrelevant. For example, as we explain below, if the government, without good justification infringes an interest that people care deeply about, it may well violate the principle of equal regard.

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regard. In sum, the principle of equal regard is the true ground for what are ordinarily thought of as exemptions on grounds of religious freedom.

On our account, then, it is a mistake to think that any particular motivations or ways of caring are entitled to special protection. Instead, whether an activity is entitled to an exemption depends on whether a denial would violate equal regard. What makes it the case that denial would violate equal regard? Our full answer depends on the details of our account of the principle of equal regard.

Equal Regard

As we understand the principle of equal regard, it does not require equal treatment, such as equal distribution of resources or, more generally, treating like cases alike. Rather, it requires, as the name suggests, an appropriate attitude of regard or respect to all citizens.

More specifically, on our account, the principle of equal regard has two prongs. The first prong concerns the motivation of government decisions. It requires that government actions not be the product of devaluative attitudes in the community. A devaluative attitude is an attitude that involves taking the interests of a group or an individual to be less important than the comparable interests of others. Such attitudes include not only strong negative feelings such as hatred and disgust, but also indifference or insensitivity to the interests of the relevant others. (Moreover, because what is essential is the devaluation of the interests of a group or individual, even strong negative feelings need not be devaluative attitudes. One can hate somebody without taking their interests to count less than those of others.)

As we elaborate in our companion essay, because the requirement is that government decisions not be the product of devaluative attitudes in the community, the bad motivations need not be those of government institutions. Our account therefore avoids difficult problems about the mental states of government institutions. (The community includes the government bodies and their members, so the devaluative attitudes may, but need not be, be those of government actors.)

According to the second prong of the principle of equal regard, a government decision is a failure of equal regard if members of the community would reasonably understand the decision to convey a message that the interests of some matter less than the comparable interests of others. (For expository convenience, we say that a government decision that would be reasonably understood in this way carries a social meaning of disrespect.)

In sum, a government decision can violate equal regard in two different ways: (1) because it is the product of devaluative attitudes or (2) because it carries a social meaning of disrespect.

There is an intimate relation between these two prongs of equal regard. If publicly available evidence on balance strongly suggests that a decision is the product of devaluative attitudes, then reasonable members of the community will likely take the decision to convey a message that the interests of some matter less than those of others. As a result, something that is merely evidence that a decision is a product of devaluative attitudes may make it the case that the decision carries a social meaning of disrespect.

In our companion essay, we consider a range of specific examples and argue that our account gives an attractive explanation of when government must grant exemptions. In one kind of situation, the government has a strong justification for a non-religious exemption and strong reasons for denying religious exemptions. Suppose the government has granted a medical exemption from a vaccination requirement to those with compromised immune systems (who would be endangered by the vaccine). The government denies an exemption to a claimant who requests an exemption on traditional religious grounds. If the denial is the product of devaluative attitudes, then it violates equal regard. But if it is not, then the

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question is whether it carries a social meaning of disrespect. The answer to this question depends on all the circumstances, but if there is a strong justification for the denial, such as the importance of herd immunity and the protection of the medically vulnerable, then, absent other relevant facts, it may well be the case that the decision does not carry such a social meaning.

In another kind of situation, the government has granted an exemption on traditional religious grounds, but denies an exemption to a claimant whose request is based on an unpopular minority religion or on the basis of beliefs that are not traditionally religious. Of course, if the government decision is the product of devaluative attitudes, it is a violation of equal regard. But even if it is not the product of devaluative attitudes, the denial of an exemption to one group when a comparable exemption was granted to another may well convey a message that the interests of the claimants are less valued than the comparable interests of the those to whom the original exemption was granted. The conscientious objector cases in the United States are vivid examples. Congress attempted to confine eligibility for conscientious objector status to those whose abhorrence of war is tied to belief in a Supreme Being, and the Supreme Court was at pains to thwart that outcome.[8]

In yet another type of situation, the government has not granted an exemption to anyone. The government denies an exemption to a claimant whose interests are severely affected by the regulation, despite the fact that the government's interest served by the denial is relatively slight. In such a case, the decision may well be the product of devaluative attitudes such as indifference to the interests of the claimants. But even if it is not, it may well carry a social meaning of disrespect. The fact that the government decision seems to disregard poignant interests of the injured group may be strong evidence that devaluative attitudes were at work. And such a decision, in turn, will often carry a social meaning of disrespect. We will look more closely cases of this sort below, when we consider the objection that an equality-based theory does not have the conceptual resources to account for them.

An Elevated Status for Religion?

Some theorists insist that no view of religious freedom based on concerns of equality alone can give adequate protection to religion. In their view, a satisfactory account must treat religion as entitled to special treatment, or at least as falling within a more general category of commitments that are entitled to such treatment. Without an understanding of religion that recognizes its elevated importance, these theorists argue, governments will be able to enact regulations that harm religion in ways that we ought to find unacceptable, but which are consistent with the demands of equality. Two theorists who share this view are Alan Patten and Cécile Laborde. Their work is serious and important, and the ideas of each pose a challenge to our equal regard approach.

Alan Patten takes views of religious freedom based on equality alone as having a common structure, which he calls the "*No Discrimination*" view.[9] Roughly, as Patten understands them, no-discrimination views respond to differences in treatment between a preferred interest and a dispreferred religious interest. These views bar "targeting (where the law singles out a particular religion, or religion in general, for unfavorable treatment) and selective accommodation (where the law extends an accommodation to relevantly similar conduct but withholds it from some particular instance of religiously motivated conduct)."[10] Fair enough, suggests Patten, but what about a case where religion is inappropriately interfered

[8] *Seeger*, 380 U.S. at 165–66.

[9] Alan Patten, *The Normative Logic of Religious Liberty*, 25 Journal of Political Philosophy 129, 130–31 (2017).

[10] *Id.* at 130–31

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with, and no one is treated better? His prime example is a prohibition on the sale or consumption of alcohol that permits no exceptions or exemptions.[11] This sweeping prohibition would not involve targeting or selective accommodation because everyone is treated the same with respect to the sale and consumption of alcohol. As a result, no-discrimination views of religious liberty would not offer any grounds to object; yet some religions would be unable to practice rituals they regard as deeply important.[12]

Cécile Laborde also believes that views of religious freedom that do not elevate religion will fall short.[13] She acknowledges that an approach to religious freedom based on equality alone can give us right answers some of the time.[14] She points to cases like the City of Hialeah's ban on the ritual slaughter of animals, which plainly targeted a growing Santeria population; the French and Belgian bans on Muslim veils; and the Swiss ban on minarets.[15] Assuming that these regulations were "motivated by (or can be justified only by) hostility toward Santerians or Muslims," Laborde acknowledges that an equality-centered approach yields the right result. No elevation of religion is required to explain what makes these governmental actions unjust.[16] But Laborde worries that, in other places and times, restrictions on religious practices such as animal sacrifices or the veil might in fact be motivated by important moral reasons, say, protecting animal rights or the equal status of women. She thinks that regulations that are the product of legitimate concerns will have to be treated as valid by equality-based views. Therefore, she argues, such views cannot adequately protect religion.[17]

Our account of equal regard does a good job handling the cases that worry Patten and Laborde. Consider, first, Patten's hypothetical law banning the sale and consumption of alcohol by everyone.[18] The force of the example is supposed to come from the absence of traction it gives to a claim of unequal treatment: No one is treated better than anyone else. But, as explained above, a failure of equal regard does not depend on differences in treatment. Instead, a government decision violates equal regard either because it is brought about by devaluative attitudes in the community or because it carries a social meaning of disrespect. To be sure, if two groups are treated differently without a satisfactory justification for the difference, there may well be a failure of equal regard. First, such an unjustified difference in treatment may be the product of devaluative attitudes in the community. And, second, if there are devaluative attitudes toward the relevant group in the community, the decision may well carry a social meaning of disrespect even if the decision is not in fact the product of those attitudes. But, crucially, each these prongs of equal regard can be satisfied without any difference in treatment.

In a case heard by the U.S. Supreme Court, for example, the Forest Service chose a route for a planned road that would have made it impossible for the members of a Native American religion to access a sacred site of enormous importance to their faith.[19] Moreover, the Forest Service made the choice despite a perfectly feasible alternative route.[20] It seems possible—indeed, likely—that devaluative attitudes played a significant role in bringing about this

[11] *Id.* at 131, 143.

[12] *Id.*

[13] Cécile Laborde, *Equal Liberty, Non-Establishment and Religious Freedom*, 20 Legal Theory 52, 62–64 (2014).

[14] Cécile Laborde, Liberalism's Religion 198–200 (2017).

[15] *Id.* at 199.

[16] *Id.*

[17] *Id.* at 199 ("[G]overnments often appeal to good neutral reasons—public order, animal rights, gender equality—to ban or regulate certain practices, including Santerian ritual sacrifice and Muslim veiling. So neutrality of justification is not sufficient.").

[18] *See* Patten, *supra* note 9, at 143.

[19] *See* Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 441–42 (1988).

[20] *Id.* at 443.

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choice of routes. It is more likely still that reasonable members of the community would understand the decision as carrying a social meaning of disrespect.

We could test that conclusion by asking whether the Forest Service would have made the same decision if what was at stake was access to the sacred site of a mainstream Christian faith. If it would not have made the same decision, that both provides evidence that devaluative attitudes were at work and makes a good case for a social meaning of disrespect. But we emphasize that such a counterfactual question is just an epistemic device—a useful heuristic for probing the facts. A negative answer to such a question is not necessary for there to be a violation of equal regard.

Patten's hypothetical ban on alcohol is in fact a good example of a likely failure of equal regard.[21] Suppose that the reasons for the inflexibility of the ban are weak. For example, suppose that the ban is intended to reduce alcoholism and its impact on families, drunk driving, and suicide. And further suppose that the requested exemption is for limited sacramental uses of wine that are unlikely to lead to these ills. Under these circumstances, there is good reason to worry that devaluative attitudes are at work. The disregard of matters of great concern to a group of people without good reason is strong evidence of this hypothesis. Moreover, even if the decision is not the product of devaluative attitudes, given the disproportionate harm to the relevant group and the weak justification, it likely carries a social meaning of disrespect, though that will depend on all the circumstances. On our view, the hypothetical law is disturbing precisely because it is plausible that there has been a failure of equal regard.

Suppose by way of contrast, we were looking at a blanket ban on a highly addictive and dangerous drug like fentanyl, which was being challenged by a small but intensely religious group for whom the ingestion of fentanyl was a central feature of their sacramental ceremony of worship. In contrast with the hypothetical case described above, suppose, plausibly enough, that the sacramental use of fentanyl does pose the risk of addiction and overdose at which the ban is aimed. The fentanyl ban would surely be unfortunate for members of the group, but without more, it does not present a similar prima facie case for a violation of equal regard. There could be more: If the religious group were a deeply unpopular minority, there would be some reason to worry that there had been a failure of equal regard, notwithstanding the legitimate reasons the state had for a blanket ban on fentanyl. On our account, if devaluative attitudes play a significant part in bringing about a decision disadvantageous to the devalued group, there is a failure of equal regard, notwithstanding the existence of untainted reasons in support of the decision. Whether the imagined case would violate the devaluative-attitudes prong of equal regard would therefore depend on what role devaluative attitudes in the community in fact played in the decision not to create an exception to the ban.

This last point provides our answer to Cécile Laborde's concern that in some places, at some point in time, women's right groups might support the ban on the Muslim veil or animal rights groups might support the ban on the ritual slaughter of animals, for reasons having no connection with devaluative attitudes.[22] Her worry seems to be that that these regulations are deeply intrusive on religious interests, and that the presence of legitimate reasons and some high-minded support for their adoption would undermine the argument against them based on equal regard. But devout Muslims and Santerians are unquestionably the victims of devaluative attitudes in many contemporary Western nations. As long as such attitudes play a significant role in bringing about or sustaining the bans in question, the

[21] *See* Patten, *supra* note 9, at 143.
[22] *See* Laborde, *supra* note 14, at 199.

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decisions violate the principle of equal regard, notwithstanding the presence of good reasons and some well-intentioned support for them.

Laborde and Patten might press us further, asking us to consider regulatory decisions that interfere with religiously motivated conduct but are neither the product of devaluative attitudes nor carry a social meaning of disrespect. To be sure, on our view, such decisions are not failures of equal regard and are therefore permissible unless they run afoul of other moral concerns. But as we illustrate below with an example involving mandatory vaccinations, this result is consistent with our moral intuitions and considered judgments. Thus, in our view, this limit to the reach of equal regard is a feature, not a bug.

In sum, on our view, religiously motivated persons or groups have no special moral claim to be exempt from legal regulations. Equal regard, as we have explicated it, does a good job of explaining intuitions about when exemptions are required and when they are not. In considering potential counterexamples, we should set the Muslim veil and Santeria animal sacrifice bans aside. These cases are awash with devaluative attitudes, and it is hard to bring our intuitions to bear on a world we cannot imagine—a world in which the respective political communities in France and Hialeah, Florida had grown beyond their devaluative attitudes but nevertheless chose to maintain the bans for other reasons and could do so without any social meaning of disrespect.

An extended example illustrates how our account differs in application from both an equal treatment account and a special treatment account (on which religion is prima facie entitled to exemption from regulation). Suppose California adopts a mandatory measles, mumps, and rubella (MMR) vaccination regime under which students may not enroll in any state-accredited school unless their vaccinations are up to date. No exemption is provided for those who oppose vaccination on religious grounds. Members of a particular religious faith believe that consenting to have their children vaccinated will condemn them and their children to eternal damnation. Do these religious objectors have a moral claim to be exempted from the vaccine mandate that is in any way specific to the religious nature of their opposition?

Our answer is that they do not. And it is not merely that they have a pro tanto right that is overridden by public necessity, leaving moral regret in its wake. Rather, there is not even a pro tanto moral right here.

It is of course a misfortune that a group's passionate beliefs and commitments should collide with the judgment of government that a vaccination mandate is needed to eradicate the scourge of measles. The group is entitled to the attention and concern of the state, to concern not muffled or discounted by devaluative attitudes. But the fact that members of the group care intensely about avoiding vaccination of their children is no different from the fact that any persons care deeply about avoiding any regulation. That their feelings have a religious ground makes no difference on our account.

Now, there may be objective reasons, such as health problems, why regulation will cause disproportionate harm to a particular group—indeed, we discuss such a case below. But such concerns do not sound in religious liberty. It is part of the spirit of religious liberty that claims of religious freedom do not depend on the truth of the religious doctrines. Thus, on our view, although in some cases it will violate equal regard for the state to ignore or discount a person's or group's passionate concerns, there is no prima facie or pro tanto entitlement to be exempted from regulation because of the intensity of one's concern. And the fact that passionate concerns have a religious source is irrelevant.

We illustrate the point that the source of passionate concern is irrelevant by introducing a second group of claimants. These secular anti-vaxxers believe that vaccines are physically dangerous, bringing heightened risk of many health problems, not least of which is autism. They, too, are passionate about the importance of an exemption from the vaccine mandate. They, too, are entitled to the attention and concern of the state. Suppose that California were

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to create a religious exemption from the MMR vaccination requirement but permit no exemption for secular anti-vaxxers. If the difference in treatment were the result of devaluative attitudes toward the secular anti-vaxxers, it would violate equal regard. And the absence of a good reason for the difference in treatment might well carry a social meaning of disrespect. Thus, though it would depend on all the circumstances, it is plausible that California would be morally obligated to exempt secular anti-vaxxers if it exempted religious objectors. Although our view is not an equal treatment view, and equal regard can be violated without a difference in treatment, differences in treatment raise a red flag when the disadvantaged group is the victim of devaluative attitudes in the community. Such differences in treatment need to be looked at carefully to determine whether failures of equal regard have occurred.

Our conclusion that California, if it offers a religious exemption, might well be required to exempt secular claimants is likely a specific point of disagreement with Patten and Laborde. Both argue that in order to appropriately protect religion, it is essential that religion be privileged over many other commitments or practices. Both assimilate religion for these purposes to a broader category: for Laborde, it is the category of "integrity protecting commitments;" for Patten, it is "opportunit[ies] for self-determination."[23] It is unclear what the precise boundaries of these categories are; but both theorists seem to intend for these elevated categories to be relatively narrow and centered on religion. Patten, for example, restates his principle of fair opportunity for self-determination as the principle of fair opportunity for religious exercise.

Neither Patten nor Laborde, as we understand them, would include in their category of privileged commitments or opportunities the health convictions of the secular anti-vaxxers in our California hypothetical.[24] They would presumably find no fault with a vaccination regime that exempts religious but not secular objectors, and as we have suggested, we think that this is a mistake. But there is a more general point here. Part of what motivates our resistance to views of religious liberty that give elevated treatment to religion is the moral arbitrariness of privileging traditional religious beliefs over, for example, the convictions of the secular anti-vaxxers. How could it be morally justified to privilege deeply felt convictions because they have a source in traditional religion? Broader categories that are shaped around religion are, in our view, doomed to repeat the problem. How could it be morally justified to privilege, say, integrity protecting commitments over, say, ones that are central to one's identity or over what one takes to give life meaning? Or any of these categories over a parent's firm belief about the welfare of her child? That Patten's and Laborde's theories condone the exclusion of the hypothetical secular objectors illustrates the general worry.

But what if California exempts only the medically vulnerable from its MMR vaccination regime? Persons with highly compromised immune systems face deadly risks from vaccinations, and babies under a certain age are at some risk and get no benefit from vaccinations. Together, the immune-compromised and infants comprise the medically vulnerable. Everyone would agree that this group should be exempt from vaccine mandates. Would the failure to exempt either the religious or the secular anti-vaxxers violate equal regard in the face of an exemption for the medically vulnerable?

Some members of the U.S. Supreme Court have suggested that if California exempts the medically vulnerable from a vaccination requirement it is constitutionally—and at least by implication, morally—obligated to exempt religious objectors to vaccination. Patten thinks

[23] Laborde, *supra* note 14, chapter 6; Patten, *supra* note 9 at 144–54.

[24] If the secular anti-vaxxers in our California story do qualify for Laborde's or Patten's more general elevated category, the theory in question would be tantamount to a very broad liberty account, pursuant to which government must exempt those who passionately desire to act in a way that violates the law, unless the government has a justification that outweighs the pro tanto right.

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that theories of religious freedom that are based on equality alone support this startling view. These theories can be read to require equal treatment of religion, which in the context of exemptions, means equal accommodation. If the medically vulnerable are exempt, so must be religiously motivated vaccine objectors.

But equal regard does not require equal treatment. The vivid existential stakes of the medically vulnerable offer the state a strong and visible reason for singling them out for exemption. Assume, as is plausible, that exempting others would impede the policy goal of reaching herd immunity and thereby protecting the vulnerable from serious illness. Under these circumstances, a decision to deny an exemption for religious anti-vaxxers would likely be made without the influence of devaluative attitudes. Assuming the decision was not the product of such attitudes, it would not violate equal regard: given the strong justification for the decision, it would not carry a social meaning of disrespect. So equal regard does not entail that an exemption for the medically vulnerable requires an exemption for the religious.

More generally, equal regard does not require that religiously motivated claimants be given the same accommodations as individuals or groups with other needs. As far as equal regard is concerned, the state can treat different people differently unless that treatment is the product of devaluative attitudes or carries a social meaning of disrespect. When there are good reasons for differences in treatment, unless the relevant decisions are in fact the product of devaluative attitudes, those decisions will often not violate equal regard.

Our goal in this section has been to respond to the work of Cécile Laborde and Alan Patten. While neither Patten nor Laborde specifically addresses the equal-regard account of religious liberty we proffer here and in our companion essay, both have insisted that any equality-based theory that does not provide privileged treatment to religion will fail to protect religion in circumstances where widely shared intuitions would insist that it should be protected. We have argued that equal regard has no such short-coming.

We have a great deal of respect for the thoughtful work of both Laborde and Patten, but in the end, we obviously disagree with each about important aspects of religious liberty. We do not mean here to have fully aired our grounds for disagreement. But two aspects of the disagreement have emerged. First, we have shown that equal regard does not leave intuitive gaps unfilled but rather offers a satisfactory account of the moral protection of religion. Second, we have suggested that the broader categories to which Laborde's and Patten's theories accord privileged treatment do not escape the problems that dog the privileged treatment of religion. Set aside the good reasons for privileging beliefs that are true and based on good evidence over ones that are not. Religious freedom is concerned with privileged treatment of convictions or commitments that does not turn on their truth or the evidence for them. The problem, we have suggested, is that it is not morally justified to privilege—by recognizing a right to be exempt from regulation—passionate convictions that fall in certain categories, say, ones that are integrity protecting, over indefinitely many others in categories that people care about deeply or take to be deeply important. Demonstrating that conclusively will have to wait for another day.

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