

# Religious Liberty and the Alleged Afterlife

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*Abstract:* It is common for religiously motivated actions to be specially protected by law. Many legal theorists have asked why: what makes religion special? What makes it worthy of toleration over and above other non-religious deeply held convictions? The answer I put forward is that religions' *alleged afterlife consequences* call for a principle of toleration that warrants special legal treatment. Under a Rawlsian principle of toleration, it is reasonable for those in the original position to opt for principles of justice that accommodate actions with alleged afterlife consequences. And, under a utilitarian principle of toleration, a greater psychological harm is eased by such accommodations. Additionally, this alleged afterlife consequence is found in most of the religions that are thought to warrant some level of special toleration—not only do the Abrahamic religions have alleged afterlife consequences, but many eastern religions do as well, e.g. reincarnation.

## Introduction

In 2008, a Muslim woman, Samantha Elauf, was denied employment at Abercrombie & Fitch because her religious practice of wearing a headscarf was not permitted by Abercrombie's "Look Policy," which prohibited "caps." Six years later, the Supreme Court ruled in Elauf's favor, determining that Abercrombie violated Title VII of the Civil Rights Act of 1964, which prevents employers from discriminating on the basis of religion (*Equal Employment and Opportunity Commission (EEOC) v. Abercrombie & Fitch*, 2015).

The legal protection given to Elauf highlights the special treatment that religion receives under U.S. law. "Caps" of other kinds would almost certainly not receive similar protection. A MAGA<sup>1</sup> hat-wearer, a pro-pacifism beanie-wearer, and even a person who wears a headscarf to express "solidarity with [their] persecuted Muslim friends" (Beckwith, 2019, p. 5) would all fail to receive special protection under the law. Abercrombie could plausibly deny them all employment without legal repercussion. So why should religion receive this *special* treatment? Numerous answers have been suggested, and numerous refutations have been issued in response. In this paper I argue that there is a principled reason for tolerating religion that explains why it ought to be accorded

special legal treatment: its alleged afterlife consequences.

I begin by explaining the problem in more detail and briefly surveying some proposed solutions. Then, in response to Brian Leiter, I propose that the alleged afterlife consequences of religion are the distinctive feature that warrants special treatment. Then I defend this claim from both a Rawlsian and utilitarian principle of toleration. Lastly, I explain how it is properly inclusive, capturing those religions typically thought to warrant special protection.

### Is Religion Special?

This question is usually posed with a case like this in mind: two different women want to open soup kitchens for the poor from their respective homes. One is motivated by her religious convictions, while the other is motivated by her empathy and altruism. The religious woman is more likely to find an exemption from local zoning laws than the altruistic woman (Eisgruber and Sager, 2009, p. 11). This and other cases are supposed to trigger intuitions of unfairness and inequality.

To remedy this, several legal theorists have tried to put religion on par with other deeply held convictions. One example is Eisgruber and Sager's "Equal Liberty" approach to religious freedom, which claims there is no reason to treat religion as special (2009, p. 52). They instead emphasize that no person should be "disvalued on account of the spiritual [or non-spiritual] foundations of their important projects and commitments" (Eisgruber and Sager, 2009, p. 52). So, if Elauf's headscarf-wearing is protected by law, then other deeply held non-religious convictions should be as well. There is no reason to favor her claim simply *because* it is religious. Another attempt to put religion on par with deeply held convictions is exemplified by Dworkin. However, he does this by expanding the definition of religion. Dworkin claims that a religious attitude is one that "accepts the full, independent reality of value" (2013, p. 10). In this way one could be a religious atheist, as he supposes Einstein was (Dworkin, 2013, p. 3). But, as Dworkin notes, "once we break the connection between a religious conviction and orthodox theism, we seem to have no firm way of excluding even the wildest ethical eccentricity from the category of protected faith" (2013, p. 124). Thus, he thinks that religious freedom should not be treated as a *special* right, but only as part of a more *general* right to ethical independence (Dworkin, 2013, pp. 129-133). Again, this would put traditionally religious claims (e.g. headscarf-wearing) on par with traditionally non-religious deeply held convictions.

On the other side of the debate, many have tried to identify features of religion that call for special treatment. Some have claimed that the relevant

feature of religion is that it "is a unique source of individual and personal identity," (Witte and Nichols, 2016, p. 277) that it is grounded in faith as opposed to reason (Macklem, 2006, p. 133), that it has an architectonic role in structuring all other goods we pursue (Moschella, 2017), and that it has the status of a divine sovereign command in believers' lives (Beckwith, 2019, p. 5). While several of these are plausible justifications for special treatment, many of them run into at least one of two problems: (1) they do not warrant toleration or (2) they are overinclusive or underinclusive. For an example of problem (1), it is not clear why something's being an item of faith rather than reason would call for special toleration. With respect to the overinclusive problem, there are many non-religious affiliations or traditions that are unique sources of personal identity; this is not an exclusive property of religion. And as for the underinclusive problem, divine sovereign commands are not present in many religions we typically regard as warranting protection, e.g. Jainism, Buddhism. Thus, religion's being a unique source of personal identity or having divine commands do not seem like reliable features upon which to justify the special claims of religion generally.

### The Alleged Afterlife Consequences

Brian Leiter claims, "no one has been able to articulate a credible principled argument for tolerating religion qua religion—that is, an argument that would explain why, as a matter of moral principle, we ought to accord special legal and moral treatment to religious practices" (2014, p. 7). In response, I would like to propose just such an argument, an account of why, as a matter of moral principle we ought to accord special legal treatment to practices grounded in religious belief. This account is rooted in the alleged afterlife consequences associated with the actions of religious believers.<sup>2</sup>

In *Why Tolerate Religion?*, Leiter overviews arguments for toleration and determines that no feature of religion warrants special toleration. The relevant features Leiter identifies in religion are the *categoricity of religious commands* and *insulation from evidence* (2014, p. 34). Categorical demands are "demands that must be satisfied no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers up" (Leiter, 2014, p. 34). But Leiter notes that there is nothing special about this feature that differentiates it from non-religious categorical demands (2014, p. 55). The MAGA hat-wearer may feel just as strong of a demand to wear his hat as Elauf feels to wear her headscarf (so goes the claim). Thus, the religious claim does not warrant a *special* sort of toleration.

The problem with this feature is that there can be an *objective* difference

between the weight of demands in religious and non-religious cases *even if* both are categorical claims. Consider an apathetic man who cares for nothing except the Dallas Cowboys. He is also particularly stubborn and superstitious and would never remove his Cowboys hat on game day. By Leiter's definition, this may be a categorical demand in his life—no matter the incentives or disincentives, he will not remove his hat. But this is vastly different from a case where a principled, young woman who has devoted her life to Allah refuses to disobey his commands by removing her headscarf in public. While the demands in their lives occupy the same *relative* position, they are objectively of a different weight.

This objectively different weight should be captured by the feature we claim as distinctive of religion. As evidenced by the Cowboys fan, the categoricity of a demand could be experienced by anyone and, in itself, calls for no special treatment. So, I propose that the feature that is distinctive of religion and calls for special toleration is that *religions have demands, obligations, or objectives the consequences of which determine one's well-being in the afterlife*. In short, religions' demands are unique and call for toleration because of their alleged afterlife consequences. The weight upon the young woman comes neither from the categoricity of the demand nor the mere fact that the command is divine, but that, because of its divinity, her eternal well-being—her eternal relationship to the divine—hangs in the balance.

Acknowledging this as a feature of religion does not require assuming that the afterlife actually exists. There is reason for a secular liberal state, which does not accept the existence of an afterlife, to protect religion on the basis of this feature. This is why I use the term *alleged* afterlife consequences. The headscarf-wearer firmly *believes* that her eternal well-being rides on her actions. This is why there is a cognitive, psychological, and moral difference between the weight of her beliefs and that of the fervent Cowboys fan's.

Consider this analogy: Imagine a country with a large population of people with extremely sensitive hearing, e.g. the sound of a car horn is debilitatingly painful for them. It seems reasonable to accommodate those people in some ways, e.g. maintaining strict noise ordinances, exempting them from certain zoning laws. There may be others without sensitive hearing who dislike loud noise and claim they should be accommodated as well. But, like the Cowboys fan, their claim simply does not have the same weight behind it. Admittedly, this analogy is not perfect. Religious belief is not a disability and is often seen as something that one chooses rather than something that happens to oneself. But I think the analogy is apt in that afterlife consequences put an objectively more intense moral

and psychological weight on believers much like noise is objectively more painful to the sensitive hearers. Some theorists have even held that forcing someone to act against their deeply held convictions (in this case, convictions backed by afterlife consequences) can constitute a moral harm equivalent to the kind of physical harm that justifies the accommodation of people with disabilities (Maclure and Taylor, 2011, p. 77).

For this analogy to be appealing, we cannot think that religion is culpably false belief as Leiter does (2014, p. 77). We would not be inclined to accommodate sensitive hearers if they freely chose to damage their ears in ways that they should have known not to. Also, we would not be inclined to accommodate sensitive hearers if they were vicious and harmful to others. So, I will assume (because I cannot adequately defend here) that religious belief is not epistemically irresponsible and, overall, is no more socially harmful than the average non-religious worldview.

### Does This Feature Warrant Toleration?

Leiter himself says that experiencing demands as categorical “is an important psychological fact about creatures like us, to which law must be sensitive” (2014, p. 132). How much more sensitive when the demands have the weight of eternity behind them? In this section I will explain how the alleged afterlife consequences of religion warrant special toleration under two arguments for a principle of toleration that Leiter puts forth: Rawlsian and utilitarian.

The Rawlsian perspective lumps moral and religious categoricity together (Leiter, 2014, p. 55): the individuals in the original position know they may have some categorical demands but do not know which ones, whether religious or moral (Rawls, 1971, pp. 6-7). For Rawls, the result is that this justifies freedom of conscience *generally* but does nothing to single out religion as special (Leiter, 2014, p. 55). But consider now that those behind the veil of ignorance are informed that they may experience some demands in their lives as demands *with afterlife consequences*—i.e. that they may firmly believe that certain of their actions will subject them to, say, an eternity of torture or heavenly bliss. It is reasonable for those behind the veil to select principles of justice that, at least somewhat, accommodate those religiously motivated actions.

Rawls himself recognized the burdensome strains of commitment attached to actions promising eternal damnation (Laborde, 2017, p. 62). But this seems to have only motivated him to give special lexical priority to freedom of conscience generally, though it is unclear why (Laborde, 2017, p. 62). Some have argued that there is a reasonable interpretation of Rawls

that would in fact give special priority to religious liberty (Koppelman, 2017, pp. 31-43; Taylor, 2003, p. 252). While I cannot devote more space here to Rawls's work and the surrounding literature, I do regard this thought, at least, as perfectly intuitive: if you were to enter a world where you might experience certain actions as eternally damning, you would likely support *some level* of legal accommodation for such actions.

As for a utilitarian justification of toleration, Leiter accepts the argument that toleration increases the overall well-being of humans (i.e. utility) by giving them a "private space" in which they can freely choose to believe (2014, p. 18). But Leiter finds no reason why this principle of toleration would call for special toleration of religion. He thinks that the combination of categoricity of demands and insulation from evidence likely produces more harm than good (Leiter, 2014, p. 61). However, I have already assumed that religion is not epistemically irresponsible and that it produces no more social harm than the average worldview. So, the major item left to consider is whether a heavier psychological weight (i.e. a harm) is eased by accommodating religious claims in particular.

Leiter thinks there is not a heavier weight behind religious claims, and he supports this by comparing religious resisters and Marxist resisters to the rise of Nazism (2014, pp. 36-39). Both groups resisted intensely and some even gave their lives. Thus, he reasons, their claims must have had a similar weight (Leiter, 2014, p. 132). However, I disagree that the demands of Marxism and religion have the same weight. Just because both the genuine Marxist and the genuine martyr's respective demands caused them to give their lives does not mean the psychological facts are the same. Death is simply the most one can give, but one can certainly feel a stronger and more genuine claim to do so than another. The Cowboys fan could give his life to wear his hat, but that does not show that he has the same psychological weight upon him as a Muslim woman who is martyred for refusing to remove her headscarf. Also, as Robert S. Taylor points out, those who die for their philosophical or moral views are well-known "precisely because of their rarity [e.g. Socrates]; religious martyrs are far more common than moral or philosophical ones" (2003, p. 253). If the frequency of martyrdom is evidence of a greater psychological weight, then the evidence is on the side of religious claims. A full defense of the psychological harms and the related utilitarian calculus cannot be adequately addressed here. But it should suffice to say that if we hold other harms equal, accommodating religious claims would likely be favored by a utilitarian principle of toleration because those claims typically have a heavier psychological weight behind them.

### Is This Feature Underinclusive?

The last question I will address is whether the feature of afterlife consequences is too narrow to capture all the religions we typically view as deserving of legal protection. For example, providing religious accommodation based on the feature of monotheism would exclude many religions that we typically think deserve religious accommodation (e.g. Hinduism, Buddhism), thus monotheism is not the best feature to base religious liberty upon. However, I think afterlife consequences is a nearly perfectly inclusive feature. Not only would it include the Abrahamic religions which typically invoke some version of heaven and hell, but it would also include religions that believe in some form of reincarnation or post-death existence. This would include most sects of Hinduism, Buddhism, Sikhism, Jainism, and even some sects of Confucianism. If one's actions in this life determine whether one goes to heaven or hell, reincarnates as this or that, or reaches nirvana, then one's religion would warrant special toleration under my proposed feature.

On the other hand, perhaps there are some religious sects that do not have afterlife consequences. In such cases I am comfortable biting the bullet: those sects would not be given special legal accommodation based on the argument given in this paper. Such sects may be venerable traditions with robust life philosophies, but the weight of afterlife consequence is not upon them, so they would not be given special accommodation.

### Conclusion

It seems right to me that Samantha Elauf was protected by law in a way that the MAGA hat-wearer would not be. A clear difference between religious and non-religious worldviews is the alleged afterlife consequences that accompany a religious believer's actions. This feature is found in most of the religions people think ought to have legal protection and this feature justifies a principle of toleration even in a secular liberal state. To be clear, I have not determined what level of accommodation ought to be given, only that *some level* is justified. Also, I have not suggested how to determine which particular actions of religious believers ought to be accommodated. These determinations are certainly worthy of further discussion, best saved for another time.<sup>3</sup>

Notes

<sup>1</sup> MAGA stands for “Make America Great Again,” a campaign slogan used by Donald J. Trump.

<sup>2</sup> While this is one way of justifying special legal protection for religious practices, this is not necessarily the ideal way.

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