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Abstraction From The Religious Dimension

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ABSTRACTION FROM THE RELIGIOUS DIMENSION

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INTRODUCTION

The recurring conflict between religious manifestations and existing legal norms has resulted in a principled debate in legal theory and liberal political philosophy regarding the role of religion in law and politics.[1] Ex-

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1. Robert Cochran and Michael Helfand expect that "given the potential for both law and religion to promote the most noble of human goods and the most depraved of human evils, the endless jousting between the two—each continuously seeking to tame the other—will undoubtedly remain a permanent feature of the human experience." Robert F. Cochran, Jr. & Michael A. Helfand, The Competing Claims of Law and Religion: Who Should Influence Whom?, 39 Pepp. L. Rev. 1051, 1052 (2013); see also Cécile Laborde, Liberalism's Religion (2017); Arif A. Jamal, Considering Freedom of Religion in a Post-Secular Context: Hapless or Hopeful? 6 O.J.L.R. 433 (2017); Christopher C. Lund, Religion is Special Enough, 103 Va. L. Rev. 481 (2017); Steven D. Smith, The Tortuous Course of Religious Freedom, 91 Notre Dame L. Rev. 1553, 1556 (2016) (discussing three challenges the constitutional protection of religious freedom faces); Micah Schwartzman, What if Religion is Not Special?, 79 U. Chi. L. Rev. 1351, 1353, 1427 (2012) (explaining that the "conflict between law and morality" is that religion is special for legal reasons (in the context of U.S. constitutional law) due to its

amples of concrete cases that reveal this conflict of standards can be seen in an increasing number of legislation and regulatory steps taken in liberal democracies,[2] which target religious manifestations that have been labelled as contentious in the public discourse because of their common characteristic: deviation from the dominant norms.[3] Among the examples of "high

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constitutional abilities (free exercise) and disabilities (non-establishment). However, religion is not special for normative reasons). (emphasis added).

2. The scope of the conflict of standards is broader than simply a conflict between the rules of the state and competing religious norms. This conflict also covers the tension between religious beliefs and what the dominant norms of a society expect from its citizens: e.g. the norm of having an open dialogue and being able to communicate. The latter has been presented as an argument in favor of the ban on face-covering veils among European states. Another example is the norm of shaking hands as a sign of greeting, without making a distinction in gender. This norm has been used as an argument in the Netherlands to refuse an orthodox Muslim man, who refrained from shaking hands with women, from a job as civil servant. *See* Rb. Rotterdam 6 August 2008, ECLI:NL:RBROT:2008:BD9643, ¶ 5.2.3 (Neth.).

3. In the legal discourse, some religious manifestations have been qualified as contentious. *See Jehovah's Witnesses of Moscow and Others v. Russia*, App. No. 302/02, Eur. Ct. H.R. (2010), ¶ 144, http://hudoc.echr.coe.int/eng?i=001-99221 ("The rites and rituals of many religions may harm believers' well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practiced on Jewish or Muslim male babies. It does not appear that the teachings of Jehovah's Witnesses include any such contentious practices."); *see also* Sohail Wahedi, *Marginaliseren van godsdienstvrijheid door abstraheren van de religieuze dimensie* [*Marginalizing Religious Freedom Through Abstraction from the Religious Dimension*], 9 RELIGIE & SAMENLEVING [RELIGION & SOC'Y] 128, 134-38 (2014). Not all religious manifestations that are considered contentious are immediately abandoned. At least two recent court rulings on the legality of adopted local bans on religious symbols show that an appeal to state neutrality and separation of Church and State is not enough to justify legislation that bans publicly wearing religious symbols. The Belgian *Raad van State*, Council of State ruled in October 2014, that a local ban on wearing religious symbols at school that targeted Muslim veils was incompatible with the right to religious freedom. Raad van State Oct. 14, 2014, No. 228.752, A.209.364/IX-8089, ¶ 52, http://www.raadvst-consetat.be (Belg.). Although the *Raad van State* ruled that the outcome in this case does not imply that a ban on publicly wearing religious symbols is *in general* contrary to religious freedom, it held that the risk of future disorder, which could justify such a ban, should be substantially present and not only hypothetical. *See* Sohail Wahedi, *Case no A.209.364/IX-8089*, 5 O.J.L.R. 624 (2016). Similarly, in 2015, the majority of the *Bundesverfassungsgericht*, the German Federal Constitutional Court, held that the North Rhine-Westphalia's ban on wearing religious symbols by school staff was not compatible with Germany's Basic Laws concerning non-discrimination and the right to freedom of faith. The Court held that an interference is only justified when there is proof of a concrete threat of public disorder or when the state's neutrality is in danger. In this case, the ban was not designed to respond to such a

profile" cases,[4] which deal with the disputed legality of such contentious religious manifestations, are legal initiatives taken in some European states to prohibit the wearing of religious veils such as the *Burqa* and *Niqab*.[5] Concerning the widely discussed French ban on face-covering veils, the European Court of Human Rights (ECtHR) upheld this controversial piece

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threat and it therefore constituted a breach of Basic Laws. See Bundesverfassungsgericht, BvR 471/10, 1181/10 Jan. 27, 2015. *See also* Sohail Wahedi, *BVerfG 471/10 and 1181/10*, 5 O.J.L.R. 368 (2016).

4. Although the cases this article refers to are predominantly European, this does not mean that the debate on the role of religion in law and politics is exclusively a European matter. Canadian and United States court rulings involve many cases that can be seen as equivalents of the European case law on free exercise of religion. *See Burwell* v. *Hobby Lobby* 573 U.S. (2014) (holding that the regulations promulgated by the Department of Health and Human Services requiring employers to provide their female employees with no-cost access to contraception, violated the Religious Freedom Restoration Act); *see also Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that "the Free Exercise Clause permits the State to prohibit sacramental peyote use, and thus to deny unemployment benefits to persons discharged for such use."); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the application of compulsory school-attendance law interfered with other fundamental rights, such as the Free Exercise Clause under the First Amendment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (stating that this case is a prime example of what "government may not do to an individual in violation of his religious scruples."). Among the Canadian examples of court cases that have ruled on the meaning and scope of religious freedom are *Mouvement laïque Québécois & Alain Simoneau v. Saguenay* [2015] S.C.R. 2 (Can.) (holding that states must not interfere in religion and beliefs and must remain neutral. The mayor reciting a prayer at the start and end of each municipal council meeting constitutes a breach of the state's duty of neutrality) and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256 (Can.) (holding that the school board's decision of prohibiting an orthodox Sikh, whose religion requires him to wear a *kirpan* (religious object that resembles a dagger and must be made of metal) infringed the plaintiff's freedom of religion. "This infringement cannot be justified in a free and democratic society") *Id.* at 298.

5. *See* Armin Steinbach, *Burqas and Bans: The Wearing of Religious Symbols Under the European Convention of Human Rights*, 4 CAMBRIDGE J. INT'L & COMP. L. 29 (2015); Myriam Hunter-Henin, *Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom*, 61 INT'L & COMP. L.Q. 613 (2012); Noemi Gal-Or, *Is the Law Empowering or Patronizing Women? The Dilemma in the French Burqa Decision as the Tip of the Secular Iceberg*, 6 RELIGION & HUM. RTS. 315 (2011); Reuven Ziegler, *The French Headscarves Ban: Intolerance or Necessity*, 40 J. MARSHALL L. REV. 235 (2006); *see generally* MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE (2012); Jill Marshall, *The Legal Recognition of Personality: Full-Face Veils and Permissible Choices*, 10 INT'L J. OF L. IN CONTEXT 64 (2014) (criticizing the so-called Burqa bans).

of legislation in *S.A.S. v. France*.[6] The Court held that the public interest of living together in peace exceeds an individual's belief, which prescribes face-covering veils for women.[7] A more recent example of adjustment to the dominant norms is present in *Osmanoğlu & Kocabaş v. Switzerland*.[8] In this case, the ECtHR held that the Swiss authorities' denial to exempt Mus-

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6. *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. ¶¶ 122, 137-59 (2014). Although in *S.A.S.* the ECtHR considered wearing face-covering veils constituted a manifestation of personal beliefs, it did not rule that the French ban was a violation of religious freedom. In this fiercely criticized judgment, the Court held that the lack of consensus among the party states, concerning the legal admissibility of wearing face-covering veils in public, provides France with broad discretion on what types of norms are incompatible with basic rules of an open democracy, such as social communication and the idea of living together in peace. *See also* Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 128 (2005) (describing the margin of appreciation doctrine of the ECtHR and explaining how consensus among party states influences the scope of the margin of appreciation party states have).

7. The French tradition of *laïcité*, which requires a strict separation between religious and state matters, has made the free exercise of religion a private matter. *See* Eva Brems, *S.A.S. v. France: A Reality Check*, 25 NOTTINGHAM L.J. 58 (2016); Hakeem Yusuf, *S.A.S. v France: Supporting Living Together or Forced Assimilation*, 3 INT'L HUM. RTS. L. REV. 277 (2014); Sally Pei, *Unveiling Inequality: Burqa Bans and Non-discrimination Jurisprudence at the European Court of Human Rights*, 122 YALE L.J. 1089 (2013) (discussing the court ruling in *S.A.S. v. France*).

8. *Osmanoğlu & Kocabaş v. Switzerland*, App. No. 29086/12, Eur. Ct. H.R. (2017). The public call for adjustment to the dominant norms could influence the way judges balance the interests at stake in a free exercise case. An example in this context is the way judges have responded to the legality of the religious refusal to shake hands as a sign of greeting. This contentious religious manifestation was debated extensively in the Dutch society before reaching the courtrooms. In 2004, the Dutch Minister of Immigration, Rita Verdonk, was denied a hand shake by an imam (the Islamic prayer leader). This incident resulted in a heated debate about the acceptability of such behavior with reference to religious freedom. The Minister wrote in response to parliamentary questions that the refusal to shake hands is contrary to the Dutch standard of greeting everyone through shaking hands, regardless of gender. *See Tweede Kamer der Staten-Generaal [The House of Representatives], Aanhangsel Handelingen II [Parliamentary Proceedings II]* 2004/2005, at 1457-58 (Neth.). The reasoning judges have used in dealing with cases regarding refusal to shake hands on religious grounds shows analogies with public opinions that have framed this practice as an act that attests to unequal gender-treatment. *See* CRvB 7 May 2009, ECLI:NL:CRVB:2009:BI2440, ¶¶ 7.6, 7.10 (Neth.); Hof 's-Gravenhage 10 April 2012, ECLI:NL:GHSR:2012:BW1270, ¶ 13 (Neth.); Elma Drayer, *Vrome praatjes [Pious talks], de Volkskrant* (Neth.), July 15, 2015, at 2 (qualifying the convictions that shape the religious basis to refuse shaking hands of the opposite gender as "measly views" that immediately affect the acquired values within modern societies, such as gender equality).

lim girls from taking part in mixed-school swimming does not violate the right to religious freedom. The judges unanimously held that although denial of the exemption request interfered with religious freedom, this interference was justified in light of the promotion of pupils' integration into Swiss society.[9] In a similar case, a Muslim pupil had asked the Federal Constitutional Court of Germany, the *Bundesverfassungsgericht* (*BVerfG*), to review a decision of the Federal Administrative Court, the *Bundesverwaltungsgericht* (*BVerwG*). The *BVerwG* had ruled that the school authorities' refusal to exempt applicant from joint swimming lessons did not violate the right to religious freedom.[10] The *BVerfG* did not accept the complaint for adjudication, as the petitioner failed to explain convincingly why the *Burkini* could not qualify as a religious alternative for other swimming clothes.[11] Another typical example in this context is the ongoing debate in many European countries regarding the legality behind the ritual slaughtering of animals, such as the *Halal* and *Kosher* way of slaughtering.[12] Hence, the recent court rulings are among the many examples of cases that have challenged the legal admissibility of contentious religious manifestations in liberal democracies.[13]

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9. *See Osmanoğlu & Kocabaş v. Switzerland*, *supra* note 8, at ¶¶ 95-101 (holding that a child's interest to assimilate into the Swiss society supersedes religious convictions of parents).

10. *See* Bundesverfassungsgericht, BvR 3237/13, ¶ III.3.aa, Nov. 7, 2016, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/11/rk20161108_bvr323713.html (holding that the female applicant did not adequately substantiate her constitutional complaint that her *Burkini*, which covered her whole body except for her face, could not be considered an adequate substitute for swimming clothes that are clearly disallowed by her religion).

11. *Id.; See* Sohail Wahedi, *BVerfG 3237/13*, 6 O.J.L.R. 426 (2017).

12. *See* Aleksandra Gliszczyńska-Grabias & Wojciech Sadurski, *The Law of Ritual Slaughter and the Principle of Religious Equality*, 4 J.L. RELIGION & ST. 233, 237-53 (2016) (outlining European approaches to the legal acceptability of ritual slaughter of animals); Carla M. Zoethout, *Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter*, 35 HUM. RTS. Q. 651 (2013); Markha Valenta, *Pluralist Democracy or Scientistic Monocracy? Debating Ritual Slaughter*, 5 ERASMUS L. REV. 27 (2012) (discussing the Dutch debate on this matter); Jeremy A. Rovinsky, *The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World*, 45 CAL. W. INT'L. L.J. 79 (2014); Claudia E. Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 GEO. WASH. INT'L. L. REV. 839 (2007) (discussing European case law on the admissibility of ritual slaughter).

13. With reference to either the lack of integration of migrant groups or by reliance on the central values of "the society" many European politicians have started to dispute the legal admissibility of a wide range of religious manifestations. As such, in 2014, French politicians proposed a total ban on Muslim veils in universities referring to the principles of French secularism. The Austrian parliament passed an "Islam bill"

Contentious religious manifestations that compete with legal and majoritarian norms of liberal democracies have given rise to the question whether "religion" should matter when one is thinking about the creation of exemptions for particular beliefs and practices.[14] Hence, the conflict of norms that is present in contentious religious manifestation cases opens a discussion about accommodation,[15] which in this context deals with the

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to prohibit Islamic organizations from receiving foreign funding. The bill has been presented to be an effective tool to prevent Muslim radicalization. The Swiss referendum on minarets and proposed or actual bans in various countries on ritual slaughter, ritual male circumcision and different types of religious dress codes are among the other examples of cases that have been regularly subjected to public debate. *See* RONALD DWORKIN, RELIGION WITHOUT GOD, 145 (2013) (arguing against the Swiss minarets referendum using a critical-normative theory). *See also* LABORDE, *supra* note 1, at 33 (doubting that majoritarian biases against contentious religious manifestations draw on a "liberal *philosophical* bias in favor of belief-based and voluntarily chosen religious practices.").

14. This article does not aim to provide an exhaustive description of religion. Rather, it aims to theorize the way liberal political philosophers have conceptualized religion for legal and political purposes. This approach fits Cécile Laborde's recent call that legal theorists and political philosophers do not need "a semantic or a descriptive notion of religion but, rather, an interpretive one." *See* LABORDE, *supra* note 1, at 1-3 (arguing that although "religion" has played a very important role in the development of liberal political philosophy through the history, it has remained an "under-theorized" concept). *See also* Lael Daniel Weinberger, *Religion Undefined: Competing Frameworks for Understanding Religion in the Establishment Clause*, 86 U. DET. MERCY L. REV. 735 (2009) (presenting two definition frameworks for "religion" and discussing their relevance for the First Amendment's non-establishment clause). *See* LABORDE, *supra* note 1 (elaborating on the role of religion in liberal political philosophy). *See also* Yossi Nehushtan who has rightly pointed out: "[t]he central question is whether the fact that religion is special in certain aspects justifies affording it a special weight as a reason to grant or to refuse to grant a conscientious exemption." Yossi Nehushtan, *Religious Conscientious Exemptions*, 30 L. & PHIL. 143, 149 (2011); *Cf.* Paul B. Cliteur, *Tolerantie en Theoterrorisme* [*Tolerance and Theoterrorism*], *in* FRANS KRAP & WILLEM SINNINGHE DAMSTE (EDS.), OVER TOLERANTIE GESPROKEN [SPEAKING OF TOLERANCE] 157, 167-69 (2016) (criticizing the state of affairs in liberal democracies by claiming that there is a "lack of tolerance." Radicalized religious people who use violence, are *intolerant* towards social plurality. As such, they do not tolerate unpleasant messages about their Gods and prophets. On the other hand, there is "too much tolerance," as liberal democracies do not take serious steps to prevent radicalization of certain religious groups).

15. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV., 685, 686 (1992). A quick scan of the scholarly debate about the "specialness of religion" informs us that liberal political philosophers and legal theorists rely on legal judgments and public debates to develop normative arguments that are meant to answer the question what the legal definition of

possibility, feasibility and desirability of creating special exemptions for the beliefs, practices and traditions of some citizens.[16] In the liberal and non-sectarian,[17] meaning, non-religious theories of religious freedom,[18] the question of religious accommodation is put under critical scrutiny by legal theorists and liberal political philosophers.[19] As such, these scholars have either challenged or defended the constitutional value of religion: the special legal solicitude for religion.[20] An essential part of the religious accom-

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religion and religious freedom should be. Thus, the broad public debate on religious manifestations has an indispensable heuristic value for the scholarly debate about the role of religion in law and politics. *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 348 (2008).

16. *Cf.* Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 603 (2006) (believing that balancing the interests, which are primarily at stake when religious norms are at odds with public rules, should be related to the specific context of a particular case: it is not possible to provide a balancing formula). The best we can do is to show that we have explicitly thought about the problem of justice. One potential way to do so is to introduce a system that is focused on the question of religious exemptions. Koppelman says that due to the impossibility to "protect all deeply valuable concerns, more specific rules are necessary. Accommodation of religion is one of these." *Id.*

17. The term "sectarian" has a functional meaning in the literature on the role of religion in law and politics. It conceptualizes theories using religious arguments (sectarian) to justify the special legal solicitude towards religion.

18. Generally, sectarian theories of religious freedom justify the legal protection of free exercise with an appeal to the distinct value of religion. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15 (1985) (arguing that the liberal state is not able to exclude ultimately the possibility that religious claims might be true, which means that the transcendental authority of such claims has more value than the claims of the state). McConnell states the following:

> If there is a God, His authority necessarily transcends the authority of nations . . . . For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a [transcendent] authority could exist. Religious claims thus differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests.

McConnell continued to defend this line in recent publications. *See generally*, Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 786-89 (2013); *Cf. also* Rafael Domingo, *A New Global Paradigm for Religious Freedom*, 56 J. CHURCH & ST. 427, 432 (2014) (defending a similar argument); *see also* Lund, *supra* note 1, at 490 (providing an overview of and discussing some of the religious arguments in favor of religious freedom).

19. *See generally* CÉCILE LABORDE & AURÉLIA BARDON, RELIGION IN LIBERAL POLITICAL PHILOSOPHY (2017).

20. *See* Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 LAW & PHIL. 581 (2015), for the theoretical distinction between sectarian and liberal

modation debate has been marked by the following two questions: accommodation for whom and for what reasons?[21] These are the two—although roughly formulated—questions legal theorists and liberal political philosophers focus on to reflect on the normative foundations of toleration for and protection of religious beliefs and practices in liberal democracies.[22]

This article argues that the scholarly debate in legal theory and liberal political philosophy about the role of religion in law and politics has been dominated by the following normative question: *should* liberal democracies care about religion *qua* religion for the public justification of decisions taken in law and politics?[23] This article consists of three substantive parts and it focuses on the question whether *the law* in liberal democracies should care about religion *qua* religion. In other words: does religion *qua* religion deserve special legal protection?

To answer this question, Part I develops a conceptual framework of normative positions, each theorizing a particular approach to religion in law and religious claims for exemptions from general laws.[24] This Part elabo-

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theories of religious freedom. *Cf.* Nehushtan, *supra* note 14, at 145-50. Nehushtan, whose work is concerned with the liberal discussion of granting exemptions, speaks of functionalist pro-religious approaches to deal with religious claims for exemptions from general laws. *See also* Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993, 996 (2010) (introducing and discussing the right to moral freedom as an extended version of the rights to religious freedom and arguing that this broadening is justified in light of the ecumenical and non-sectarian account of moral freedom).

21. These two questions are helpful to deal in a more systematic way with the controversies that arise out of free exercise. Brian Leiter compares an orthodox Sikh boy to a Sikh boy from a traditional family. Both want to wear a dagger: the orthodox Sikh boy for religious purposes (he wants to wear a *kirpan*, a religious object made of metal that resembles a dagger) and the other boy for reasons of tradition. BRIAN LEITER, WHY TOLERATE RELIGION? 1 (2013). This case questions what the justification would be to treat the two differently. That is to say, Leiter asks, "[w]hy the state should have to tolerate exemptions from generally applicable laws when they conflict with *religious* obligations but not with any other equally serious obligations of conscience." *Id.* at 3.

22. *See* Micah Schwartzman, *Religion, Equality and Anarchy*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 15 (2017) (arguing that the current debate in liberal political philosophy about the role of religion in law and politics consists of two more specific debates on the role of religion for the purpose of state actions (public justification debate) and its relevance for granting exemptions (the religious accommodation debate) to certain groups in society).

23. *See id.*

24. The concepts introduced and discussed in Part I stand for different theoretical frameworks present in the liberal theories of religious freedom that include arguments concerning the way liberal democracies could deal with religion in law and religious claims for exemptions from laws. This way of conceptualizing extant liberal approaches

rates on the body of arguments that has been developed by scholars in legal theory and liberal political philosophy, to discuss the special legal solicitude for religion. These influential liberal approaches are classified into *rejection*; *substitution*; *generalization*; *equation* and *representation*. This classification of extant liberal theories might look "oversimplified," but it is a useful method to bring positions that use similar arguments under the same category.[25]

Part II draws on the framework of normative positions to answer the question whether religion *qua* religion deserves special protection in law. This Part provides a threefold answer to this question. First, it provides an overview of the arguments that suggest why religion definitely does not require special legal protection *qua* religion. Second, it provides insight into the arguments used to claim that religion does not necessarily require special legal protection. Third, it draws attention to some arguments that explain why religion *qua* religion deserves special protection. This threefold response is used to introduce the synthesis of the normative positions that are conceptualized in this article. This synthesis is called *abstraction from the religious dimension.*

The synthesis of the normative positions is further disentangled in Part III, which claims that abstraction from the religious dimension is the binding characteristic of the normative framework developed in this article. This Part explains how abstraction dismisses the special legal protection of religion *qua* religion and argues that abstraction renounces arguments justifying religious freedom with an appeal to distinctly religious values. In addition, it explains how abstraction draws on a general framework of values to justify free exercise. The main argument of this Part is that abstraction stands for a non-sectarian and religion-empty understanding of religious freedom: free from distinctly religious values, though not hostile to religion.[26]

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towards the role religion could have for legal and political purposes elaborates on Cécile Laborde's discussion of the *substitution* and *proxy* approaches. *See* Laborde, *supra* note 20, at 583.

25. *See* Schwartzman, *supra* note 22 at 16 (explaining how the development of a general theory about the role of religion for legal and political purposes helps to identify the inconsistencies that are present in both, public justification theories and religious accommodation theories). *See also* Smith, *supra* note, 1 at 1568 (criticizing the wave of generalization in the scholarly debate about religious freedom).

26. Although the main purpose of this article is to introduce abstraction without having a normative judgment about this binding feature of the liberal theories of religious freedom, the framework of argumentation patterns provides an appropriate base to reflect critically on the contemporary direction of the law and religion debate in legal theory and liberal political philosophy. *See* Michael W. McConnell, *Why Protect Relig-*

The main conclusion of this article is that the liberal theories of religious freedom have one important commonality: *abstraction from the religious dimension*. The central message of this shared feature is that for the legal analysis of religious freedom or a clear case of religious manifestation, it is not possible, nor necessary to describe or understand the case at stake in distinctly religious terms. Thus, abstraction covers and connects arguments that oppose to justify the special legal protection of religious freedom, religious beliefs and practices in light of *any presumed* religious value. The argument is that liberal theories of religious freedom do not need to value, understand or engage in a semantic discussion about "religion" to talk about religious freedom. Abstraction also covers the normative response to the question: should *the law* in a liberal democracy care about religion, because it is religion? Allegedly, religious toleration should not take place due to any distinctly religious value. Rather, a broader and less specific (meaning in this context sectarian) framework of values should be used to justify and explain free exercise of religion in liberal democracies.[27]

I. THEORETICAL REFLECTIONS ON LAW AND RELIGION

What do current debates in legal theory and liberal political philosophy tell us about the way modern liberal democracies interpret, value, protect and thus deal with religious freedom? To answer this question, we must focus on a broad set of religious freedom theories. The main distinction that has been made in the literature on the role of religion for granting exemptions and justifying decisions in law and politics concerns the one between

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ious Freedom?, 10 CHRISTIAN L. 15 (2014) (warning of the "new whiff of intolerance" towards religious freedom as a "bedrock value" of constitutional democracies).

27. The main research method of this article is a conceptual meta-analysis of positions defended in the "specialness-debate" of religion, with a particular focus on the liberal theories of religious freedom. To identify the binding characteristic of the normative positions, this article has developed a matrix of positions. This matrix focuses on the arguments developed to deal with the question whether religion *qua* religion needs special legal protection. Based on the commonalities between the arguments present in the liberal theories of religious freedom, the approaches are conceptualized and classified as *rejection*; *substitution*; *generalization*; *equation* and *representation*. This classification of positions is an appropriate method to develop a normative legal-philosophical framework that theorizes the main claim of this article: *abstraction from the religious dimension* as the binding characteristic of the liberal theories of religious freedom. *See also* Schwartzman, *supra* note 22, at 28 (explaining how building up a theory in a systematic way sharpens our mind to see the inconsistencies in the existing body of knowledge).

liberal and sectarian theories of religious freedom.[28] As such, sectarian theories justify the special legal solicitude towards religion with an appeal to some values that are presented as distinctly religious,[29] although this privilege is usually limited to some officially recognized religions.[30] This Part

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28. *See* LABORDE & BARDON, *supra* note 19, at 2-4 (explaining that the discussion about religion in law is a sub-theme of the broader debate among liberal political philosophers and legal theorists about the relationship between religion and the liberal state); Schwartzman, *supra* note 22, at 15. *See also* Laborde, *supra* note 20, at 582 (explaining the distinction between liberal and sectarian theories of religious freedom and arguing that the transcendental value of religion does not justify religious freedom). The paradigmatic distinction between sectarian and liberal theories of religious freedom is present within the paradigm of "religion" in liberal political philosophy. Therefore, there are non-liberal, non-sectarian theories of religious freedom, such as communist theories. *See* Paul B. Anderson, *Religious Liberty under Communism*, 6 J. CHURCH & ST. 169 (1964). Also, there are hybrid theories of religious freedom, using a mixture of liberal and sectarian arguments to justify religious freedom and the legality of certain religious manifestation. *Cf.* the Israeli approach to religious freedom. *See* Donna E. Arzt, *Religious Freedom in a Religious State: The Case of Israel in Comparative Constitutional Perspective*, 9 WIS. INT'L L.J. 1 (1990).

29. DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 116, 117 (2009) (using a transcendental argument to justify the special legal protection of religion). *See also* RAFAEL DOMINGO, GOD AND THE SECULAR LEGAL SYSTEM 79, 80-82 (2016) (considering the "protection of suprarationality" as the "ultimate justification" for protecting religion *qua* religion); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1183 (2013); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 57 (1996) (claiming that within the context of U.S. constitutional law, the "split-level character" could only be clarified in light of an exclusive "religious justification" of religious freedom).

30. *Cf.* The Constitution of the Islamic Republic of Iran that contains a sectarian explanation of "religious freedom." Articles 12 and 13 of the Constitution exhaustively enumerate religions that are allowed to practice their faiths within the legal framework of the Islamic Republic. The "recognized" religions include Zoroastrianism, Judaism and Christianity. The Shia Jafari school of beliefs is the "eternally immutable" state's religion. *See* QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (1980) (IRAN), http://www.divan-edalat.ir/show.php?page=base, (translation) (last visited Apr. 3, 2018) http://www.alaviandassociates.com/documents/constitution.pdf. Sectarian theories of religious freedom are also advocated outside theocracies. The Dutch orthodox Christian political party, *Staatkundig Gereformeerde Partij* [*The Dutch Reformed Political Party*] ("SGP") recently argued for a sectarian explanation of religious freedom. In their manifest, the *SGP* defends the argument that the state should make a distinction between religions that have shaped the Dutch tradition (including Christianity and Judaism and excluding Islam), to preserve the Judeo-Christian character of the Dutch culture and society. *SGP, Islam in Nederland* [*Islam in the Netherlands*] 3, 4 (2017), https://www.sgp.nl/actueel/manifest—islam-in nederland/6125 (last visited Apr. 3, 2018).

develops a conceptual framework of normative approaches to religion in law.[31] This framework classifies the liberal positions into five categories. First, principled rejection of arguments that justify the special legal protection of religion with an appeal to values that are presented as distinctly religious. Rejection also involves arguments that reject to qualify specific beliefs or manifestations as religious. Second, substitution that consists of arguments explaining why religion is a subset of a broader human faculty, namely conscience. Substitution also covers arguments that say religious freedom has no distinct constitutional value, as other liberties, such as the freedom of expression and association in combination with the right to non-discrimination, in practice could guarantee free exercise of religion. Third, generalization that opposes a sectarian interpretation of religion and religious freedom, arguing that religion stands for deep ethical commitments of human beings and that religious freedom is the general right that gives human beings access to ethical independence and moral freedom. Fourth, equation, which says that equality of treatment should be the norm when authorities are dealing with deep commitments of human beings who ask for exemptions from the application of general laws. Fifth, representation, which justifies the special legal protection of religion in light of values that are not necessarily religious in nature. Religion represents in this position certain values that let human beings flourish and this particular argument justifies the special legal protection of religion.[32]

A. *Rejection*

The rejectionist position rejects arguments that justify religious freedom with an appeal to values that are considered distinctly religious. This position consists of two broader categories: *principled* rejection and *non-principled* rejection. Non-principled rejection claims that the concept of religion does not apply to certain beliefs, traditions or manifestations.[33] However, non-principled rejection does not exclude the option to use the term "religion" to consider other manifestations as religious for reasons of con-

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31. The term "principled" used to discuss the sub-categories of *rejection* and *substitution* does not refer to Ronald Dworkin's principles. Rather, the term is meant to indicate that the *principled* sub-categories provide a deeper philosophical justification for the argumentation pattern they defend. *See generally* DWORKIN, supra note 13.

32. The focus is on the appropriate interpretation of "the notion of religion in law (regardless of whether the category of freedom of religion is upheld or not)." Laborde, *supra* note 20, at 594.

33. *See generally* AMOS N. GUIORA, FREEDOM FROM RELIGION 19 (2009); Wibren van der Burg, *Beliefs, Persons and Practices: Beyond Tolerance*, 1 ETHICAL THEORY & MORAL PRAC. 227, 233 (1998) (using a similar typology to discuss religious toleration).

sensus and tradition. Thus, it preserves the term "religion" for particular religions and excludes other religions, as those do not fall under the specific definition of "religion." The appropriate example is the rhetorical approach that is present in the political discourse to consider Islam not a religion, but rather a totalitarian ideology with a closed internal system of rules that prescribe in detail how one should live a life. Against this backdrop, it has been argued that practices and beliefs that are based on Islam should not have access to the privileges of religious freedom.[34] Principled rejection draws primarily on the idea that there are no reasons, which could be considered principled, to tolerate religion *qua* religion within liberal democracies.[35]

1. Principled Rejection

The principled rejectionist position rejects, for principled reasons, to tolerate religion *qua* religion. This position starts from the question what the philosophical notion of pure toleration (i.e. toleration on principled grounds) says about the justification of the special legal protection of religion *qua* religion. Thus, it wonders whether the concept of toleration provides any room for arguments that justify religious toleration because of *any specialness* of religion (i.e. distinctly religious values). This sub-position defines pure toleration as the situation in which the dominant group sees on moral or epistemic grounds a reason to allow (meaning tolerate on principled grounds) another group of citizens to continue with manifestations that are considered objectionable by the dominant group. Principled rejection draws on this particular definition of toleration and concludes that the principle of toleration does not require special legal protection for religion *qua* religion.[36]

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34. *See infra* Part II.

35. LEITER, *supra* note 21, at 7, 55, 67; *see also* Schwartzman, *supra* note 22, at 22; Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217 (2017); Cécile Laborde, *Conclusion: Is Religion Special?*, *in* JEAN LOUISE COHEN & CÉCILE LABORDE (EDS.), RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 423 (2016); DWORKIN, *supra* note 13, at 111, 144; NUSSBAUM, *supra* note 15, at 164; WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 138 (2005); James Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 943 (2005); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

36. Toleration can be justified on two grounds: moral or epistemic grounds. Brian Leiter concludes that there is nothing special, in terms of morality or epistemology, to warrant toleration of religion *qua* religion. LEITER, *supra* note 21, at 7-13; *see* LORENZO

The principled rejectionist questions whether one can identify more principled reasons, i.e. reasons that find their origins in morality or epistemology that could justify a toleration regime for religion *qua* religion. To answer this question, the principled rejectionist position makes a distinction between two potentially distinctive characteristics of religion: "the categoricity of religious commands" and "insulation of religious beliefs from evidence and reason."[37] This particular feature is closely related to the argument that religious beliefs might be distinctive, due to their involvement in a "metaphysics of ultimate reality."[38]

a. *No moral grounds to tolerate religion* qua *religion*

According to the principled rejectionist position, the moral reasons for toleration *only* justify the special legal protection of human conscience. This moral justification of liberty of conscience does not simultaneously single out religion and its categoricity of commands for special legal protection. Thus, no evidence could support the argument that people in the Rawlsian "original position" will opt for religious freedom, *next to* equal liberty of conscience.[39] Hence, the emphasis on the need for liberty of conscience does not make a distinction between the backgrounds of conscientious commands: it does not single out religion.[40] Leiter explains this argument as follows: "Rawls repeatedly lumps religious and moral categoricity together, so that it is fair to say that the only thing individuals behind the veil of ignorance know is that they will accept some categorical demands, not they will accept distinctively religious ones, that is, ones whose grounding is a matter of faith."[41] Similarly, the utilitarian moral arguments for tolera-

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ZUCCA, A SECULAR EUROPE: LAW AND RELIGION IN THE EUROPEAN CONSTITUTIONAL LANDSCAPE 8, n. 17 (2012) (providing a broader definition of toleration).

37. LEITER, *supra* note 21, at 33-34.

38. *Id.* at 47. *See also* NUSSBAUM, *supra* note 15, at 168.

39. Rawlsian morality arguments in favor of toleration states that people in the original position, when they perform behind the "veil of ignorance," will definitely accept some categorical demands, though these are not of a religious nature *per se*. In other words, this ground of toleration does not provide a principled argument to tolerate "religion *qua* religion." *See generally* LEITER, *supra* note 21, at 55.

40. *See* Simon Căbulea May, *Exemptions for Conscience*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 191 (2017) (arguing that accommodation of sincere conscientious objections to generally applicable laws face the same criticism of unfair treatment as religious accommodation does).

41. LEITER, *supra* note 21, at 55; *See* Andrew Koppelman, *A Rawlsian Defence of Special Treatment for Religion*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 31 (2017) (presenting some Rawlsian arguments in defense of religious freedom).

tion, which focus on the maximization of human well-being that, among others, depends on the ability of people to live by their conscience, do not prescribe special protection of religion. Therefore, toleration on moral grounds does not support the arguments that aim to single out religion as a matter of principled toleration.[42]

b. *No epistemic grounds to tolerate religion qua religion*

The other principled ground for toleration that has been found in the epistemic, Millian arguments, draws on the relevance of principled toleration for knowledge expansion. This principled ground seems to be at odds with the second potentially distinctive feature of religion: insulation of religious beliefs from evidence and reason.[43] As Leiter argues, it is far from obvious "to think, after all, that tolerating the expression of beliefs that are *insulated* from evidence and reasons—that is, insulated from *epistemically relevant* considerations—will promote knowledge of the truth."[44] Although this argument does not say anything about the relevance of *religious manifestations* for knowledge expansion, it is conceivable to say that principled rejection equally rejects arguments that aim to justify on epistemic grounds toleration for religious conduct, because of religion. The argument at this point is that, after all, there is no reason to deny that religious practices are, like religious beliefs, equally insulated from evidence.

c. *Conclusion*

The principled rejectionist position claims that there are no principled reasons (i.e. reasons that are grounded in morality or epistemology) to tolerate religion in law *qua* religion.[45] Principled toleration only requires equal protection of liberty of conscience and it does not require, on the same principled grounds, the special protection of religion. Toleration of conscience via liberty of conscience also provides protection to religious con-

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42. LEITER, *supra* note 21, at 55, 61.

43. Leiter argues that reliance on Mill's perspective on what is "true for the right reasons" will not make a strong case to tolerate religion *qua* religion for epistemic reasons; religious faith excludes the idea that there might be some uncovered truth. *Id.* at 58.

44. *Id.* at 55-56.

45. *See also* Kimberley Brownlee, *Is Religious Conviction Special?*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 309 (2017) (arguing that religious convictions cannot be singled out for special legal treatment on moral or epistemic grounds and that religious and non-religious moral convictions that are protection-worthy should receive the same amount of protection, if they meet certain conditions).

science. There is *no principled reason* to make a *legal distinction* between human conscience *in general* and religious conscience *in particular*.[46] This position results in the conclusion that a distinct protection of religious claims of conscience is undesirable for principled reasons. Thus, no moral reason could justify a legal regime that only grants exemptions to religious claims of conscience. As Leiter says: "a selective application to the conscience of only religious believers is not morally defensible."[47]

2. Non-Principled Rejection

Non-principled rejection rejects the qualification of certain beliefs, speeches or conducts as religious and it is mainly present in the political and legal discourse. As such, one can refer to the political approach of the Dutch right-wing party, *Partij voor de Vrijheid,* the Party for Freedom, towards Islam.[48] This political party has repeatedly argued that Islam is not a religion, but a totalitarian ideology that should not have access to the privileges of religious freedom.[49] Consequently, it has proposed an immigration ban from Islamic countries, the legal prohibition of the Koran and the closure of all mosques and Islamic schools in the Netherlands.[50] Non-principled rejection in the legal discourse occurs when someone asks for permission to perform a practice that is portrayed as religious but not apparently allowed by authorities. In some of these cases that deal with the legal admissibility of norm-deviant practices, the court or other parties involved, refuse to say that the practice at stake has, at least potentially, a religious dimension.

As such, the Dutch Nijmegen municipality did not allow a Pastafarian female, a follower of the Church of the Flying Spaghetti Monster, to keep a pasta strainer on her head for her driver's license photograph.[51] According to the authorities, this Church does not belong to any religion.[52] It is rather a parody of religion and its manifestations are expressions of the freedom of speech.[53] Among other examples of Dutch court cases that contain argu-

46. Religion is a subset of the human conscience. Therefore, its free exercise should be protected through liberty of conscience.

47. LEITER, *supra* note 21, at 133. *See also* Himma, *supra* note 35, at 219.

48. *Tweede Kamer der Staten-Generaal* [*The House of Representatives*], *Aanhangsel Handelingen II* [*Parliamentary Proceedings II*], 2016/2017, at 2-6-61 and 2-6-62 (Neth.).

49. *Id.*

50. *Id.*

51. Rb. Gelderland 17 January 2017, ECLI:NL:RBGEL:2017:275, ¶ 6 (Neth.).

52. *Id.*

53. *Id.*

ments that fall under the scope of non-principled rejection, one could refer to tax exemption litigations of the Scientology Church[54] and the Church of Satan case.[55]

B. *Subsitution*

The substitution position claims that both religion and religious freedom have adequate substitutes.[56] As the rejectionist position, substitution consists of *principled* substitution and *non-principled* substitution.[57] The sub-category of principled substitution draws on arguments that say religion is a subset of a particular faculty that is worthy of special legal protection. This protection-worthy faculty concerns human conscience.[58] The argument is that free exercise of religion and the admissibility of religious claims for exemptions could be adequately ensured via freedom of conscience.[59] Non-principled substitution says that basic liberties, such as the right to free

54. Hof. Den Haag 21 October 2015, ECLI:NL:GHDHA:2015:2875, ¶ 8.16 (holding that the activities of the Scientology Church—in particular, Auditing and Training—are commercial in nature and not religious, serving primarily private interests. Thus, the Church is being ineligible for tax exemptions).

55. The case of Saint-Walburga, which focused on sisters forming the Church of Satan, turned on the question whether a brothel could be considered a religious institution. HR 31 October 1986, ECLI:NL:HR:1986:AC9553 (Neth.); *Cf. Religion Based on Sex Gets a Judicial Review*, N.Y. TIMES, http://www.nytimes.com/1990/05/02/us/religion-based-on-sex-gets-a-judicial-review.html (last visited March 3, 2018) (discussing a case in which a couple charged for pimping and prostitution claimed that the activities that took place in the Church were part of their sacred religion).

56. *See generally* Laborde, *supra* note 1; Michah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1099 (2014) (discussing the "substitution" position).

57. The philosophical grounding for principled substitution clarifies the distinction: *see supra* note 31 (explaining the relevance of the terms principled v. non-principled in the conceptual framework this article has developed).

58. This article will not engage in the discussion about the different conceptions of conscience, nor will it discuss the argument that there is a difference between human conscience and religious conscience. *See* Lund, *supra* note 1, at 503, 504. For the argument that this article aims to develop, it is sufficient to indicate that some liberal theorists of religious freedom argue that religion and religious freedom have certain substitutes.

59. *See* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 89 (2011) (arguing that given "the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but rather, all core beliefs that allow individuals to structure their moral identity."). *See also* LABORDE, *supra* note 1, at 66, 67 (critical of the position defended by Jocelyn Maclure and Charles Taylor).

speech and the freedom of association, in conjunction with non-discrimination and some security rights, such as the general ban on rape and murder, are *in practice* enough to guarantee the free exercise of religion. Thus, as Nickel has rightly asked: "who needs freedom of religion," when this right turns out to be superfluous?[60]

1. Principled Subsitution

Principled substitution says that religion is a subset of a broader protection-worthy category, the conscience.[61] With reference to the work of Roger Williams, Nussbaum argues:

> The faculty with which each person searches for the ultimate meaning of life is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly. The faculty is identified in part by what it does—it reasons, searches, and experiences emotions of longing connected to that search—and in part by its subject matter—it deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudicing the question whether there is a meaning to be found, or what it might be like. From the respect we have for the person's conscience, that faculty of inquiring and searching, it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the right of others or comes up against some compelling state interest.[62]

According to Nussbaum, this way of reasoning helps us "to make sense of our feeling that there really is something about religion or quasi-religion that calls for special protection and delicacy."[63] And this protec-

60. Nickel, *supra* note 35, at 943.

61. *See also* Koppelman, *supra* note 41, at 38 (rejecting the claim that religion is a subset of human conscience and arguing that the latter "is at best a complement, not a substitute, for teleologically loaded terms such as religion.").

62. NUSSBAUM, *supra* note 15, at 168-69. Nussbaum's conception of religion as a protection-worthy sub-category of human conscience fits her work developing a universally applicable framework for social justice. Nussbaum's normative framework—which is closely linked to political liberalism—elaborates on Aristotelian Essentialism and focuses on identifying the main characteristics of a human life. *See* Martha C. Nussbaum, *Human Functioning and Social Justice. In Defense of Aristotelian Essentialism*, 30 POL. THEORY 202 (1992).

63. *See* NUSSBAUM, *supra* note 15, at 169 (arguing that the search for meaningful answers to ultimate questions of life helps us to keep our special solicitude for religion, as a matter of respect for a broader human faculty, separated from "silly" faculties. That

tion-worthy "something" is the human conscience, which is part of the inalienable dignity people possess, regardless of their educational background, the state of richness, health, religiosity and so on.[64] Thus, no principled reason to single out religion because it is religion, but a principled argument to justify the special protection of a broad liberty of conscience that encompasses and protects the religious conscience as a matter of respect for human dignity.[65] Therefore, the reason as to why religious claims for exemptions are sometimes granted is "because they involve matters of *conscience*, not matters of religion."[66]

2. Non-Principled Subsitution

The purport of non-principled substitution is that the right application of the existing framework of basic liberties, such as the freedom of speech and association, in combination with rights that prohibit discrimination and violence, makes a separate right to religious freedom fairly unnecessary.[67] In other words: freedom of religion has, not to say many, but at least some very "adequate substitute[s]."[68] Arguments that support the replacement of religious freedom consider this right "dispensable,"[69] as other basic liberties ensure the free exercise of religion. The argument suggests that religious manifestations in the core cover a broad range of areas people are involved in, such as business, politics and association. Hence, free exercise of religion could be seen as a derivate of other basic liberties. Non-principled substitution understands religious freedom in light of the argument "that the sorts of activities it involves are covered by the most important general liberties."[70] However, the argument that says "we can adequately enumerate

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is to say, "faculties used by my car lover, who isn't engaged in a search for meaning, or the person who feels called to dress like a chicken when going to work, which is (probably) just too silly to count as a genuine search for meaning.").

64. *Id.*

65. *Id.* at 164-74; *see also* NUSSBAUM, *supra* note 5, at 61-66; *Cf.* LEITER, *supra* note 21 (discussing the line that liberty of conscience is an appropriate substitute for religious freedom). In the theoretical framework that Leiter uses to develop his argument, principled substitution arises out of what the liberal concept of toleration considers protection-worthy for principled reasons: equal liberty of conscience.

66. LEITER, *supra* note 21, at 64.

67. *See* Nickel, *supra* note 35, for a further discussion of this position; *see also* Mark Tushnet, *Redundant of Free Exercise Clause?*, 33 LOY. U. CHI. L. J. 71, 73, 94 (2001).

68. Tushnet, *supra* note 67, at 94.

69. Nickel, *supra* note 35, at 941.

70. *Id.* at 950.

the basic liberties without referring to religion"[71] and that this will ensure the free exercise of religion, has consequences for the question as to how we should understand religious freedom.

As such, non-principled substitution expects that the idea that religious freedom rests on the same basics like other basic liberties will gain ground. Thus, there is no reason to think that religion is something unique that could justify the protection of religion *qua* religion. Also, the expectation is that understanding the need for the free exercise of religion in light of the existing set of basic liberties could help to eliminate the idea that religious beliefs are privileged in society. Therefore, the granted exemptions are the outcome of a right application of basic liberties and not due to the presumed distinct value of religious beliefs. Finally, the emphasis on the protection of religious beliefs via the application of basic liberties ensures that people have a real choice to engage in or disapprove certain convictions.[72]

C. *Generalization*

Generalization advocates a *broader*, ecumenical and non-sectarian definition of religion and religious freedom. Against this normative backdrop, it defends the position that religious freedom should not be considered a *special right*—such as the right to freedom of speech—protecting only a selected group of people: the believers, but rather a *general right* to ethical and moral independence.[73] This position is ecumenical for the reason that it looks beyond the sectarian, meaning theistic account of religion and it is non-sectarian for the reason that it does not make a distinction between theistic and non-theistic convictions about the good.[74]

Generalization looks for reasons of liberal neutrality beyond the narrow, theistic conception of "religion." The argument is that God-believers and non-believers could be seen as "religious," as both could have the same deep feelings about fundamental questions.[75] The generalist position sees in the deep commitment that religious and non-religious people share an "intrinsic and inescapable ethical responsibility" to succeed in life.[76] Therefore,

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71. *Id.* at 943.

72. *Id.* at 943-51.

73. DWORKIN, *supra* note 13, at 132 (discussing religious freedom as a general right to ethical independence); *see also* Perry, *supra* note 20, at 996 (stating how broadening religious freedom will encompass moral freedom).

74. Perry, *supra* note 20, at 996; *see* Roland Pierik & Wibren van der Burg, *What is Neutrality?*, 27 RATIO JURIS 496, 507 (2014).

75. DWORKIN, *supra* note 13, at 5.

76. *Id.* at 114. I am grateful to M. Christian Green who came up with the suggestion to look at Paul Tillich's idea of "ultimate concerns" used by scholars to interpret

this position says that religious freedom should be considered the general right to ethical independence that opens the doors to moral freedom. Dworkin states:

> Ethical independence, that is, stops government from restricting freedom only for certain reasons and not for others. Special rights, on the other hand, place much more powerful and general constraints on government. Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a *"compelling"* justification. Speakers may not be censored even when what they say may well have bad consequences for other people: because they campaign for forest despoliation or because it would be expensive to protect them from an outraged crowd. The right to free speech can be abridged only in emergencies. . ..[77]

The generalist position considers religious freedom the right that gives human beings full access to ethical independence. Thus, the generalist account of religious freedom emphasises the opportunities people have to make independent decisions about how to live their lives by their deeply held ethical commitments. This approach apparently extends the definition of religion.[78] The main justification for this extension is rooted in the idea that we need a deeper (meaning non-sectarian) understanding of religious freedom since the free exercise of religion cannot be protected on sectarian grounds, for distinctly religious reasons.[79] The leading normative argument behind generalization and its emphasis on rethinking religious beliefs as

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religion beyond its theistic definition. *See* James McBride, *Paul Tillich and the Supreme Court: Tillich's Ultimate Concern as a Standard in Judicial Interpretation*, 30 J. CHURCH & ST. 245, 260 (1988) (discussing this development).

77. DWORKIN, *supra* note 13, at 131.

78. The advocated extension of the definition of "religion," as defended by the generalist school of thought, falls under the so-called "*inclusive non-accommodation*" theories of religious freedom. The "*inclusiveness*" is related to the public justification debate, implying that "religion" is not something special for the justification of legal and political decisions. Thus, no limitation on the addition of "religion" to the body of categories that can be used by legal and political authorities to justify their decisions. Similarly, "religion" is not special for the accommodation question: religions and non-religions should be treated equally by granting exemptions. *See* Schwartzman, *supra* note 22, at 22. A serious concern of this "symmetrical theory" of religious freedom—on both sides (public justification and religious accommodation) religion is not something special—is the huge risk of anarchy. *See generally* DWORKIN, *supra* note 13, at 117; LEITER, *supra* note 21, at 94; NUSSBAUM, *supra* note 15, at 173 (drawing attention to the side-constraints of an all-inclusive term religion).

79. DWORKIN, *supra* note 13, at 17, 129. *See also* Matthew Clayton, *Is Ethical Independence Enough?*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN

deep ethical commitments, and religious freedom as a general right to moral and ethical independence, is the assumption that public authorities are not in the position, nor able, to judge what should count as moral or religious truth. Perry says the following:

> [government], including a political majority, is not to be trusted as an arbiter of moral truth—when no legitimate government interest is at stake; moreover, the coercive imposition of moral uniformity, when no legitimate government interest is at stake, is more likely to corrode than to nurture the strength of a democracy. Religious believers do not have less reason than nonbelievers—instead, religious believers and nonbelievers have the same basic reason—to insist that government not ban or otherwise regulate or impede a moral practice.[80]

Ethical independence is presented as a normative value of the political liberty paradigm. Hence, it restricts authorities' opportunities to disfavor a particular view on what deserves attention in life. Dworkin states:

> In a state that prizes freedom, it must be left to individual citizens, one by one, to decide such questions for themselves, not up to government to impose one view on everyone. So, government may not forbid drug use just because it deems drug use shameful, for example; it may not forbid logging just because it thinks that people who do not value great forests are despicable; it may not levy highly progressive taxes just because it thinks that materialism is evil. But of course, ethical independence does not prevent government from interfering with people's chosen ways of life for other reasons: to protect other people from harm.[81]

Thus, understanding religion in terms of access to ethical independence pursues an ideal of liberal neutrality,[82] towards what Nussbaum has called, the "ultimate questions" of life.[83] The call for liberal neutrality towards deep human commitments has been strengthened by the claim that ethical independence in the core "requires that government not restrict citi-

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LIBERAL POLITICAL PHILOSOPHY 132 (2017) (a recent defense of Dworkin's approach to religious freedom).

80. Perry, *supra* note 20, at 1012. This concerns a Lockean criticism on governmental interference in matters of morality and religion. Locke states that the main purpose of the law "is not to provide for the truth of opinions, but for the safety and security of the commonwealth and of every particular man's goods and person." *Id.* at 1003.

81. DWORKIN, *supra* note 13, at 130.

82. Cécile Laborde, *Dworkin's Freedom of Religion Without God*, 94 B.U. L. REV. 125, 1258 (2014).

83. NUSSBAUM, *supra* note 15, at 168.

zens' freedom when its justification assumes that one conception of how to live, of what makes a successful life, is superior to others. It is often an interpretive question, and sometimes a difficult one, whether a policy does reflect that assumption."[84]

To clarify why we should endorse liberal neutrality as a matter of principle, the generalist position divides basic liberties into *special* and *general* rights. The difference between these two variants is rooted in the threshold authorities have to step over when they aim to restrict a right. Special rights focus on the "subject matter" and it is complicated to limit these rights legitimately, except in cases of emergency. The focus of a general right is on the relation between authorities and people. General rights restrict the scope of arguments authorities can provide to legitimately limit the exercise of a general right.[85]

The specific distinction between *general* (restrict arguments to limit free exercise) and *special* (focus is on a protection-worthy subject) rights gives generalists a reason to argue that religious freedom should be seen a general right as the category of "religion" remains a complicated subject to interpret. Thus, the definition problem of religion that according to the generalist position is intertwined with freedom of religion is an important argument to oppose granting religious freedom a *special* status, or considering religious freedom a special right. The semantic criticism at this point states that a special right would explicitly focus on the definition of religion and it would not be able to solve the definition problem of this right.[86] Also, a special right requires high demands on restrictions that aim to limit the exercise of such a right.

Instead, the generalist position argues that approaching religious freedom as a general right to ethical independence will provide protection to the free exercise of religion. The generalist position explains that the right to ethical independence "condemns any explicit discrimination . . . that assumes . . . that one variety of religious faith is superior to others in truth or virtue or that a political majority is entitled to favor one faith over others or

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84. DWORKIN, *supra* note 13, at 141-42; *see also* Pierik & Van der Burg, *supra* note 74, at 507 (stating "equal respect for autonomous citizens means that the state should not only refrain from interfering with the exercise of this freedom, but also that it should equally protect and, if necessary, support it.").

85. DWORKIN, *supra* note 13, at 132-33 (stating that "a special right of religion declares that government must not constrain religious exercise in any way, absent an extraordinary emergency. The general right to ethical independence, on the contrary . . . limits the reasons government may offer for any constraint on a citizen's freedom at all.").

86. *Id*; *see generally* LABORDE, *supra* note 1, at 30-33; SULLIVAN, *supra* note 35, at 1-4 (discussing the definition problem of religion).

that atheism is father to immorality."[87] It "protects religious conviction in a more subtle way as well: by outlawing any constraint neutral on its face but whose design covertly assumes some direct or indirect subordination."[88] However, understanding religious freedom as a general right to ethical independence might force people to adjust their religious conduct in a way that fits the rationale of laws that are not *per se* directed to them.[89] Therefore, the generalist position argues that authorities should take into account whether the bans and other restrictions on a particular practice they propose or impose, are in fact targeting what one group might consider "a sacred duty" to comply with.[90] If that is the case, "then the legislature must consider whether equal concern . . . requires an exemption or other amelioration. If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exception."[91]

However, the generalist says that when a religious practice "would put people at a serious risk that it is the purpose of the law to avoid, refusing an exemption does not deny equal concern. That priority of non-discriminatory collective government over private religious exercise seems inevitable and right."[92] Thus, there is no principled reason to exempt the followers of the Santo-Daime Church who drink ayahuasca tea that contains DMT. The justification to deny exemption is rooted in public health grounds.[93] Nevertheless, there is a principled reason to provide equal financial grants to religious organizations that reject same-sex couples and organizations that accept them. Dworkin equally explains the reason as to why we should finance these by stating:

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87. DWORKIN, *supra* note 13, at 133-34.

88. *Id.* at 134.

89. Ronald Dworkin stated, "[i]f we deny a special right to free exercise of religious practice, and rely only on the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, non-discriminatory laws that do not display less than equal concern for them." *Id.* at 135-36.

90. *Id.* at 136.

91. *Id.*

92. *Id.*

93. *Id.* at 136-37. In the Netherlands, some members of the Santo-Daime Church, who have been prosecuted for the import or possession of ayahuasca tea were discharged from prosecution. *See also* Wahedi, *supra* note 3, at 134-35. The lack "of any significant risks to public health" is the main reason for discharge. The ECtHR reached another conclusion on this matter and declared the applicants inadmissible as "the prohibition of the possession for use of DMT was necessary in a democratic society for the protection of health." *Fränklin-Beentjes and Ceflu-Luz Da Floresta v. The Netherlands*, App. No. 28167/07, 3 Eur. Ct. H.R. ¶ 48 (2014).

> Financing Catholic adoption agencies that do not accept same-sex couples as candidates, on the same terms as financing agencies that do, might be justified in that way, provided that enough of the latter are available so that neither babies nor same-sex couples seeking a baby are injured.[94]

D. *Equation*

Equation requires equal respect for all deep concerns of people. Thus, *in effect* religious beliefs and practices, as they concern deep human concerns, should not be favored over similar deep concerns of other citizens. Religious freedom should ensure this equal treatment of people.[95] Against this backdrop, equation opposes arguments that justify religious freedom in light of any "distinct value" of religious manifestations. Rather, it argues that believers' vulnerability to discrimination should be considered the main justification for religious freedom. In addition, equation opposes a "religious" understanding of religious freedom. In this sense, equation is very close to generalization. However, there are two main differences. First, it is not indifference or neutrality as such that requires principled equation.[96] It is rather the idea of equality of treatment of all acts and thoughts that have an intrinsic value.[97] Second, equation does not generalize religious freedom to something like the general right to ethical independence and moral freedom.[98] It rather approaches religious freedom from the principle of equality of treatment, which is considered the main constitutional value of a liberal democracy.[99] Therefore, the equation approach is part of what has been

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94. DWORKIN, *supra* note 13, at 136.

95. Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?* 84 NOTRE DAME L. REV. 807, 834-35 (2009) (stating that "the point of the Religion Clauses is not to affirm (or deny) the value of religious practices, any more than the point of the Free Speech Clause is to affirm (or deny) the value of flag burning.").

96. *See* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 496-97, 520 (2009).

97. *See* Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, at 352 (2010) (arguing that some liberal theorists of religious freedom have "[attacked] religious exemptions on the general premise that they are fundamentally unfair to nonreligious people.").

98. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51-77 (2007); *see generally* LABORDE, *supra* note 1, at 55-57; Lund, *supra* note 97, at 360 (critical of the theory developed by Eisgruber and Sager). *See also* Boyce, *supra* note 96, at 496-97 (differentiating between equality in *treatment* and equality in *effect*) (emphasis added).

99. LABORDE, *supra* note 1, at 29 (arguing that egalitarian theorists of religious freedom advocate a regime in which "all citizens—traditionally religious or not—are treated with equal concern and respect, as free and equal citizens of a democratic soci-

called the egalitarian theories of religious freedom.[100] The question is, however, equation of *what*?[101] At the outset, this position is anti-favoritism,[102] and it advocates equal treatment of all conscientious manifestations and beliefs that contain an intrinsic value.[103]

Recall the recent case of the Pastafarian who was denied by a local municipality in the Netherlands to submit a photograph with a pasta strainer on her head. Another Pastafarian who was similarly rejected by the local authorities, referred to the possibility of Muslims and Jews to submit photographs on which they have covered their heads.[104]

This case reminds us of a theoretical example about two people who do not share the same religion but share similar objections that give them a reason to ask for accommodation. A is a Jehovah's Witness and B is a

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ety."). *See also* Boyce, *supra* note 96, at 520 (stating that "[e]quality of treatment is the central principle of our constitutional order . . . [and] [t]o require or permit exemptions only for religious but not secular individuals profoundly violates that constitutional principle. Because the free exercise of religion necessarily entails the freedom to believe as well as disbelieve, granting exemptions only to believers also violates the core values underlying the Free Exercise Clause.").

100. *See* Cécile Laborde, *Liberal Neutrality, Religion and the Good?*, *in* JEAN LOUISE COHEN & CÉCILE LABORDE (EDS.), RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 249 (2016) (discussing egalitarian theories of religious freedom).

101. *See* LABORDE, *supra* note 1, at 89 (explaining what equation aims to realize. "On the one hand, people's ability to act in accordance with their deep commitments should not be subjected to unequal state burdens; on the other hand, the state should not endorse the symbols and rituals of dominant religions because they could be disparaging to racial-like minorities.").

102. SULLIVAN, *supra* note 35, at 149; *see also* LABORDE, *supra* note 1, at 42 (elaborating on the egalitarian criticism towards religious accommodation, considering this as unfair and contrary to the liberal commitment "to neutrality about the good and equality between citizens"); Boyce, *supra* note 96, at 551 (arguing that in today's era of secularization a favored treatment of religious beliefs and acts is very problematic).

103. EISGRUBER & SAGER, *supra* note 98, at 51-77; *see also* Nehushtan, *supra* note 14, at 149 (commenting on the position of Eisgruber and Sager: "[i]t is possible to give a certain priority to religious reasons, not because of their content but rather for largely neutral reasons. Eisgruber and Sager, for example, take this line in suggesting that religion is distinctive rather than unique. They claim that religion, much like race and gender, justifies subjecting government's decisions to greater scrutiny than many other topics or policies receive."); LABORDE, *supra* note 1, at 51 (arguing that an egalitarian theory of religious freedom, as conceptualized by Eisgruber and Sager, is an "attractive" alternative for "those who worry that formal legal equality leaves minority interests at the mercy of majoritarian preferences yet see little justification for a [sectarian] privileging of religious interests *qua* religious.").

104. Rb. Noord-Nederland 28 July 2016, ECLI:NL:RBNNE:2016:3626, ¶ 5.1 (Neth.).

pacifist. A and B have objections to manufacture tank components.[105] This example has been used by the proponents of the equation approach to argue that a legal regime that exempts A and not B is quite problematic.[106] This objection of improper distinction is present in the Pastafarian case. The equation position will ask why some believers, such as Muslims and Jews, are allowed to cover their heads on the driver's license photograph they submit, while Pastafarian believers are denied the same opportunity.[107]

Another appropriate example in this context is the ongoing debate in legal theory and society about the legal acceptability of ritual male circumcision. As such, several European courts have ruled about the legality of this practice. In this regard, one could refer to the German and Finnish court judgements. In both cases, the circumcision of young boys was followed by medical complications. Although the Finnish Supreme Court held that male circumcision, under particular circumstances, was an acceptable practice,[108] the German district court in Cologne held that the irreversible character of this practice violated the boy's rights to religious freedom, as they were unable to give their consent. Next, the judges argued that the parental right to religious freedom and their right to raise their children by their convictions, do not justify the practice of ritual male circumcision.[109] The recurring question is: what is the justification to keep on considering this practice permissible? The criticism is that all forms of female circumcision, better known as genital mutilation are prohibited. Even incision, which is less violable than ritual infant male circumcision. The difference in legal approaches has been criticized as discriminatory.[110] The equation position, which advocates for a similar approach to religious and non-religious argu-

105. Eisgruber & Sager, *supra* note 35, at 1292.

106. *Id.*

107. However, the question remains: what kind of beliefs, convictions and practices should be equalized? In addition, how can the comparative framework be shaped in this respect? *See also* LABORDE, *supra* note 1, at 53 (arguing that "[the] category of non-religion is too loose and imprecise to serve as a comparator to that of religion.").

108. Heli Askola, *Cut–Off Point? Regulating Male Circumcision in Finland*, 25 INT'L J.L. POL'Y & FAM. 100, 106 (2011).

109. Landgericht Köln [The District Court of Cologne], 7 May 2012, 151 Ns 169/11, ¶ III. In applying the court's reasoning, the parental right to raise their children in accordance with their Islamic faith does not justify ritual male circumcision, which is considered an irreversible intervention that lacks consent and violates bodily integrity. Circumcision does not provide children with an opportunity to make independent decisions regarding the religion they choose to adopt. Therefore, the decision to be circumcised must be postponed.

110. Sohail Wahedi, *Het beoordelingskader van rituele jongensbesnijdenis* [*The assessment framework of ritual male circumcision*], 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL'Y] 59 (2016).

ments concerning the way people want to live their lives, theoretically strengthens the criticism of "a double standard on the part of [those] who fail to challenge other unnecessary surgical interventions—such as male circumcision or cosmetic surgery—in their own communities and cultures."[111]

Thus, equation "requires simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[112] Meaning there is no principled reason to differentiate between deep human commitments. The norm should be an equal approach to non-religious and religious perspectives on the ultimate questions of life. This argument rests on a definition of religious freedom that does not provide religion with a base for reproduction. The equation approach rethinks religious freedom as "the right of the individual . . . to life outside the state—the right to live as a self on which many given, as well as chosen, demands are made. Such a right may not be best realized through laws guaranteeing religious freedom but by laws guaranteeing equality."[113] Therefore, the regime of religious toleration should be understood against the backdrop of human vulnerability to discrimination. Eisgruber and Sager states:

> [what] properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns. When we have replaced value with vulnerability, and the paradigm of privilege with that of protection, then it will be possible both to make sense of our constitutional past in this area and to chart an appealing constitutional future.[114]

This position allows us to claim that there are two main differences between generalization and equation. The first focuses on how we should understand religious freedom as a liberty. The second approaches religious freedom from the ideal of equality.

E. *Representation*

The main claim of representation is that the theory it has developed is not narrow in the sense of exclusively protecting one group. Hence, it is not

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111. Moira Dustin, *Female Genital Mutilation/Cutting in the UK*, 17 EUR J. OF WOMEN'S STUD. 1, 8-23 (2010).

112. Eisgruber & Sager, *supra* note 35, at 1283.

113. SULLIVAN, *supra* note 35, at 159.

114. Eisgruber & Sager, *supra* note 35, at 1248.

a sectarian theory of religious freedom. It is rooted, as Laborde says: "in the ecumenical value of ethical integrity, and in the normative justifications for generic liberal rights such as speech and association."[115] Representation understands religion as a concept that stands for a set of protection-worthy values that are not necessarily "religious" in the core.[116] These values justify according to the representation position the codification of a special right to religious freedom.[117] As such, it has been argued that religion, like respect, stands for a "hypergood:" a particular category of higher goods.[118] Koppelman argues that:

> [religion] . . . has a value that can override many other goods and preferences. But religion is one among many hypergoods. It should not be privileged over the rest of them. This fundamental problem of modernity should not be adjudicated by the state. The problem of determining the appropriate hypergood, if any, and its reconciliation with the broad range of ordinary goods, is a question that occupies the same existential territory as religion. If the state is incompetent to resolve religious questions, it is likewise incompetent to resolve this one.[119]

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115. The position this article qualifies as "representation" elaborates on the "proxy" and "disaggregation" approaches. *See* LABORDE, *supra* note 1; Laborde, *supra* note 20.

116. *See* Ronan McCrea, *The Consequences of Disaggregation and the Impossibility of a Third Way*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 69 (2017) (criticizing Laborde's disaggregation approach).

117. Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 332 (2001) Rutherford argues that religion, within the context of U.S. constitutional law has a special status, not on sectarian grounds, but for the reason that religion serves very important functions. Rutherford identifies "four related functions that religion serves: (1) religion helps balance power and limit the power of both the government and organized faith; (2) religion sometimes enables disempowered groups to organize and increase their power; (3) religion produces values that are neither market-driven nor controlled by the government; and (4) religion provides a source of spirituality and personal identity that enables individuals to live with purpose and dignity."). *See also* Jamal, *supra* note 1, at 439 (defending religious freedom as the right that gives protection to the minority views); Lund, *supra* note 1, at 515 (arguing that "the way to protect all deep-and-valuable human commitments is by naming certain specific deep-and-valuable commitments. There is no other way. We start with the ones we know, and we keep an open mind about the rest. Religion is not the only deep-and-valuable human commitment. But it is one of them, and that is enough.").

118. Koppelman, *supra* note 16, at 594.

119. *Id.* In his later publications, Andrew Koppelman has elaborated on considering religion a legal proxy. *See e.g.* Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 981 (2010) (stating "it is not

More specifically and to identify the relevant legal values religion stands for, the representation position reflects on the potential matches between the "different parts of the law" and "different dimensions of religion for the protection of different normative values."[120] Examples of such matches are the presentation of religion as: a conception of the good life; a conscientious moral obligation; the key feature of identity; mode of human association; a vulnerability class; a totalizing institution and an inaccessible doctrine.[121] According to the representation position, some of these matches, such as the presentation of religion as a conception of the good life, a matter of conscience, identity and association, are more "relevant to the notion of freedom of religion" than other overlapping areas.[122] Hence, the representation position could be defined as "religion-blind without being religion-insensitive, because it sees religion, not as a specialised and self-contained area of human belief and activity, but as a richly diverse expression of life itself."[123]

II. SHOULD THE LAW IN LIBERAL DEMOCRACIES CARE ABOUT RELIGION?

Should the law in liberal democracies care about religion *qua* religion? What does the classification of the normative positions tell us about the "specialness" of religion? Thus, the question is: does religion *qua* religion

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possible to offer a unitary account of what religion is good for. Like a knife or a rock, it is something that people find already existing in the world, which they then put to a huge variety of uses. Religion denotes a cluster of goods."). This position has been defended more recently in ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 124 (2013). *See also* Koppelman, *supra* note 41, at 37 (repeating the view that religion encompasses many goods that people aim to purse and religious freedom enables them to do that).

120. Laborde, *supra* note 20, at 594.

121. *Id.* at 594-95.

122. *Id.* at 595-97. The argument is that the values behind the identified matches are *as such* worthy of special legal solicitude. Thus, the representation position draws on the idea that the values behind a broad set of matches provide an appropriate base to justify the legal protection of religious beliefs and practices.

123. *Id.* at 600. Formulated in this way, a religious way of life is just one way human beings could give moral substance to their lives. The normative argument behind this position is the classical liberal idea that authorities should refrain from dictating the right way of life. Citizens should find in freedom their desirable path to live their lives. Therefore, representation advocates "strong evaluations" to examine whether believers could be exempted from the application of laws that are at odds with their convictions, such as the prohibition of wearing headscarves and yarmulkes in public. The representation position claims that "the value of integrity" is the right interpretative value to deal with such "strongly valued practices" of the free exercise.

deserve special legal protection? At the outset there is no one right answer to this question. The classification of the normative approaches is an appropriate method to look beyond theoretical differences and figure out whether we can identify and subsequently theorize a binding element in the liberal theories of religious freedom. Thus, the focus is on the binding characteristic of the argumentation patterns this article has conceptualized.

A. *Does Religion Qua Religion Require Special Legal Protection?*

This section classifies the types of responses that answer this question. This classification is based on how the normative positions this article has conceptualized in the development of its theoretical framework answer this question. The similarities between the responses uncover three categories of responses. First, a *Strong No*, religion does *definitely not* qualify for special legal protection *qua* religion. Second, a *Soft No*, religion does *not necessarily* deserve special legal protection *qua* religion. Third, a *Soft Yes*, it is eligible for special legal protection, *though not for distinctly religious reasons*.[124] This section elaborates on these three responses and answers the more general question whether *the law* in liberal democracies should care about religion simply because it is religion?

1. No, Definitely Not: The Strong No

One potential answer suggests *definitely not*. The argument of this *Strong No* is that the concept of religion is on principled grounds not eligible for special legal protection *qua* religion. Thus, according to this answer, the concept of religion does not provide any room to support arguments that justify the special legal protection of religion with an appeal to the distinct values of religion. Therefore, this response rejects arguments as defended in the sectarian theories of religious freedom, justifying this liberty with an explicit appeal to values that can be considered distinctly religious, i.e. the transcendental value of religion[125] or what a particular religious dogma prescribes as protection-worthy.[126] As such, the *Strong No* corresponds with the principled rejectionist answer to the question whether religion *qua* religion requires special legal protection. The rejectionist position understands

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124. I am grateful to Professor Steven D. Smith who challenged me to figure out what theoretical responses are possible to the question as to whether religion *qua* religion deserves special legal protection. The threefold response (the *Strong No*, the *Soft No* and the *Soft Yes*) is based upon his suggestion.

125. McConnell, *supra* note 15.

126. Qanuni Assassi Jumhurii Islamai Iran [The Constitution of the Islamic Republic of Iran], *supra* note 30.

"religion" as the combination of categorical commands that are insulated from evidence.

Does this conception of religion make a strong case to tolerate religion *qua* religion? The principled rejectionist position suggests not. The argumentation pattern to deny special legal protection to religion *qua* religion starts by defining what the notion of pure toleration requires. The principle of toleration requires that a belief or practice that is objectionable and that can be stopped by the dominant group in society, is nevertheless *tolerated* for *principled reasons*. These principled reasons of toleration find their origins in what *morality* and *epistemology* consider protection-worthy. Principled rejection says that toleration on moral or epistemic grounds does not require *special toleration* of categorical commands that are insulated from evidence (i.e. religion does not require special legal protection *qua* religion). In sum, the principled grounds for toleration do not provide a fruitful basis to argue that religion needs special legal protection *qua* religion.[127]

2. No, Not Necessarily: The Soft No

Another possible response to the question whether religion *qua* religion requires special legal solicitude concerns the *Soft No*. The *Soft No* response entails that religion *as such* does *not necessarily* require special legal protection, nor is an explicit right to religious freedom required to guarantee the free exercise of religion. Reflecting on the justification grounds of the special legal solicitude towards religion uncovers that "other" broader faculties, liberties and vulnerabilities (i.e. the believers' vulnerability to discrimination due to their specific habits) require special attention and protection. This response considers religion a subset of these other broader faculties (e.g. conscience, ethical integrity and deep commitments) that justify a distinct legal protection regime because of their particular specialness. In the same manner, religious freedom has been rethought as the right that provides protection to beliefs and practices that are not necessarily rooted in a theistic understanding of religion. As such, religious freedom has been presented as the right to ethical independence and moral freedom.[128] Finally, religious freedom has been considered a subcategory of other constitutional freedoms that, without any doubt need codification and

127. The position that religion *qua* religion does not require special legal protection corresponds with the position of Brian Leiter, who has stated that Kantian and utilitarian moral grounds as well as Millian epistemic grounds of toleration only make a strong case to protect equal liberty of conscience that *encompasses* the religious conscience. Thus, there are no principled reasons to tolerate religious conscience separately.

128. DWORKIN, *supra* note 13.

legal protection in liberal democracies (e.g. basic liberties, such as the freedom of conscience, thought, association and expression). Thus, for the justification of the right to free exercise of religion, the *Soft No* response does not necessarily rely on distinctly religious values.[129] Rather, it approaches religion and religious freedom from a broader framework of faculties and liberties. This response paves the way for the suggestion that there is no need for a constitutionally protected religious freedom that gives protection *only* to religious beliefs and practices. The conflicts between law and religion are manageable, even without an appeal to the distinct values of religion. The main message of this response is that although religion does not necessarily require special protection simply because it is religion, it deserves special legal attention under some other general and apparently non-religious faculties, categories and rights, e.g. conscience, ethical independence, moral freedom and a combination of basic liberties, such as the freedom of speech, association and expression.

3. Yes, Though Not For Distinctly Religious Reasons: The Soft Yes

The *Soft Yes* concerns the final possible response to the question whether—according to the liberal theories of religious freedom—religion *qua* religion deserves special legal solicitude. This response does not justify religious freedom with an explicit appeal to distinctly religious values. It implies a "*yes*" as it says that religion deserves special legal protection *qua* religion. However, it takes a "*soft*" turn immediately, as it is a liberal answer that for principled reasons refrains from the adoption of an argumentation pattern that justifies the special legal protection of religion on the grounds that are perceived distinctly religious. Against this backdrop, the *Soft Yes* response corresponds with the representation position. The "*yes*" of this response suggests that religion is eligible for special legal solicitude as it represents a set of values and functions that are worthy of legal attention and protection. However, in correspondence with the "*soft*" nature of this response, these values are not necessarily religious. Recall the representation argument suggesting that religion stands for a proxy of goods, social functions and the pursuit of non-profit values that *as such,* justify the special legal solicitude for religion. Thus, the *Soft Yes* response entails that religion deserves special protection in law, though not necessarily for reasons that find their origins in the distinct value of religion.

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129. The *Soft No* response corresponds with the substitution, generalization and equation positions.

B. *The Synthesis of Abstraction From The Religious Dimension*

This article has focussed on the liberal theories of religious freedom and their main contribution to the debate on the role and place of religion in law. Based on this, Part I has developed a conceptual framework that consists of normative positions, each theorizing a particular approach towards religion and religious claims for exemptions from laws. The argumentation patterns of this conceptual framework have proved to be useful in answering the question whether religion *qua* religion deserves special legal protection in liberal democracies. The question remains however, whether the threefold response to the special legal solicitude towards religion (the *Strong No*, the *Soft No* and the *Soft Yes*), provides a fruitful base to identify and subsequently theorize a particular feature that can serve as the binding element of the liberal theories of religious freedom. To this end, it is important to figure out what the overall message of the threefold response may be concerning the question whether religion *qua* religion requires special protection in law.

The clear message across the three types of responses is that distinctly religious values are not considered eligible to justify the special legal solicitude towards religion. Thus, the synthesis of this threefold response is the dismissal of the special legal protection of religion *qua* religion. Moreover, this synthesis renounces arguments that justify religious freedom with an appeal to *any* distinct value of religion. What clarifies and justifies the special legal attention for religion is a broader and apparently religion-empty (i.e. free from distinctly religious values) framework of faculties, liberties and vulnerabilities.[130] The question is, what does this predominantly negative answer to the question as to whether religion *qua* religion requires special legal protection suggest about the binding feature of the liberal theories of religious freedom? Can we say that the threefold response that we have given is an illustration of "decoupling religion from a god?"[131] Alternatively, does the synthesis of our threefold response fit the "tendency, among legal practitioners, to re-describe" religious matters in non-religious terms?[132]

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130. LABORDE, *supra* note 1, at 42 (criticizing the "vague" broader framework that is adopted by egalitarian theorists of religious freedom to justify the special legal solicitude towards religion).

131. DWORKIN, *supra* note 13, at 132 (stating that "the problems we encountered in defining freedom of religion flow from trying to retain that right as a special right while also decoupling religion from a god.").

132. Laborde, *supra* note 20, at 590 (arguing that "there has been a tendency, among legal practitioners, to re-describe [particular religious] practices in the language

The synthesis of our negative response encompasses both when it reacts to the justification grounds of the special legal solicitude towards religion. It decouples religion from *any* God. Essentially, it presents religion as one subcategory in the more general and apparently non-religious categories of human conscience and the conceptions of the good life. It decouples religion from *any* God in a further sense. The threefold response conceptualizes religion in a God-empty way, free from distinctly religious values. An appropriate example of a God-empty conception of religion is the definition of religion as the combination of categorical demands that are insulated from evidence and reason.[133] Other God-empty conceptions of religion are concerned with the identification of general and apparently non-religious values that are *as such* worthy of legal protection. Examples of such intrinsic and valuable aspects of religion are the values behind human conscience,[134] ethical integrity,[135] deep ethical commitments,[136] hope,[137] vulnerability to injustice,[138] and so on. These valuable—though not specifically or distinctly religious—aspects to religion justify *as such* the special legal protection of religious beliefs and manifestations.

The synthesis of our threefold response fits similarly the tendency of re-description, which suggests that for the legal analysis of a case of relig-

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of conscientious obligation, so as to accommodate them under the label of freedom of religion.").

133. LEITER, *supra* note 21, at 33-34. Koppelman is critical of Brian Leiter's conception of religion, referring to it as "a radically impoverished conception." Koppelman, *supra* note 119, at 962; *see* McConnell, *supra* note 18, at 784 (suggesting, "it is futile to draw up a list of features descriptive of religion and only of religion. What makes religion distinctive is its unique *combination* of features, as well as the place it holds in real human lives and human history.") *See also* François Boucher & Cécile Laborde, *Why Tolerate Conscience?*, 10 CRIM. L. & PHIL. 493, 496 (2016) (stating "Leiter fails to establish insulation from reasons and evidence as the demarcating feature of religion. This is because he draws on incompatible interpretations of 'insulation from reasons and evidence' to reply to different challenges regarding either the under-inclusiveness or the over-inclusiveness of his definition of religion.").

134. NUSSBAUM, *supra* note 15, at 168-69. *But see* KOPPELMAN, *supra* note 119, at 153 (arguing that "[i]t is not clear how Nussbaum can maintain the distinction between her position and a libertarian view in which any regulation of anyone's conduct is presumptively invalid . . . [As such], [t]he boundaries of protection in Nussbaum are thus uncertain."). *See also* Laborde, *supra* note 20, at 589 (arguing that the substitution position is not able to provide equal protection to all religious practices that are valuable, though not always on conscientious grounds).

135. Laborde, *supra* note 20, at 589.

136. DWORKIN, *supra* note 13, at 5.

137. KOPPELMAN, *supra* note 119, at 122.

138. Eisgruber & Sager, *supra* note 35, at 1248.

ious manifestation, it is neither necessary, nor useful to define or understand that case in specific and distinct religious terms. This tendency of re-description arises from projects that aim to rethink religious freedom in a religion-empty way that is not *only* protecting theistic beliefs and manifestations. The normative argument is that both theistic and non-theistic beliefs and manifestations that have an intrinsic value, which attaches to valuable aspects of a human life, should be treated with the same amount of respect and concern. For this reason, religious freedom has been rethought, approached and defended as the liberty of conscience,[139] the right to moral freedom,[140] the right to ethical independence[141] and the citizens' equal right to live outside the state.[142]

So far, we have argued that the synthesis of our threefold response decouples religion from *any* God and relies mainly on a non-religious language to re-describe religious matters.[143] The question is whether we could provide a more coherent description of our synthesis that encompasses both the decoupling side as well as the re-description aspect of the debate in jurisprudence about law and religion. In other words, is it possible to identify and subsequently define in a more systematic way the feature that serves as the binding characteristic of the liberal theories of religious freedom? This feature looks beyond the varieties of normative positions and connects these perspectives from their common point of focus: the justification grounds for the special legal protection of religion. With this presumption in mind, we can say that the starting point of our reflections for the identification of the potential binding element of the liberal theories of religious freedom is the *interpretative concern* of these theories about the *proper legal definition* of religion and religious freedom and the *fair application* of this specific definition in practice. This *interpretative concern* guides us to define the *binding characteristic* of the liberal theories of religious freedom. First, we have seen that these theories aim to provide the most appropriate definition of religion in law. Second, they have one important *concern*: the egalitarian attention to fair treatment of deep human com-

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139. MACLURE & TAYLOR, *supra* note 59, at 89; NUSSBAUM, *supra* note 15, at 169.

140. Perry, *supra* note 20, at 996.

141. DWORKIN, *supra* note 13, at 130.

142. SULLIVAN, *supra* note 35, at 159.

143. *Cf.* McCrea, *supra* note 116, at 71 (arguing that religion does not exist in the disaggregated form); Peter Jones, *Religious Exemptions and Distributive Justice*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 162 (2017) (explaining that the non-religious description of religious exemptions, such as the use of a cultural frame, fits the egalitarian strategy to defend religious exemptions on non-sectarian grounds).

mitments and beliefs. Hence, the binding characteristic we aim to theorize is a normative response to the question: how should liberal democracies understand and accordingly deal with the concept of religion in law? This binding feature of the liberal theories of religious freedom encompasses the entire body of arguments that pave the way to deal with the indicated *interpretative concern* of the debate about the role of religion in law within the paradigm of liberal political philosophy. The binding characteristic we aim to define takes the form of *an interpretative shield*: it is embedded in philosophical arguments that can resist the justification of religious freedom with an appeal to distinctly religious values. In addition, it draws on a non-sectarian language to conceptualize religion and religious manifestations.

What does this *interpretative shield* suggest about the binding feature of the liberal theories of religious freedom? Does it help us to provide a more coherent definition of our synthesis that covers the decoupling and the re-description aspects of the law and religion debate in jurisprudence? Yes, it does. The negative answer to the question as to whether religion *qua* religion requires special legal protection stands for *abstraction from the religious dimension*. Thus, abstraction is the binding element of the various normative positions discussed in this article. Abstraction dismisses arguments that justify the special legal solicitude towards religion *qua* religion. Moreover, it renounces arguments that justify religious freedom with an appeal to *any* distinct value of religion. Subsequently, abstraction proposes a general framework of ecumenical values that justify free exercise of religion and it rethinks religious claims for exemptions from laws, from that general framework of ecumenical values.[144]

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144. *See* Wahedi, *supra* note 3, at 134. In earlier research that aimed to provide a better understanding of how contentious religious manifestations were presented and framed in contemporary legal, political and societal debates, abstraction was introduced as a mechanism that, by the use of different rhetorical means and arguments, marginalized or even disregarded the specific religious dimension of a particular religious manifestation. This research suggested that the mechanism of abstraction covered at least three different approaches to deal with contentious religious practices: *marginalization*, *neutralization* and *reframing* of the religious dimension.

Marginalization conceptualized the entire body of arguments suggesting that the religious dimension is not sufficiently distinctive or important for understanding a religious manifestation and therefore this particular dimension could be ignored largely in the legal assessment of the religious manifestation at stake. For example, the former Dutch Minister of Justice compared face-covering veils to nudists, leaving aside the religious significance of covering the whole body. *Cf. also* the suggestion of Professor Ellen Hey on a draft version of my PhD proposal: "[a]bstraction is an omnipresent but little noticed phenomenon in the marginalization of religious values." (available upon request). *See also* Wibren van der Burg, *Homogeniteit versus diversiteit – schuivende verhoudingen* [*Homogeneity versus diversity – sliding relationships*], 5 RELIGIE &

III. ABSTRACTIONS FROM THE RELIGIOUS DIMENSION DISENTANGLED

The dismissal of the arguments that aim to justify the special legal protection of religion *qua* religion, which is the origin of abstraction, takes place at different levels. As such, abstraction dispenses with philosophical arguments in mind the special legal protection of religion *qua* religion, at the *conceptual level of religion*, *religious values*, *constitutional value of religion* and finally at a practical level—*the protection of the free exercise of religion in practice*. The overall claim is that for the analysis of a clear case of religious manifestation, such as ritual male circumcision or wearing headscarves and yarmulkes, it is neither possible, necessary, nor useful to

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SAMENLEVING [RELIGION & SOC'Y] 103 (2010) (discussing the marginalization of the religious dimension).

Neutralization conceptualized the body of arguments suggesting that religious freedom is superfluous, as other fundamental rights—e.g. free speech and the freedom of association—provide enough protection to religious manifestations. As such, this approach aimed to "neutralize" the religious dimension of a manifestation as a matter of speech or association. An example is considering a Church's decision to ban female priests as a matter of freedom of association. *See* EISGRUBER & SAGER, *supra* note 98, at 63; Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, *in* MICAH SCHWARTZMAN, CHAD FLANDERS & ZOË ROBINSON (EDS.), THE RISE OF CORPORATE RELIGIOUS LIBERTY 77, 88 (2016) (stating that "[the] group-centered right of close association, like the dyadic version of the right, offers a justification for the right of the Catholic Church to discriminate in its choice of priests. And . . . the group-centered right is in principle available outside the realm of religion. Here there are numerous possibilities. The Thursday Club is an obvious candidate; so too might well be the Tarpon Bay Women's Blue Water Fishing Club.").

Reframing conceptualized the body of arguments suggesting that there is a shift away from the traditional frame that a particular religious manifestation is supposed to be protected, based on religious freedom, unless there are strong reasons (e.g. violation of other fundamental rights) to restrict it. The new alternative frame starts from the description of a contentious manifestation as *prima facie* unacceptable and merely asks whether it might nevertheless be tolerated on the basis of religious freedom. Thus, the burden of proof is completely reversed. An appropriate example is male circumcision. The legal permissibility of this practice was rarely questioned in the past as it concerned an admissible religious manifestation. Today, a shift is visible towards the idea that ritual infant male circumcision is unacceptable as it concerns a harmful manifestation that violates fundamental rights. *See* DONALD A. SCHÖN & MARTIN REIN, FRAME REFLECTION. TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES (1994); *See also* Abbie J. Chessler, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555 (1997). *But cf.* Rhona Schuz, *The Dangers of Children's Rights' Discourse in the Political Arena: The Issue of Religious Male Circumcision as a Test Case*, 21 CARDOZO J.L. & GENDER 347 (2015).

describe or understand such type of cases in specific and distinct religious terms.[145]

A. *The Concept of Religion*

Abstraction focuses at this level on the interpretative concept of religion.[146] In general, it does not describe religion in distinctly religious terms, but instead it defines religion broadly, that is to say in non-religious terms.[147] The argumentation pattern of this step of abstraction focuses on what religion entails and identifies the characteristics that follow from that question in non-religious terms. Recall, the conception of religion as a combination of categorical demands to act and beliefs insulated from evidence and reason. These features of religion do not justify singling out religion *qua* religion.[148] Hence, in the case of conflict of norms, the concept of human conscience provides a fruitful base to solve that conflict. Thus, religion is a subset of human conscience. That faculty, conscience, is worthy of protection and not religion as such.[149] Another non-religious and general definition of religion is embedded in the philosophical idea that says, the category of religion stands for deeply held ethical commitments of human beings to succeed in life.[150] In these definitions of religion, there is abstraction from the religious dimension, as for the description of religion they do not refer to distinctly religious values.[151] Accordingly, religion has been defined religion-empty,[152] and the language that has been used to talk about religious manifestations is merely religion-empty.[153]

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145. The interplay and confrontation between theories of religious freedom and debates about concrete cases of free exercise will have an indispensable theoretical value in defining the latitude of abstraction.

146. LABORDE, *supra* note 1, at 30 (arguing that egalitarian theorists of religious freedom elaborate on "an interpretative, *not a semantic*, conception of religion.").

147. *Id.* at 31 (stating that egalitarian theorists of religious freedom focus mainly on what is *potentially* "protection-worthy" about religion).

148. *Id.* at 28 (stating that "religion may be paradigmatic of beliefs, identifications, and practices that people have a particular interest in pursuing in their own way, individually or collectively. But . . . while religion is a paradigm of those valuable concerns, it does not uniquely capture them.").

149. LEITER, *supra* note 21, at 33-34.

150. DWORKIN, *supra* note 13, at 114.

151. LABORDE, *supra* note 1, at 32 (arguing that the category of religion has been defined less specific, "ethnocentric and biased" by the egalitarian theorists of religious freedom).

152. This part points to the de-coupling process of religion from God.

153. This aspect refers to the re-description process of religious matters in non-religious terms. *See* LABORDE, *supra* note 1, at 14 (criticizing the liberal religion-empty

B. *The Distinct Value of Religion*

The argumentation pattern of this step of abstraction focuses on the question whether religion is a valuable category in law. Although the argumentation framework does not doubt that the category of religion can have particular values, such as balancing the power and mobilizing people to do non-profit work,[154] it shifts from these values towards a more general and broad (i.e. less sectarian) framework of values when it aims to justify the special legal solicitude towards religion. This shift results in the claim that religion *as such* does not have a distinct value and the values attached to religion are general of nature. Thus, there is abstraction from values that are considered distinctly religious, such as the transcendental and suprarational values of religion,[155] towards a more general framework of values, such as those concerning the human conscience,[156] ethical integrity[157] and ethical commitments.[158] Hence, what has been presented as a distinct value of religion fits more general values. Therefore, the argument to justify the distinct value of religion and accommodate accordingly a particular religious manifestation applies simultaneously to comparable non-religious practices, arguments and projects that ask for exemptions.[159] One might think of the desire to become a vegetarian and the desire of not eating pork meat for religious reasons.[160] The value of both cases at this level of abstraction is similar, as being a vegetarian or refraining from eating pork can be understood in terms of acting in accordance with deeply held ethical commitments about how to live a life.

The argumentation pattern at this level of abstraction entails that it is not necessary to rely on transcendental (meaning sectarian) grounds to justify the free exercise of religion.[161]

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concept of religion and stating "that the analogy between religion and "conceptions of the good" (or similarly loose terms) is unsatisfactory, and that the slogan "equal liberty" sometimes obfuscates what is being equalized.").

154. Rutherford, *supra* note 117, at 332.

155. *See generally* McConnell, *supra* note 15.

156. *See generally* McConnell, *supra* note 26.

157. *See* NUSSBAUM, *supra* note 15, at 168-69; KOPPELMAN, *supra* note 119, at 153; Larbode, *supra* note 20, at 589.

158. *See* Laborde, *supra* note 20, at 589-90.

159. *See* May, *supra* note 40, at 191 (arguing that non-religious moral projects could be worthy of legal protection, as some religious moral projects require exemptions).

160. *See* MACLURE & TAYLOR, *supra* note 59, at 77.

161. LABORDE, *supra* note 1, at 28 (rejecting the idea that religion is special, meaning "that religious citizens should receive uniquely privileged treatment in the law—say, in the form of exclusive exemptions on the ground of religious belief. Relig-

C. *The Consitutional Value of Religion*

The argumentation pattern of this level of abstraction draws on the conclusion that religion does not have any distinct value that might justify the special protection of religion *qua* religion.[162] Instead, a broader category that encompasses religion is worthy of legal protection, which could be the liberty of conscience, the right to ethical independence or the right to moral freedom. Also, the constitutional value of religion is defined in non-religious terms of liberal neutrality, which entails that free exercise of religion prohibits authorities from favoring or disfavoring a particular way of life, except in cases of harm prevention. Another constitutional value of religion is found in the way religious groups are vulnerable to discrimination. Formulated in this way, religious freedom covers the right that gives protection to general values, such as the ability to search for ultimate questions of life and the independence to have an attachment to ethical commitments and moral decisions about right and wrong. Therefore, for the legality of a religious manifestation, religious arguments do not count.[163] One might think of the justification given to allow headscarves: it is not because of the specialness of your Gods that 'we' allow headscarves. It follows rather from our political commitment to respect human conscience. In this particular case, the constitutional value that justifies the allowance of headscarves is not found in religious arguments, but rather found in our respect for human conscience that is protection-worthy *qua* conscience.[164]

D. *The Protection of the Free Exercise of Religion in Practice*

The argumentation pattern suggests at this level of abstraction that for the free exercise of religion a special right to religious freedom is not necessary in practice. It is rather superfluous. The main argument is that the free

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ious beliefs and activities might be *specially* protected, but not *uniquely* so: if and when they are, it is as a subset of a broader category of respect-worthy beliefs and activities.").

162. *See* Lund, *supra* note 1, at 494 (engaging in the debate on the constitutional value of religion inside secular states).

163. LABORDE, *supra* note 1, at 31 (stating that egalitarians theorists of religious freedom do not ask "whether the law adequately captures what is ordinarily meant by religion. From a normative perspective, [they ask:] what is it about religion that is protection-worthy? What deeper normative values underpin protection of freedom of religion?").

164. *See* George Letsas, *The Irrelevance of Religion to Law*, *in* CÉCILE LABORDE & AURÉLIA BARDON (EDS.), RELIGION IN LIBERAL POLITICAL PHILOSOPHY 44, 49 (2017) (arguing that the concept of fairness could be used to explain and justify granting exemptions to religious manifestations).

exercise of religion is in fact guaranteed by a combination of different rights, such as the freedom of speech and association and the non-discrimination norm. The claim is that religious freedom does not add anything new to the existing body of basic liberties and human security rights.[165] As some theorists of religious freedom have asked: do we need religious freedom to tolerate practices of gender discrimination that are clearly present in religious institutions? To argue why we do not need religious freedom in this context, they refer to a combination of basic liberties, such as freedom of expression, association and the more basic rule that says: in a free society, everyone should have the right to make choices regarding the establishment or disestablishment of relationships.

This framework of general liberties helps us to understand why a clear case of gender discrimination in religious institutions that is considered a "contentious" religious manifestation, *could* be tolerated without *any reference* to religious freedom. The argumentation pattern at this level of abstraction entails that liberal democracies do not need religious freedom to deal properly with the legal admissibility of religious manifestations that are at odds with some basic liberties, such as the non-discrimination right.[166]

E. *Again: Any Reason to Care About Religion Because it in Religion?*

The theoretical suggestion that draws on the *interpretative shield* of abstraction says that it is not necessary to care *in law* about religion *qua* religion. Abstraction suggests that for the involvement in the law and religion debate, it is not necessary to be aware of what religion in the core entails.[167] Thus, there is no need to take the sectarian transcendental or suprarational aspects of religion into account when we are dealing with questions of law and religion.[168] Abstraction is in this sense religion-eva-

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165. LABORDE, *supra* note 1, at 32 (drawing attention to a particular concern raised by some egalitarian theorists of religious freedom who argue that "freedom of religion protects a generic capacity, it can be adequately guaranteed through basic liberal freedoms such as freedom of thought, speech, and association.").

166. *Cf.* EISGRUBER & SAGER, *supra* note 98, at 63.

167. *See* John R. Munich, Comment, *Religious Activity in Public Schools: A Proposed Standard*, 24 ST. LOUIS. U. L.J. 379, 388 (1980) ("This definition does not consider the content of the belief nor is it concerned with the institutional manifestations of a belief.").

168. Traces of abstraction are visible in many debates about religious practices that are considered contentious, harmful or for different reasons just inappropriate to the ideals of liberal democracies. One example is the approach of some politicians to ban face-covering veils as a matter of security, emancipation and the social norm of being visible. Another example is the way courts have defined ritual male circumcision in

sive, which makes it abstraction *from* the religious dimension.[169] The *interpretative shield* of abstraction that suggests there is no need in law to care about religion simply because it is religion, is embedded in two philosophical premises. First, there is no distinctly religious—that is to say a transcendental—justification for religious freedom (*the opposition premise*).[170] Second, the justification for free exercise arises from a framework of non-sectarian values (*the proposition premise*).[171] In other words, there is no principled reason to adopt or to provide a sectarian understanding of religion to deal with questions concerning the free exercise of religion. Thus, the law in liberal democracies does not need to care about religion simply because it is religion.

CONCLUSION

Liberal theories of religious freedom have one important feature in common: *abstraction from the religious dimension.* Abstraction involves

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terms of bodily integrity, public health and the right to self-determination. Similarly, the proposed bans on ritual slaughter have been defended as a matter of "animal well-being." Even though it is undisputed that ritual slaughter and male circumcision are inherently related to Judaism and Islam, abstraction largely leaves aside the religious dimension of these acts and almost only secular values, presented as universal and general, are decisive in the assessment of the legality of such manifestations. The Dutch debate on the relationship between law and religion should be understood against the backdrop of two factors. First, the Dutch history of multi-religious minorities has never meant a total freedom to religious manifestations in public (e.g. the partial prohibition of religious processions until the late eighties of the last centuries). Second, the situation of relative religious toleration based on the presence of a multitude of seemingly permanent religious minorities has substantially changed over the last five decades. *See* Wahedi, *supra* note 3, at 134; Geurt Henk Spruyt, *Politicians and Epidemics in the Bible Belt*, 12 UTRECHT L. REV. 114, 124 (2016); Marjolein van den Brink & Jet Tigchelaar, *Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision*, 30 NETH. Q. HUM. RTS. 417 (2012) (utilizing different frames to discuss the legal admissibility of male and female circumcision).

169. It is reasonable to argue that when the religious dimension of a contentious manifestation is *translated* to a framework of general legal terms, such as, bodily integrity or gender equality, the original religious dimension (e.g. the Jewish Covenant theory that is of importance for circumcision) becomes completely superfluous. Thus, a very particular dimension that is considered special by a particular group of people (believers) is abstracted from that area and subsequently discussed in abstract terms.

170. This premise corresponds with the suggestion that abstraction dismisses arguments that aim to justify the special legal protection of religion *qua* religion.

171. This premise corresponds with the suggestion that abstraction proposes a more general framework to justify free exercise and it rethinks religious claims for exemptions from general laws, from that particular framework of general values.

arguments that advocate the adoption of a non-sectarian, God-empty and religion-empty understanding of religion in law. This common feature of the liberal theories of religious freedom dismisses arguments justifying the special legal protection of religion *qua* religion. Moreover, abstraction renounces arguments that justify religious freedom with an appeal to *any* distinct value of religion. Subsequently, abstraction proposes a general framework of ecumenical values in order to justify the free exercise and it rethinks religious claims for exemptions from general laws, from that framework of non-sectarian values.