Religion, Identity and Freedom of Expression

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The freedom to express religious beliefs and to manifest them publicly in speech and in practices of various sorts has become a big issue in Western European politics and law. We need think only of a few recent cases:

(1) The debate in France about whether or not to ban the veil worn by Muslim women in public places and the legislation under consideration by the Chamber of Deputies to ban the burka and to penalise family members who are held to pressurise girls into wearing this garment. The burka has already been banned in Belgium. Many Muslims regard the wearing of these distinctive forms of dress as mandated by their religion and the proposed and extant laws as restrictions of their freedom of religious expression.

(2) The debates arising out of the Equality Act 2010 about the rights of religious organisations to discriminate in favour of those with sympathy for and, in some cases, belief in the doctrines and practices of the religion.

(3) The decision of Roman Catholic adoption agencies to close down rather than offer children for adoption by gay and lesbian couples as the law requires.

(4) Controversies over the wearing of religious symbols in both public sector workplaces such as schools and hospitals and private sector organisations such as British Airways.

(5) The disciplining of a nurse who offered to pray for a patient in her care.

(6) The requirement that rooms in guest houses, which are also private homes, be available to gay and lesbian couples even if such relationships are contrary to the religious beliefs of those offering accommodation.

(7) The role and function of faith schools in a liberal democracy when such schools are largely publicly funded.

(8) The very categorical dismissal by Lord Justice Laws of an appeal by an employee of Relate who was dismissed because, on the grounds of his religious beliefs, he would not offer counselling to a gay couple. This judgment led Lord Carey to claim that Christians were being forced out of public life because they were being prevented from acting on their conscientious convictions in the public realm. The Pope also drew attention to this sort of issue on his recent visit to Spain when he argued that the role of human rights and equality legislation made it more and more difficult for Roman Catholics to articulate in the public realm what they regard as being intrinsically morally wrong about homosexual acts.

(9) A report in *Le Monde* on 12 May 2010 that the French minister for Immigration, Integration and Social Identity, Eric Besson, had announced that Imams hoping to operate in France would

have to attend courses in two public universities to learn how to articulate their Islamic beliefs in ways compatible with French political values and republican culture. This case raises questions about the role of the state and the privilege that it claims in relation to regulating the manifestation of religious beliefs.
These examples involve to
In the UK these issues have become much more overt since the passing of the Human Rights Act (HRA) in 1998. This Act has been important in what might be seen as a transition from *ethos* to *rules* – a move from seeing liberal democracy as a matter of practice and habit to one of explicit rules, principles and laws such as those embodied in the HRA and the 2010 Equality Act. Certainly some of the most passionate academic and judicial defenders of the HRA have seen it as articulating in legal form some of the basic principles and values of liberal democracy, defining as it were the basis of civic equality and civic freedom. An ethos is rather different just because it is a matter of practice and habit; in such a context there can in fact be more fudging of issues and compromises between different points of view and forms of community life based upon those differences. So, in the case of renting rooms in a private guest houses for example, this would have been dealt with at an earlier time on a much more informal basis because the gay couple had no right to a room in the guest house *qua* gay couple and would probably have been directed elsewhere. This would no doubt have led to hurt feelings and resentment but not to a public infringement of explicit rights. The HRA and the Equality Act have become in the UK something akin to what Rawls had in mind when he talked about public reason – that political claims based on whatever sort of beliefs have to be advanced and defended in terms embodied in legislation of this sort which is supported by an overlapping consensus (Rawls 1993).[1] However, making liberal principles explicit in law and regulations means greatly reducing the scope for easy fudging and compromise. This is particularly true of Article 9 of the ECHR incorporated by the HRA. This Article guarantees an absolute right to freedom of religious belief but coupled with a degree of conditionality relating to the expression or the manifestation of belief and how that might impact upon others. The manifestation of religion is subject, in the words of the Convention, to "such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others". Many of these limitations, as I have said, may previously have been settled by convention or habit but are now settled by rules and have been turned into questions of law and are justiciable.

In this paper I want to explore the philosophical and jurisprudential basis of two questions that are fundamental to how we might formulate coherent ideas on the grounds on which freedom to manifest religion and the abridgement of that freedom might be justified. The two questions that I have in mind are, first, the claims of religious identity – the idea that certain manifestations of belief are intrinsic to and are mandated by the religion in question and that such manifestations must, of necessity, be made in the public sphere – and, secondly, the question of what is so special about religious beliefs such that they need special treatment in law and whether the case for that special treatment is sustainable. These two questions are in fact closely related. In the case of the claim to what religious identity requires, it might be argued that it is in the nature of, or intrinsic to, religious identity that it should be manifested in certain public ways, including for example speech, practice, ritual and the articulation of claims about the proper order of the public realm within which the religious believers are embedded. So the question here is, to echo the words of Kwame Anthony Appiah (2005), whether or not having a particular identity confers a right to manifest that identity's normative requirements. On the view that it does, religious belief is intrinsically linked to certain sorts of manifestation

and it is claimed that it is not possible to defend an absolute right to freedom of religious belief but only a conditional right to the manifestation of that belief. This, however, leads to the second question, namely, what is it about religious identity that gives it, or ought to give it, some kind of privileged legal status – such that, for example, religious people might justifiably claim and be given exemption from general laws in a liberal society? This question is particularly pressing when those laws can be seen as defining common citizenship in terms of equality. The answer must be some argument to the effect that religious belief is particularly valuable or significant in human life so that it deserves special consideration in the law; but this is more or less the same question as what it is about religious identity that makes it particularly valuable and that can justify legal privilege and legal exemption. So, while I shall try to keep these two questions separate for the purpose of discussion, they do in fact merge into one another.

I shall take up questions of identity first of all. No doubt religious believers are convinced that their beliefs lie at the heart of their identity. In the terminology of Michael Sandel (1982), they have 'encumbered selves' – that is to say, their religious beliefs are constitutive of their sense of self, their fundamental understanding of who they are, the meaning that they give to their lives, their sense of what is required of them and of their obligations to others. Their religious beliefs embody ends which dominate their lives and which, at least in a general sense, shape the nature and significance of the subordinate ends, goals and purposes that they entertain. These beliefs, they might think, have to be manifested in public in a whole variety of ways and that manifestation is intrinsic to and is mandated by their beliefs. These are two somewhat separate things. By intrinsic I mean that certain practices are regarded as being essential to the integrity of the faith which the person has, such that truly to believe it entails engaging in these practices – a good example would be the Islamic requirement to pray five times a day. By mandated I mean something a little different, namely the idea that one is required to live out the practices intrinsic to one's belief in the public realm. So, for example, it might be that a particular religion has, as an intrinsic aspect, the belief that gay sexual activity is fundamentally morally wrong and a religious believer would accept this view as being intrinsic to the religion but he/she could hold to that view as a private belief. However, the religion might also mandate the manifestation of that belief in the public world as, for example, refusing accommodation to gay couples if the religious believer was the proprietor of the guest house. Here the religious belief itself, an intrinsic aspect of that belief, and the requirement to act on the belief, are parts of a continuum. The religious believer, whose belief takes this form, would not naturally see the right to religious belief as one thing and the more conditional right to manifest the belief as another. The protection of an absolute right to freedom of belief and freedom of conscience has been a great achievement of liberalism but it has very often assumed that such beliefs and conscientious behaviour is to be seen as essentially private. However, as the cases and issues cited at the beginning of this paper show, this is no longer the case.

A good deal of the litigation in both the UK and Europe over issues of this sort has been focused on the question of whether a particular practice is or is not an intrinsic part of a belief. So is wearing jewellery (say a crucifix or a chastity ring) an intrinsic part of religious belief? Is wearing a burka an intrinsic part of Islam? Is offering to pray for a patient an intrinsic part of Christian belief about what it is to care for others? Etc. One can see why such an approach of seeking to determine what is essential to a particular religious identity has been taken – although the judgments are anything but consistent – because the argument that behaviour X is required by the religion or mandated by the religion would fall if the belief underlying X is not in fact an intrinsic part of the religion. So, if a particular practice is neither mandated by a religion nor

intrinsic to it, whether a practice should be allowed becomes subject to the imposition of the conditions set out under Article 9 of the ECHR since, on the assumptions just set out, banning the practice would not to infringe religious belief. This is not to say that, so long as a belief is intrinsic to the religion, its mandated practice will be tolerated under the law because that practice may still be subject to the countervailing conditions set out under Article 9. All that I am pointing out is that, in terms of legality, many cases in the UK and Europe have turned on whether a belief and a practice are to be regarded as intrinsic to the religious belief in question and thus as part of religious identity.

The legal approach to this issue is though fraught with difficulties mostly of a normative sort. Broadly speaking there are three closely interrelated issues. The first is that a judge may well be very ill equipped to make a judgement about what is essential to a religion and whether behaviour of a particular sort is mandated by its essential beliefs. The judge typically is neither a theologian nor a specialist in comparative religion. Secondly, if the idea of what is essential or intrinsic to a religious belief is being pursued in the courts, it would seem to be essential for the court to be alive to the fact that, even within the religion or within denominations or sects within the same religion, there may well be different opinions about what is essential to the religion. This is certainly true of Christianity, Judaism and Islam, in all of which there are on-going and often bitter disputes about what is intrinsic to the faith in question. This immediately raises the question of the kind of authority the court will accept as giving a proper and accurate account of what is essential to the religion. In many cases, these authorities will be male and elderly and there has to be a real question as to whether this whole approach to the question of what is intrinsic to religion is a form of empowerment of conservative interpreters of the particular religious tradition and an undermining of more modern (and possibly more liberal) versions. The final point here though is: what is the position of the individual believer whose conduct is being judged, whether it is the schoolgirl wearing a crucifix or chastity ring contrary to school rules or wearing Islamic dress contrary to the school uniform policy, or the nurse who feels the religious obligation to pray for a patient, or the religiously conservative guest house proprietor? How far should their own interpretation of the requirements of their belief have some kind of priority in a case, and how far should some religious authority, be it a priest or scholar, be allowed to correct and perhaps undermine the believer's own understanding of their belief and its requirements? This would be a particularly awkward question in relation to some kinds of protestant evangelical groups who do not recognise any kind of religious authority even within their own sect and rely entirely on their own religious experience and how their experience guides their reading of Scripture and its requirements.

So there are quite subtle questions to be raised about essentialism in religion, the authority to interpret it, where this power and authority reside within that particular belief system and how these should impact on legal cases. Thus the appeal to identity is not an appeal to some kind of self-evident naturalistic fact but rather a complex, constructed and contestable claim.

The alternative position would be to abandon altogether the idea of linking the resolution of the issue of the freedom to manifest religion to that of religious identity. This view would receive support from some positions that would, in any case, want to dispute claims about religious identity in general. One position here arises out of some of the cases and issues cited. It might be claimed that there is a fundamental difference between religious identity, which is self-chosen and self-assumed, and those forms of identity which are *given* matters of fact, for example ethnicity, gender and sexual orientation. It is frequently argued that, in relation to the

issue of the protection of identity from discrimination and oppression, there is much more of a case for ascribing these given forms of identity a protected status in the form of rights than religion for the reason stated: religion is a chosen form of identity and these other forms are not. The simple test of the difference, it might be argued, is that in the religious case one can leave the religion whereas one cannot abandon one's ethnicity or, in the vast majority of cases, one's gender, or, in the view of many, one's sexual orientation (although there is some controversy about that). These should be protected characteristics, whereas religion is just another set of preferences and lifestyle choices and, while a liberal society will protect people pursuing their own conception of the good in their own way so long as they do not interfere with the similar freedom of others, this is different from the protection to be afforded to features of life which are given and discovered rather than chosen. Defenders of this view would also typically argue that discrimination, say against gays, is sanctioned by a life-style choice (as they take religion to be) and should not be allowed when it is directed against an identity that is given rather than chosen.

Critics of this position will argue that it makes too simplistic a contrast in virtually every dimension, whether it is in terms of choice, the claimed requirements of a particular identity, or the relationship between identity and beliefs.

In terms of choice, it is often argued that the idea that religion is self-assumed and can be relinquished as a matter of choice is misconceived. There are two aspects to this: one from within a religious perspective, the other with a broader resonance. From within a religious perspective, it is often argued that religion is not to be seen as a matter of choice. Rather allegiance to religion is based on the idea that one is called to that set of beliefs and that way of life by God and that often people accept a religious belief after quite a struggle because they recognise this call rather than its being a matter of choice. The beliefs that come to constitute the self of a religious person and that provide the dominant end for his/her life is something discovered not chosen. The second more general claim is that, when religion is seen not just as a form of private belief but as part of the life of a community within which one lives as an adherent of its religion, the costs of exit from the life of the community may be too high for many or even most adherents to bear. These costs can range from a loss of cultural identity, to loss of family, possessions, and may even involve subsequent coercion and threats of force (Gutmann 2003). On this view, religion is not a matter of lifestyle choice or of having a set of preferences which can be changed like fashion, but involves some of the deepest attachments a human being can have in relationship to others. Equally, it might be argued that, even leaving others out of the equation, abandoning a religious view which has shaped a life hitherto is a traumatic shock to the psyche of that person and therefore the claim is that religious identity, while in many ways different from gender, ethnic and sexual identity, is nevertheless still a basic form of identity which should be respected and protected in the same way as those other identities.

The critic of the idea that there is a categorical contrast to be drawn between religious and other forms of identity might also want to focus on the issue of the relationship between an identity and what might be seen as its requirements. In the view of the critic, there is not and cannot be a clear and authoritative or functional link between an identity, understood in a particular way, and the way of life thought to be functionally necessary for a person with that identity. Sartre's *The Reprieve* (1972), the second novel in his series on *The Roads to Freedom*, contains a good example of why this will not work. The issue is focused on the character of

Daniel who is a pederast. Daniel reflects on his desire to be a pederast as an oak tree is an oak tree. He says that he wants to be what he is – he wants completely to fulfil his essential nature and identity as a pederast. However, it is central to Sartre's existentialism that this cannot be done: one cannot treat oneself as an object defined in terms of one's essential nature. For Sartre there is no given human essence to fulfil and there is no uncontested essence in relation to social roles. What is seen as the requirement of an identity or role is a matter of belief, and these beliefs are contestable and the adoption of one set of beliefs rather than another is a matter of choice. This latter point is one made also by Simone de Beauvoir in *The Second Sex*. Gender does not create some kind of essentialist fate. No doubt gender is characterised by biological givens but how one reacts to what one takes to be one's identity is subject always to radical choice. What we might regard as essential requirements of an identity are in fact social constructions and beliefs that are always capable of being disputed. Even if one took one's identity to be a kind of given, whether by biology or inherited culture, it is always possible for an individual to take up his or her own attitude towards what this essential nature is supposed to be. To assume that in human life one has to fulfil one's nature in the same way that an oak tree is an oak tree is always to extinguish the radical freedom which human beings have – even if it is freedom limited to taking up an inner mental attitude towards one's identity as might be the case, for example, of someone with a severe physical handicap. To see one's identity as fixed is, for Sartre, to 'Eteindre le regard interieur' (1972, p. 151). On this view, identity is always going to have highly contestable features just because of its constructed and intentionalist nature. So, on this view, there is no sharp contrast to be drawn between, say, ethnicity and gender as ineluctable given forms of identity and religion as a chosen form.

There are indeed other ways of making the same argument in terms of what Appiah calls the normative requirements of identity – what my identity requires me to do. The most important of these is the fact/value issue. A so-called given identity is presumably describable in wholly factual terms since, if its characterisation were to involve central normative elements, the contestable issues of moral belief and attitude would be engaged in characterising the identity itself. However, assuming that the identity can be specified in factual terms, it then becomes very problematic to see how such an empirical account of identity can, in and of itself, support a set of claims about the normative requirements of an identity of that sort. Important in the context of the normative requirements of identity would be the question of how far the recognition of, and respect for, this identity put others under an obligation in respect of that identity. This requires an account of the identity that, it is thought, ought to be respected and protected by others. Such normative requirements could be validly supported only if the identity itself was thought to include normative characteristics. This, however, would raise the question of what would be the grounding of such characteristics. So what is not at all clear is how there can be a wholly authoritative account of what behaviour is mandated by an identity that is assumed to be given and empirical. Of course, such behaviour can be seen as being in some sense normatively required if the identity already has some kind of moral character, but to take this view is to abandon the claim that there is a sharp contrast between given and chosen identities, given that the moral character which one ascribes to an identity will be based on moral commitments.

This also naturally leads on to issues of belief.[2] On one understanding of given identity, all claims about that identity are matters of fact and not belief. However, given the arguments just presented, this contrast is not in fact sustainable. If identities, at the very least in terms of their normative requirements, involve beliefs, then, as Peter Jones (1999) has pointed out, those

beliefs may be thought of as true or false, right or wrong, well supported or badly supported. Again, in so far as identity plays a role in normative thinking as a way of justifying behaviour and expression and in terms of the obligations of others, a categorical distinction cannot be drawn between given forms of identity, such as gender and race, and self-assumed forms of identity, such as religion is often held to be.

It might in a sense be best to see empirical claims about identity more as *markers* of identity, as Amy Gutmann (2003) argues. In recognising this, however, the argument about the political and legal recognition of identity only just starts. Citing an identity does not conclude an argument about legal privilege and obligation. Rather it marks the opening of the debate – a debate that is normative rather than empirical. This approach runs counter to the current tendency to seek to naturalise what might be called conventional or constructed identities and more particularly their requirements; that is to say, to turn normative conceptions of identity and their requirements into claimed empirical features alone.

We now need to look at what this might mean for freedom of expression. If there is not a categorical distinction to be drawn between given or naturalised identity and constructed or normative identity, then an argument in favour of legally privileging the former over the latter – in the examples we have been using, privileging ethnicity, gender and sexual orientation over religious belief – will not work.

What might well be a stronger set of arguments would be presented in terms of the harm principle along with a defence of the idea that a liberal democratic society requires people to be treated with equal concern and respect and as civic equals, whatever their identity might happen to be and whatever normative requirements individuals might think arise from their identities. On this view, there should be prohibitions of activities that cause harm to others, coupled with the idea that one such form of harm would be action that undermines the civil status of particular individuals as free and equal citizens. This sort of harm would be particularly important in some of the cases mentioned earlier. Take the case of the gay couple denied a room in a guest house, or the position of Catholic adoption agencies. On this view of harm, people are harmed in respect of their civil status if they are refused a service that is available to all other citizens. On this strongly civic egalitarian view, it will not do to say that no harm is done because the gay couple could have found another guest house or another adoption agency. Indeed, in the latter case an amendment, which did not get debated, was proposed to the Equality Bill 2010 that would have accepted the right of Catholic adoption agencies to discriminate against gay couples on condition that they informed such couples that there were other local adoption agencies that could cater for their needs. However, for the radical civic egalitarian there could be no case for such exemptions from general laws on such conscientious grounds because they would permit harm to be done to the civic status of particular individuals and that harm would violate a fundamental principle. Moreover, religious conscientiousness does not deserve any special consideration just because it is *not* special.

The argument also works from the religious point of view. In the case of the veil or a religious adornment, if we leave behind the question of what is or is not essential for identity, the question then arises as to what harm, if any, is being done by the wearing of these things. It is of course possible to argue, as in the case of France, that civic equality is a matter of having positive values of a republican and substantively egalitarian sort. In those circumstances it could be argued that, from the point of view of that country, such manifestations of religion harm the

ethos of civic equality understood in this positive republican manner. However, this argument is unlikely to be all that powerful in a society, such as the UK, where civic equality and freedom is understood much more negatively as freedom from coercion and discrimination. In those circumstances it would be more difficult to argue that such forms of religious manifestation cause harm to the basic democratic values of society. There might be examples in which there is a case for saying that something may well cause harm. Take two examples: the wearing of Islamic dress going beyond a headscarf at a school that has a policy on the wearing of school uniform and where that policy is based upon claims that the whole school shares in the benefits of the uniform; secondly, the inability to identify a Muslim woman driver caught on a speed camera or on CCTV because her face is wholly obscured by a veil. In both of these cases it can at least be argued that harm either has been caused or could be caused in the course of the action. In neither case though does the issue turn on questions of religious identity and its alleged requirements. What matters is whether harm has been caused either to basic rights to civil equality or to some more sectionalised good that produces benefits to all of those involved. This is not to say that the harm principle is easy to interpret because it is not, but, unlike treating these sorts of case as turning on the normative requirements of identity, there can instead be a publicly accessible debate and controversy about goods and harms which can be posed in a civic discourse to which all have access.

It has to be said, however, that moving to the harm principle as a universal basis for looking at such issues and away from the particularism of identity does not resolve all the issues at stake for two reasons. The first is still the claim that religion is somehow special and should merit special treatment and privilege in the law. Secondly, in terms of potential harm done to civil equality by religious attitudes and actions, there is the very large and intractable question of how to justify the claims of civil equality to a religious person whose own moral beliefs may well seem to that person to be of much greater importance than the claims of civil equality, or who may think that the status of civil equals applies only to those who are virtuous in a context in which virtue involves, for example, abiding by the sexual mores endorsed by that person's religious beliefs. So we need to examine these two reasons.

So is religion special? I have looked at arguments that imply it is not – that is to say, arguments mounted by those who believe in the importance of given and naturalised identities, which gives those identities special claims, and who reject religion as such a form of identity. However, I have tried to offer reasons for thinking that such arguments do not work very well. That might, however, lead one to think that no particular position or perspective should have special recognition. In the present context, that would mean that the question of religious freedom of expression is misconceived. The issue is freedom of expression whether of a religious or a non-religious person. This would fit the claims just made about the importance of the harm principle: that people of all sorts of beliefs should be free to express those beliefs both verbally and behaviourally so long as in so doing they did not cause harm to others. On this view, religious affiliation is neither here nor there. So is there any basis for the claim that religion is special and that the religious conscience should be exempt from some aspects of general laws?

I think that the best case that can be mounted has been put indirectly by Bernard Williams in his book *Moral Luck* (1972). I say indirectly since Williams was not himself a religious believer and, more importantly, did not set the considerations that he had in mind in a specifically religious context but nevertheless his discussion is enlightening. Williams argues that people have what he calls "ground projects", which are beliefs that give a sense of meaning and significance to

their lives and that may indeed give them the best reasons they have for wanting to live at all. Such ground projects, which could obviously include religious beliefs, embody what we might see as matters of ultimate concern and might be philosophical and even political beliefs if they are sufficiently comprehensive. Williams, however, goes on to suggest that such ground projects and the recognition of their importance might well provide a basis for an individual not to accept the requirement to treat all other citizens in the same way, if the integrity of that individual's ground projects would be brought into question by treating them in that way. Williams puts the point in the following way (1972, p. 14):

> There can come a point at which it is quite unreasonable for a man to give up in the name of the impartial ordering of the world of moral agents something which is a condition of having any interest in being around in the world at all.

The relevance of this to the gay guest house issue and Catholic adoption agencies is clear. To say that I have to respect the basic civil equality of gays in these specific ways runs totally counter to my ground projects and might therefore be seen as unreasonable on Williams' argument. But it applies in one way or another to all the cases mentioned at the start of this paper. People have fundamental beliefs that give meaning to their lives and this can justify the basis of special treatment in terms of freedom of expression. Amy Gutmann in *Identity and Democracy* provides a not dissimilar argument to justify the idea that religion or, more generally, ultimate ethical commitments are special (2003, ch. 4). However, she goes on to argue that the issue here goes very deep into the nature of the justification of the fundamental values of a liberal democracy which, as we saw at the start of my discussion, are seen by many in the UK at least to be embodied in the Human Rights Act and the Equality Act.

The basis for this in fact brings us onto our second reason to do with the justification of the foundational principles of liberal democracy within which freedom of expression has a place. Liberal democracy is often characterised as an order that treats citizens with equal care and respect. From the point of view of someone with ultimate ethical commitments, this would normally mean a respect for those commitments and the conscientious speech and behaviour that follows from them. On the other hand, there is the civil and political equality of all and the rules of law which protect that equal citizenship which also embodies the principles of equal concern and respect, exemption from which detracts from the universality of the rule of law and of equal citizenship. So, if the person with ultimate commitments is required to keep these commitments private and not to manifest them, then he or she is being asked to accept the priority of what Williams calls the 'impartial ordering of the world of moral agents' over all the person's other commitments, which in Williams' view is unreasonable. It could be reasonable only if that ordering were of such normative strength that it outweighed individuals' ultimate commitments or ground projects. It is not at all clear that this condition can be satisfied. Nagel, for example, in *Equality and Impartiality* argues that the principles of a liberal democratic order have to be justified twice: once in terms of general reasons that are at least in principle accessible to all, and secondly in terms of reasons that will seem salient to those with ultimate commitments, to use Gutmann's terminology. The same issue is, of course, central to Rawls's *Political Liberalism*. Nagel puts the point in the following way (1991, pp. 31-2):

> The problem is that since any system must be justified twice, it may be impossible to devise a system which is acceptable both from the point of view of what would be impersonally desirable and from the point of view of what can be reasonably demanded

> of individuals … the problem [for political theory] is to increase the degree to which personal and impersonal values can be harmoniously satisfied in spite of their natural rivalry. … A fully realized social ideal has to engage the impersonal allegiance of individuals while at the same time permitting their personal motives some free play in the conduct demanded by the system.

The same point is made by Appiah when, in *The Ethics of Identity*, he argues that we need a mixed theory of value which has space for what he calls project dependent moral positions as well as more impartial opinions, for obligations that are universal and for obligations that are relative to our thick relations to our projects and our identities (2005, p. 234). In the context I have been discussing, the impartial and universal standpoint would correspond to what I have called civic egalitarianism, which is universal and does not accept the case for exemptions from general laws that embody a sense of common citizenship and so rejects special treatment in respect of religious or for that matter other kinds of ultimate commitment. These commitments should be treated as private beliefs which, when they conflict with the demands of civic egalitarianism, can be expressed in public only in a conditional way, that is, only in ways that are compatible with maintaining civic egalitarianism.

This dispute seems to be intractable because one response that could be made by the person holding religious beliefs or ground projects would be to argue that civic egalitarianism, or more generally the values of liberal democracy themselves, embody forms of ultimate belief or that the project of liberal democracy and civic egalitarianism is itself a ground project. The hard question then posed is: What is it that privileges liberal democracy and civic egalitarianism over beliefs that are equally ultimate but different from them? Of course, many liberals want to avoid this question by claiming that liberalism is not like a ground project or an ultimate belief. It is not a comprehensive doctrine but represents a Rawlsian overlapping consensus or the dual justification proposed by a thinker like Nagel. There are (at least) two problems with this. The first is that, when, for example, Rawls discusses the equally intractable problem of abortion in *Political Liberalism* (1993, p.243), he does so in a way that gives a privilege to liberal values and he does argue that in very hard cases – perhaps of the sort with which I started this paper – these values have to be supported, at least in part, by treating liberalism as a comprehensive doctrine or at least as drawing upon comprehensive doctrines. But that raises again the issue of whether a religious person's comprehensive beliefs should be subordinated to another comprehensive doctrine, namely liberalism, which is somewhat unsupported as a comprehensive doctrine.

The second problem is that, while Nagel proposes a twin track theory of justification and the harmony of the personal and political as an aim for political theory, we do not currently possess any such theory and the jurisprudential basis of treating the cases with which I started has a very insecure normative foundation.

So, given this situation and given pressing disputes, what is to be done? I have already made one suggestion namely that we should focus on the harm principle rather than on issues of identity. This shift in focus would be likely to allow a great deal more freedom of expression than might otherwise be permitted because a case would have to be made that a form of expression causes harm. There is no algorithm for harm which is without controversy but two conditions seem to be clear enough: the first is that X causes harm to Y if X, in the pursuit of goal *a,* prevents Y from pursuing his goal *b*; the second would be physical and palpable harm. These

conditions would provide at least a threshold for the ascription of harm that would lift it well beyond offended sensibility. Considerations of this sort would possibly provide a more consensual basis for dealing with issues of religious expression than reverting to claims about identity.

The second point would be to revisit the idea that civic egalitarianism can brook no exceptions in its universality and, indeed, the rule of law. Of course, historically there have been exceptions, the most obvious example being conscientious objection in time of war and liberals have vigorously defended such exceptions. If we look back at Williams and Nagel, the former says that it is unreasonable to sacrifice the integrity of ground projects to what we might call the demands of citizenship; Nagel says that liberals have to face the joint problem of what can reasonably be demanded of individuals within a political context that also permits 'personal nature some play'. So, if liberalism has defended concessions to conscientious objection in time of war, if as Williams and Nagel argue it must be part of the reasonableness of liberalism that it does recognise the importance of personal ultimate commitments, and given that liberalism has been a strong, indeed the strongest, defender of freedom of conscience, then why not allow exemptions from general rules in favour of freedom of expression, whether it is wearing jewellery or denying accommodation to gays, if that is based upon ultimate beliefs so long as there are alternatives available? The argument does not depend on trying to trump the argument for the exemption on the basis of the claims that gay identity is more basic than that of the religious person, an argument which I have already tried to undermine. The counter-argument to that in the case of gay accommodation would be that gays are harmed in terms of the exercise of a basic capacity of citizenship. However, this brings the argument back to harm, which I have suggested is more productive than that of identity.

There is though an important general question at stake here. In the case of public authorities operating in the name of the state and delivering services in the name of the state, it seems that there would be an overwhelmingly compelling argument in favour of civic equality, non-discrimination and no exemptions for conscientious reasons. However, when we come to arrangements in the voluntary sector (the Catholic adoption agencies for example) or the commercial sector (renting out rooms in a guest house which is one's own home), it is not so clear that a basic capacity of citizenship has been harmed. In the case of the voluntary sector there are lots of charities that help people with particular beliefs and ways of life: Jews, Catholics, Muslims, Sikhs, Hindus and so forth. These are intrinsically discriminatory, so we would need to be clear what precisely it was about Catholic Adoption agencies that made them different or whether the discriminatory nature of such charities harms a sense of equal citizenship. Equally, in a business transaction I may put an item on sale but that does not mean that I have to treat all my potential customers equally – I can choose to sell it to Y and not to X – so, given that this is a fact about commercial life, what is the difference with the guest house proprietor? The defender of the non-exemption position in respect of freedom of expression is quite likely at this point to argue that, in both cases, the identity of the gay couple is damaged and for that reason there should be no exemption. I have, however, suggested that arguments about identity need to be treated very carefully and not just invoked as a way of closing the debate. Of course, the issue can be debated in terms of harm, which is an accessible public discourse as I have already suggested.

There is, however, another issue here, namely the extent to which we want public law to reach into the voluntary and commercial sector. If the rights of citizenship are understood to apply

well outside of public authorities and are applicable in the commercial and voluntary sector, then clearly the reach of public law will grow enormously and with it the regulation of otherwise free choice and liberty of conscience. So we would need to be aware of the potential extent of what has already come to be called the public law revolution (Parliamentary Joint Committee on Human Rights 2009).

Notes

1. I have discussed this aspect of the Human Rights Act in Plant 2007.

2. For a thorough and compelling account of this theme, see Jones 1999.

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