

Laborde's Liberalism's Religion: The Problem of Religious Exemptions

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In this paper, I critically examine Cécile Laborde's Liberalism's Religion and argue that her approach to religious exemptions faces significant difficulties. I first highlight some methodological disagreements with Laborde's theory. I raise concerns about her theory's 'two-pronged' structure being too narrow. Moreover, Laborde's 'disaggregation approach' promises a context-sensitive, bottom-up theory of exemptions which examines exemption claims on a case-by-case basis, but instead offers a top-down theory that provides an idealized explanation for potentially all religious exemption cases. I argue that a non-ideal approach which does not offer an overarching explanation of exemptions is preferable to Laborde's. Next, I discuss further problems with Laborde's theory, which concern her assumption that if there is something 'ethically salient' about religious practices, it must be located at the personal level. Laborde claims that if we want to ascertain the ethical salience of a practice, we must focus on the relationship between the person and her commitments. But this individualistic focus cannot always account for why we want to accommodate religious practices. Such practices, I claim, are sometimes accommodated not on an individual, but on a group-based rationale. Finally, I address Laborde's dismissal of the analogy between religion and disability. Laborde's view regarding disabilities and the stated analogy is unsatisfactory in two respects: it is based on the medical model of disability and it overlooks the role of the environment in turning physical impairments into disabilities.

Keywords: Liberalism and religion, religious accommodation, religious exemptions, multiculturalism, disability accommodation.

1. *Introduction*

The relationship between religion and politics has fascinated political and legal theorists for a long time. Since most liberals hold the ideal of state neutrality in high regard, special accommodation of religion in

law is not easily justified. One question that liberals are particularly interested in is whether exempting religious practices from generally applicable laws is justifiable without giving religions unjust privilege. The uneasiness with religious accommodation is not difficult to understand: although religion's prominent role in society has weakened, religious exemptions permit members of certain religious groups freedoms that non-members do not enjoy (cf. Levy 1997: 28). This is indeed puzzling for liberals who believe the state should not favor one conception of the good over others.

In her new book, *Liberalism's Religion*, Cécile Laborde offers a novel framework for reconsidering the question of religious exemptions.¹ Her alternative view to earlier, mainstream approaches that try to analogize religion with other 'conceptions of the good' is the 'disaggregation approach,' a concept that she adopts from the work of James Nickel (see Laborde 2015: 594). In Laborde's understanding, "[t]he starting point of the disaggregation strategy is to suggest that different parts of the law should capture different dimensions of religion for the protection of different normative values" (Laborde 2015: 594). The view posits that we should not look at religion through a single lens. Rather, we ought to analyze what religion *is* in the given context and what values are at stake. Thus, throughout the book, Laborde devotes great effort into the examination of what 'religion' in the given context is, and what kind of normative response it prompts.

I am convinced that *Liberalism's Religion* will become an instant classic. But despite its elegance, ingenuity and importance, I will argue in this paper that Laborde's approach to religious exemptions faces serious difficulties. I will contrast her approach with my earlier work that I believe provides more convincing solutions to the highlighted challenges.

This article proceeds as follows. Section 1 provides a brief outline of Laborde's theory of exemptions. The three subsections of Section 2 flesh out my three distinctive disagreements with Laborde's approach. The final section concludes.

2. Laborde's theory of religious exemptions

In *Liberalism's Religion*, Laborde rejects three promising liberal strategies for solving the puzzle of religious exemptions—*dissolving* religion, *mainstreaming* religion and *narrowing* religion. The strategy of 'dissolving religion' acknowledges that it is indeed unjustified to exempt religious practices from the requirements of generally applicable laws. This is Ronald Dworkin's position, which holds that religion and religious freedom are not themselves special (2013). Thus, Dworkin's answer to what Laborde calls religion's 'ethical salience problem', i.e.

¹ The other big question her book addresses, which I do not discuss in this paper, is religious establishment.

the evaluation of the ethical relevance of “different kinds of beliefs, practices, and identities” (Laborde 2017: 41) is that religious belief is just one type of comparable non-religious commitments, worldviews, and (even seemingly mundane) preferences (Laborde 2017: 44). This is why Laborde labels Dworkin’s stance on religion as ‘dissolution’:

[Dworkin’s strategy] proposes to broaden religion into a maximally inclusive category that comprises preferences, commitments, identities, beliefs, worldviews, and so forth. Religion is not so much analogized with them as dissolved into them. This means that neither religion nor the more inclusive category it falls under needs to be defined precisely, because their boundaries and scope are irrelevant for the purpose of egalitarian treatment. Logically, therefore, because there is no specific category that displays identifiable features that would justify differential treatment, there is no justification for exemptions from the law. (Laborde 2017: 44)

Laborde rejects Dworkin’s view because she believes it suffers from “hidden tensions” and “internal contradictions” (Laborde 2017: 46; cf. Laborde 2014a). Dworkin maintains that religion is not uniquely special, but just one possible conception of the good; as such, Dworkin believes religion is not ethically salient at all, that is, religion does not deserve special ethical consideration. But Laborde shows that sometimes Dworkin does acknowledge that religion is ethically salient, when he suggests that in some cases it is wrongful for the state to indirectly burden religious individuals’ “sacred duties” (Laborde 2017: 47). But if this is the case, then religious practice *is* ethically salient. Dworkin, however, does not offer the grounds for distinguishing between important practices motivated by sacred duties and unimportant practices (Laborde 2017: 48–9).

The other liberal egalitarian strategy that Laborde rejects is the one that she labels the “mainstreaming strategy” (Laborde 2017: 50–61), based on the view of Christopher Eisgruber and Lawrence Sager (2007). Eisgruber and Sager hold that religious believers should enjoy equal, but not special freedom. Religion is special, but not uniquely so; concerns of free exercise of religion are on a par with equally important and protection-worthy interests, such as familial commitments or the needs of the disabled (Laborde 2017: 52). Thus, Eisgruber and Sager believe that providing religious exemptions is justified by a concern for antidiscrimination.

But which feature of religion is ethically salient for egalitarian and antidiscrimination purposes? One feature that Eisgruber and Sager highlight is the vulnerability of religious minorities to hostile and unjust treatment of the majority. Their main example of majority neglect is the *Employment Division v. Smith* case, in which two Native Americans were denied unemployment benefits because they were fired for ingesting peyote, a hallucinogenic drug used for Native American rituals.² But because a similar exemption was provided to a religious ma-

² *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

majority group, namely, the exemption for ceremonial wine at Christian masses in Oregon, not exempting Native Americans is discriminatory in their view (Eisgruber and Sager 2007: 92; Laborde 2017: 54). In addition, Eisgruber and Sager try to explain why religion is morally salient for exemption: religious commitments are “deep”, similarly to other serious protection-worthy commitments like familial commitments and disability-related needs (Laborde 2017: 55).

While sympathetic to Eisgruber and Sager’s emphasis on differential treatment for religious majorities and religious minorities, Laborde rejects their view because she does not agree with analogizing religion with disability. Religious practices are fundamentally different, Laborde holds, because disability is by and large a negative state of the person that she wants to get rid of, whereas a religious practice is not considered a detriment that calls for compensation (Laborde 2017: 56).³

The third mainstream approach to religious exemptions is the view of Jocelyn Maclure and Charles Taylor (2011), which Laborde labels the “narrowing strategy” (Laborde 2017: 61). In Laborde’s view, Maclure and Taylor reduce the ethical salience of religion to conscientious duties (Laborde 2017: 61). For instance, they analogize religion with other non-religious conscientious commitments, like pacifists’ rejection of military service (Maclure and Taylor 2011: 89–90). Laborde, however, dismisses their approach because she thinks it is *too* narrow: conscience as the ground for providing religious exemptions is not satisfactory because many religious claims for exemption are much more practice-oriented than the ‘narrowing strategy’ suggests. She mentions devout Muslims and Catholics as relevant examples: if a devout Muslim observes Ramadan, or a devout Christian observes Lent properly, then these practices are “fundamentally about exhibiting the virtues of the good believer, living in community with others, and shaping one’s daily life in accordance with the rituals of the faith” (Laborde 2017: 66–7), rather than conscientious duties, strictly speaking.

As I mentioned earlier, Laborde’s alternative view to these mainstream approaches is the disaggregation strategy. Armed with this method, Laborde aims to keep what is best in earlier theories without inheriting their shortcomings. Laborde dismisses Dworkin’s strategy, for it does not find religion ethically salient. But while she finds Maclure and Taylor’s approach too narrow, she builds on their theory by adopting their two-pronged theoretical structure. According to this approach, what must be established in the first step is the ethical salience of religion, after which comes the question whether the given practice should be accommodated or not.

What makes religious practices ethically salient for Laborde vis-à-vis Eisgruber and Sager and Maclure and Taylor? Despite her denial of the conscientious duty approach of Maclure and Taylor, Laborde believes the strongest form of ethical salience is in the neighborhood of

³ In subsection 2.3, I examine this point in greater detail.

conscientious duties, as she thinks that what makes religion ethically salient is *integrity*. Religious practices, according to Laborde, are related to “integrity protecting commitments”, or IPCs (Laborde 2017: 197–217). Laborde identifies two types of IPCs: obligation-IPCs, which have a scope wider than Protestant conscientious duties (because they refer to embodied practices on top of beliefs) and identity-IPCs, which may concern any religious practice connected to the believer’s deeper sense of the self (Laborde 2017: 197–217). Either of these two grounds are sufficient for Laborde to give a pro tanto reason for accommodation.

Once the question of ethical salience is answered, the second step is to discover principles that inform us when IPCs should be accommodated. Laborde proposes two principles for justifying exemptions: *disproportionate burden* and *majority bias* (Laborde 2017: 217–38). The disproportionate burden principle, which aims to ensure that laws will “avoid disproportionately burdening certain kinds of commitments” (Laborde 2017: 221), has four elements: *directness*, *severity*, *aim of the law*, and *cost-shifting*. *Directness* “is measured in relation to the costs incurred by individuals in avoiding subjection to the law or regulation in the first place” (Laborde 2017: 221). The more direct a burden that a law places on the given religious practice, the more reason we have for exempting it from the requirements of that law. How *severely* a religious practice is burdened on Laborde’s view depends on how deeply the practice is rooted in the believer’s *perceived* (i.e. subjective) obligation (Laborde 2017: 223). The *aim of the law* criterion observes the extent to which a given law is central “in promoting egalitarian justice” (Laborde 2017: 225). Thus, “[t]he more tightly a law promotes a goal of egalitarian justice, and the more it requires universal and uniform compliance for its effectiveness, the less it will tolerate exemptions” (Laborde 2017: 225). Finally, *cost-shifting* aims to guarantee that exemptions will not cause unjust burdens to those not exempted by the law, but this must be balanced against the previous three considerations. Laborde concludes that whether “exemptions are compatible with justice” depends on “if the balance of these four reasons renders the burden disproportionate” (Laborde 2017: 228).

Laborde’s second principle for religious exemption is majority bias. This principle justifies exemptions where the background conditions favor a historically dominant religion (Laborde 2017: 229). This is a comparatively egalitarian principle that is clearly influenced by Eisgruber and Sager. Thus, for example, the preference of Muslims to leave their workplaces earlier on Friday can be justified on the grounds that the structure of the working week displays a majority (Christian) bias.

In the remainder of the paper, I will show that despite its elegance, Laborde’s theory faces serious challenges.

3. *The problem with Laborde's conception of the ethical salience of religion*

In this section, I will highlight three different problems with Laborde's approach. First (subsection 2.1), I will highlight some methodological disagreements I have with the two-pronged structure of Laborde's theory. Second (subsection 2.2), I show her fundamentally individualistic formulation of ethical salience, i.e. that the ethical salience of religion depends solely on some personal features of the religious believer, to be too narrow. Finally (subsection 2.3), I show her rejection of the analogy between religion and disability to be unconvincing; I demonstrate this by looking at my argument from earlier work that establishes this analogy.

3.1 *Some methodological disagreements*

As we have seen above, Laborde highlights two features of religious practices that make them ethically salient: obligation-IPCs and identity-IPCs (while giving stronger moral weight to the former). Thus, Laborde's formulation of ethical salience does not cover all religious practices. She bites the bullet here. Reflecting on the view of Andrew Koppelman, who considers all religious activities as potentially protection-worthy even if they are only motivated by "habit, adherence to custom or happy religious enthusiasm," Laborde asserts that practices which spring from these motivations are not eligible for accommodation (Laborde 2017: 216; cf. Koppelman 2006). Is the omission of non-integrity-based religious practices a problem? I believe it is. This stems from my methodological disagreements with Laborde.

First, I find the two-pronged structure of Laborde's theory too narrow. I understand why she and others like Maclure and Taylor believe that, for accommodation, we need to explain why a given religious preference is special compared to a non-religious one: if Sikhs' motivation for wearing a turban on motorcycles, which excludes the possibility of wearing a crash helmet, merely comes from happy religious enthusiasm, then it is hard to argue against Brian Barry's former colleague, who assured him that "nothing matches riding a Harley-Davidson at full throttle down a deserted freeway, and [...] a bare head is essential to the value of the experience" (Barry 2001: 47). Establishing ethical salience in the first step protects one's theory of religious accommodation from such counterarguments. But it also excludes the possibility that there can be reasons for accommodating a religious practice from happy religious enthusiasm that do not apply to people who prefer to ride a Harley down a deserted freeway bareheaded just for the sake of the special experience. In the next two sections, I show that, in some cases, we can find compelling reasons to accommodate religious practices without establishing the ethical salience of the practices first.

These compelling reasons, as I demonstrate in the next two sections, are sometimes related to religious individuals as members of re-

ligious groups, and other times to how the environment interacts with the given religious preference. But this analysis that lays emphasis on the person-environment interaction can only be done if our theory is highly sensitive to context. What is surprising is that the disaggregation approach promises exactly such deep context-sensitivity, but its Labordian formulation fails to fully deliver. Instead of the rich descriptions of empirical cases and their history, Laborde's approach simply remains a close cousin to Maclure and Taylor's conscience-based theory. Hence, my second methodological criticism is that Laborde fails to take advantage of the full potential of the disaggregation approach.

Let me illuminate this methodological criticism. I agree with Emanuela Ceva that the main novelty of Laborde's approach to religion is a methodological one, namely, her disaggregation approach, which aims to both identify the important values at play in the multiple contexts where religion is present and "unpack the religious phenomenon itself" (Ceva 2018: 819). This "unpacking" of religion as a method to me suggests, to use Jonathan Wolff's phrase, a "problem-driven" (bottom-up) approach rather than a "theory-driven" (top-down) approach (Wolff 2011). Wolff holds that with public policies, we should apply the problem-driven approach, which implies that "the first task is to try to understand enough about the policy area to be able to comprehend why it generates moral difficulties, and then to connect those difficulties or dilemmas with patterns of philosophical reasoning and reflection" (Wolff 2011: 9). The problem-driven approach fits nicely with Laborde's disaggregation approach—disaggregating religion as a phenomenon should be handled, I believe, by first examining the kind of problem we are facing regarding a given religious practice, and understanding all the complexities of the situation. By contrast, Laborde's theory of exemptions seems top-down: she makes great efforts in the book to provide a theory that integrates all occurring and possibly emerging religious accommodation cases. That is, if we have an accommodation claim, we should try to think about how it would go through the filters of ethical salience (IPCs) and Laborde's two principles of accommodation.

But given how complex and diverse the problem of religious accommodation is, I believe these integrative, top-down theories that aim to explain and justify all accommodation claims are doomed to fail. Instead, theorists should aim to provide partial, bottom-up explanations, or insights that focus on the problems on the ground. In other words, instead of trying to "paint the full picture", theorists of religious accommodation should aim to provide partial theories without which the full picture of religious accommodation would be incomplete.⁴

⁴ Here I refer to Calabresi and Malamed's famous work (Calabresi and Malamed 1972). Calabresi and Malamed aim to provide a partial legal theory of property rules and torts, without offering a comprehensive theory of tort law. As they put it, "[a]s Professor Harry Wellington is fond of saying about many discussions of law, this article is meant to be only one of Monet's paintings of the Cathedral at Rouen. To understand the Cathedral, one must see all of them" (Calabresi and Malamed 1972: 1089n2).

3.2 *Laborde's ethical salience is too individualistic*

Laborde's approach runs into further problems, which stem from one of the fundamental features of her formulation of ethical salience: it is primarily individualistic. Laborde assumes that if there is something ethically salient about religious practices, it must be located at the level of a person. So, if we want to learn about the ethical salience of a practice, we must direct our focus onto the relationship between the person and her commitments. But this individualistic focus cannot *always* account for why we want to accommodate religious practices. Let me highlight three aspects of religious accommodation which render an individualistic approach unconvincing. First, consider Peter Jones' point about 'innocent' reasons for the special legal protection of religion:

Religions are more likely than non-religious beliefs to throw up norms of conduct that clash with prevailing socio-economic arrangements, such as holy days, religious festivals, dress codes, sacred symbols, prayer times, dietary requirements, and so on. It is difficult to imagine a non-religious system of belief generating a similar range of norms, unless it was itself quasi-religious. (Jones 2012: 1)

Jones' observation highlights an important point, namely that religions can frequently be *comprehensive* in the sense that they regulate similar aspects of their followers' lives as the state does for its citizens. I hold that the presence of this kind of comprehensiveness can give compelling reasons for considering the accommodation of any religious practice that clashes with similar majority practices, without relying on the question of ethical salience. I think this non-individualistic perspective should have been on Laborde's radar. In other words, her analysis should be sensitive to whether the burdens falling on the exercise of a given religious practice are *intrinsic* to that practice, or they are *positional*, in which case the burden is due to an environment where the practice clashes with majority arrangements.

Second, a further difficulty is related to group-based religious and cultural accommodation. Laborde fails to recognize that *numbers can matter*, in terms of how many individuals seek accommodation. What certainly does not help Laborde here is her focus on providing exemptions, which in many cases does not involve significant cost-shifting. Of course, I do not want to suggest that she fails to consider the distributive aspects of religious accommodation entirely, since the last of the four components of her principle of disproportionate burden concerns cost-shifting. I also acknowledge that exempting certain practices from generally applicable laws is a problem for liberals.

But Laborde's focus is somewhat narrow in that it detracts attention from the fact that accommodation often requires *assistance* to claimants, which can entail the modification of the social and material environment. Frequently, for such reconstructive claims, idiosyncrasy is not enough to justify accommodation however ethically salient the claim might be. Of course, an immediate response from Laborde can be that the first prong concerns only *pro tanto* reasons for accommoda-

tion; whether the given (ethically salient) religious practice should be accommodated is a further question. An ethically salient idiosyncratic claim might not end up being eligible for exemption based on considerations of distributive justice. But then again, the accommodation of any religious practice, even those that Laborde takes not to be ethically salient, might be justified once there are enough people within a socially salient group who share the given practice.

Take Akiva Nof's case. During the Gulf War in 1990, the state of Israel provided gas masks to its citizens in order to protect them from possible gas attacks. Interestingly, the state manufactured special gas masks (which were twice as expensive) for its religious citizens who were bearded, since normal gas masks were useless for them (gas masks need to be airtight). But, Akiva Nof, a non-religious bearded citizen, also wanted a special gas mask for free, claiming that his beard was an essential part of his identity. He was denied, so his case ended up in Israeli Supreme Court, where he won.⁵ For the sake of the present argument, let's assume that Nof's motivation counts as an integrity protecting commitment (IPC), but the Orthodox Jews' preference for beards does not (they merely grow beards for happy religious enthusiasm or adherence to synagogue fashion). Thus, a Labordian theory would only focus on the question whether Nof's ethically salient practice is worthy of accommodation, or not.

The difficulty with Laborde's individualistic integrity view in such a scenario is that it is counterintuitive. For if someone's integrity is what makes a difference, then the special gas mask should not be manufactured in the first place because the Orthodox Jews' preference for beards is not ethically salient. Moreover, special masks would arguably not be manufactured for the sake of a single person,⁶ like Nof, however ethically salient his practice is.

In my view, it would be very counterintuitive to argue that designing and manufacturing a single special size mask, even if not very costly, is a requirement of justice. I believe it makes much more sense in this context to hold that once a sufficiently large group (having Labordian IPCs or not) carves out an accommodation, other persons who have a justifiable claim (possibly including conscientious objectors) can join that accommodation. But an individual, ethically salient practice or preference alone does not have this accommodation prompting force. That is, the ethical salience of the individual identity-IPC in this case does not trigger accommodation, unlike moral considerations from the group level. Or, if we want to stay loyal to the notion of ethical salience, in cases like those of the special gas masks, we can say that ethical salience of religion is generated by its group, not its individual dimension.

At this point, Laborde could object that if numbers matter in such a way, then we prove too much. The argument would suggest that any group, even with *prima facie* trivial characteristics, might be eligible

⁵ I take this example from Perez (2009).

⁶ Here I assume the problem of the economies of scale.

for accommodation, and it would not be obvious what is special about religion; that is, we end up with the unappealing position of dissolution. To reply to this worry, on the one hand, I do not find it counterintuitive that even the most mundane characteristic/practice can be accommodated if it is shared by enough people. Consider cyclists' preference for more bike lanes. This preference is triggered by the fact that bikers in a neighborhood have reached "critical mass". It would be unfair to deny this accommodation to them (while simultaneously provide it to people using alternative means of transport, e.g. car drivers).

On the other hand, this is not dissolution, at least not in the Dworkinian sense. Dworkin builds on the same two-level assumption that characterizes Laborde's theory: the first step establishes the ethical salience of a religious practice, as a necessary but not sufficient (*pro tanto*) reason for accommodation. If a given practice is not ethically salient then accommodation is not warranted; since the ethical salience of religion for Dworkin cannot be established as part of this first step, accommodation is unjustified. But my view is different. The ethical salience of a given practice is not necessary for justifying the accommodation—the reason for accommodation might stem from a different source.⁷ I also do not share Dworkin's dissolution approach because I do consider certain religious practices ethically salient (including Labordeian IPCs), but I simply hold that building our theory of accommodation on ethically salient individual practices would be too narrow. In addition, I think that comprehensiveness and sufficient numbers make religious groups special beyond the individual level of beliefs and practices and this can arguably justify accommodation.

Moreover, a third group-based reason for accommodation is *social salience*. According to Kasper Lippert-Rasmussen, "a group is socially salient if perceived membership of it is important to the structure of social interactions across a wide range of social contexts" (Lippert-Rasmussen 2013: 30). Unlike Laborde, I hold that this aspect of religious groups is important in the accommodations/exemptions context, since minority group membership and related religious practices can be subject to the majority's discriminatory treatment, similarly to racial groups or the disabled. In my view, non-accommodation can sometimes expressively harm religious minorities, by sending a message to claimants that their practice is less valuable than that of the majority merely on the grounds of their group membership. Thus, accommodation might be justified if it helps to prevent expressive harm to religious minorities. Laborde rejects this expressive-discrimination perspective in the context of exemptions/accommodations:

Consider [...] freedom of speech. In most cases, religious convictions should be analogized to ideas and opinions open to public critique. But when the target of the speech is not the beliefs themselves but some prejudiced, libel-

⁷ This can be the *mismatch* between individual characteristics and environmental requirements as I emphasize in Section 2.3, where I draw the disability analogy.

ous, or offensive characteristic attributed to the group itself, we can talk of hate speech via the racialization of religion, and the second dimension of religion comes to the fore. In cases of exemptions, however, I have suggested that the salient dimension of religion is neither “belief” nor “race.” It is, rather, what I have called integrity-protecting commitments. They are weightier than mere belief (which may or may not be connected to integrity). And they are not an externally assigned, racelike identity: they are commitments that individuals positively identify with, which should not be construed as a disability or disadvantage. (Laborde 2017: 224)

But as I emphasize elsewhere, neglecting a socially salient group’s crucial characteristics in designing public arrangements amounts to negligence and is discriminatory (Zala 2018: 819). The wrong-making feature of this kind of negligence is exactly that it causes an expressive harm to these groups, as in the case of racist policies. In the Sikh crash helmet case, as I demonstrate in my other work, this element of expressive harm is certainly present, arguably justifying the Sikhs’ exemption from wearing crash helmets on motorcycles (Zala 2017: 11), whereas an individualistic, integrity-based notion of accommodation is counterintuitive in this case.

One might think that the role of Laborde’s principle of majority bias is exactly to tackle these problems. After all, this principle deals with individuals as members of religious groups. But it is puzzling why Laborde does not entertain the idea of expressive harms if she thinks majority bias is a crucial problem regarding exemptions. Ideally, the principle of majority bias should counter tendencies of indirect religious discrimination, which should not only showcase the relevance of expressive harms, but also highlight why establishing ethical salience is unnecessary when minority religious practices are proxies for treating groups unfairly. It also points to a fundamental tension in Laborde’s theory between the two prongs simply because any, even the most trivial religious practice, can be subject to majority bias. But if that is the case, then we do not have to treat ethical salience as a lexically prior entry requirement for accommodation. In the following section, I show that even the majority bias principle’s scope is too narrow because—as we will see regarding human variation issues—the need for minority accommodation does not always entail bias on the part of the majority.

3.3 *Religion and disability*

My final critical remarks refer to Laborde’s dismissal of the analogy between religion and disability. Laborde’s discussion of this issue is sporadic and exclusively focuses on Eisgruber and Sager’s argument, although she is definitely not alone in rejecting this analogy (Barry 2001: 36–7; Dworkin 2002: 291–6). Laborde’s view regarding disabilities and the analogy between disability and religion is unsatisfactory in two respects.

First, her rejection of the analogy comes from a false understanding of why disability is a social problem. According to Laborde, “[i]t makes

a moral difference that people (by and large) positively endorse and embrace their religious convictions, whereas they (by and large) prefer not to suffer from a disability” (2017: 56). This characterization of disability is often called the ‘personal tragedy view’ and underlies the ‘medical model’ of disability (Barnes 2016: 168). But the personal tragedy view is both offensive to people with physical impairments and misleadingly essentializes their situations. It is true that, for many people, losing an already possessed physical function is tragic and a circumstance of their lives that they would like to prevent from ever happening if they had the opportunity. This is especially true for those individuals whose life projects crucially depend on some physical characteristics and skills. Just think of a conductor who loses his hand in an accident (provided s/he does not possess the unique skills of Leonard Bernstein).

But this is not necessarily true for every person who is physically impaired. For those who were born with a functional limitation, this might not be a problem (that they should “overcome”) at all. This is because for many physically impaired people, their impairments are not, to use Ronald Dworkin’s distinction, *limitations* on but *parameters* for their lives and life plans (Dworkin 2002: 260). Laborde seems to acknowledge this when she says that

One may object [...] that people may also embrace, and identify with, their state of pregnancy, age, or disability. This is correct, but it misses the point: there are separate reasons for accommodating such states of being or cycles of life. IPC exemptions, by contrast, arise principally out of a conflict between the law and a given belief or project. An incidental burden on an IPC should be construed not as a disadvantage worthy of compensation but instead as one of the costs of (well-ordered) freedom. (Laborde 2017: 219)

Two things must be said regarding Laborde’s rejoinder. First, here again, she affirms that what she has in mind is the medical model of disability, which holds that disability is a personal deficit that must be corrected or compensated. A criticism can be raised that her view on disability is *ableist*, claiming implicitly that being able bodied is a norm that physically impaired people should live up to. The first problem with her denial of the analogy between disability and religious accommodation is that it could only be true if ableism were correct.

But there is a further difficulty with Laborde’s view: because of her inappropriate understanding of disability, she does not acknowledge the *role of the environment* in creating impediments for both disabled and religious individuals. Laborde, just as Eisgruber and Sager, considers disability an individual characteristic. For Eisgruber and Sager, the analogy between disability and religion is intuitive, and they try to substantiate it by stating that for disabled individuals, their disability is a comparably “deep” and “serious” commitment or project (Eisgruber and Sager 2007: 101, 104; Laborde 2014b: 58). Laborde rightly rejects their reasoning because it is unnecessary for accommodating the disabled that their physical impairments should have a special meaning to them. This individual focus is misleading because many of the diffi-

culties the disabled face are results of unaccommodating environments.

In previous work, I show exactly how the environment creates impediments for both religious minorities and the disabled. There, I apply the human variation model of disability (HVM) to the problem of religious accommodation. According to the HVM, disability is a problem of mismatch between personal characteristics and the environment (Wasserman et al. 2016). According to the chief proponents of this model, Richard Scotch and Kay Schriener:

[D]isability could be defined as an extension of the variability in physical and mental attributes beyond the present—but not the potential—ability of social institutions to routinely respond[...] [T]he problems faced by people with disability might be seen as the consequence of the failure of social institutions (and their physical and cultural manifestations) that can be attributed to the institutions' having been constructed to deal with a narrower range of variation than is in fact present in any given population. (Scotch and Schriener 1997: 155; quoted in Zala 2018: 812)

In other words, the problem of the physically impaired is that they are an *atypical* minority, the social and physical arrangements of which are tailored to the characteristics of the majority. Thus, I approach the Sikh crash helmet case from a completely different angle than Laborde. The complication is not that Sikhs object to the general requirement of wearing a helmet, but that the British state failed to take into account in enacting the mandatory helmet regulation that there are citizens in the UK for whom wearing helmets on top of their turbans is not an option (cf. Poulter 1998: 292). This raises moral controversies because the negligence of the British state could potentially send the message that Sikhs are less important citizens than non-Sikhs.

Laborde could reply that her principle of majority bias can account for human variation cases. But this comes at a cost: to begin with, she has to acknowledge that Eisgruber and Sager's mainstreaming strategy often makes sense. Consequently, the principle of majority bias would have to be refined, as it should no longer be about whether there is fairness among the treatment of religious groups, but about fairness between mainstream society and a religious minority. Or, if we are sufficientarians or capabilityarians, we do not even need a comparison group to justify reconstruction. We would hold that Sikhs must have the opportunity to ride motorcycles safely, independently of the fact that this opportunity is provided to others.

Consider the following example, involving the Japanese restroom experience of Irving Zola, a disability scholar and activist, who upon entering a public restroom in Japan was surprised to find not only that the restroom had toilets for the disabled “with an expansiveness in size and features” he has “never encountered outside of a private home”, but that the restroom also had a full range of accommodating toilets for “normal” people (Zola 1993: 23). Thus, the restroom had both traditional Japanese toilets (where one squats over a “squat hole”) and Western style toilets (Zola 1993: 23). Zola was amazed because he real-

ized he had been trapped in the dichotomous view of disability (according to which someone is either disabled, or not). The amazing variation of different toilets from the Japanese experience made him recognize that disability is a gradual notion, a matter of degree (Zola 1993: 23–4).

Yet, the reason why this example is interesting to me is because it shows a number of important things about accommodation in general. It not only shows that modifying the environment can be required by reasons for accommodating the needs of religious, cultural and physically impaired people, but that it would also be offensive if the characteristics of one of the socially salient groups were not considered during the design of the public restrooms.

We can also test Laborde's IPCs with Zola's example. First, the example shows that the need for accommodation depends neither on obligation-IPC's nor on identity-IPC's. Accommodation is triggered, I believe, because a lack thereof would send the message towards salient social groups, like the Japanese or the physically impaired, that the state does not consider them likely users of such public facilities (cf. Anderson 2010: 92). The moral assessment of this situation would not change if an additional religious group appeared requiring a new design for the toilet. Their preference for the special design of toilets would provide pro tanto reasons for accommodation even if it was neither an obligation, nor a matter of personal identity, but merely an ordinary, trivial reason.

4. Conclusion

In this paper, I showed that Laborde's theory of religious exemptions faces some important difficulties. These are related to her formulation of the ethical salience of religious practices that provide reasons for accommodating such practices exclusively. I pointed out that her emphases on obligations and identity as the grounds of religious individuals' integrity, which, in turn, serves as the backdrop for accommodation, faces some challenges. First, her formulation of the ethical salience of religious practices based on personal integrity is too narrow. Second, her individualistic understanding of ethical salience faces several problems. Finally, I aimed to show that her rejection of the analogy between religious and disability accommodation is unconvincing.

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