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WHY FREEDOM OF RELIGION DOES NOT INCLUDE FREEDOM FROM RELIGION

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I. INTRODUCTION

Freedom of religion has always been recognized by liberal regimes as a fundamental right, a right intended to enable believers to carry out their religious practices without interference. In recent times, this concept has acquired additional meaning and is often understood as also entailing, or including, freedom *from* religion.[1] This extension in the meaning of the

[1] See, for example, Kathleen Sullivan, 'Religion and Liberal Democracy', *University of Chicago Law Review* 59 (1992), 197 (''The right to free exercise of religion implies the right to free exercise of non-religion.''); Suzanna Sherry, '*Lee v. Weisman*: Paradox Redux', *Supreme Court Review* (1992), 134 (''It may impair religious liberty for the government to suppress non-religiously derived beliefs that religious doctrine is erroneous – in other words, the freedom to believe carries with it the freedom not to believe.''); Kimberly J. Cook, Abortion, Capital Punishment, and The Politics of 'God's Will''', *William and Mary Bill of Rights Journal* 105 (2000), 135 (''The freedom of religion clause in the Constitution also implies freedom from religion.'') The Supreme Court of Israel has made this point on several occasions, for example in H.C. 5016/96 Horev v. Minister of Transport, 51(4) P.D. [Piskey Din] 1, 93 (1997) (''The right to freedom from religion is included in the notion of freedom of religion and of conscience''). According to Wayne House, 'A Tale of Two Kingdoms: Can There Be Peaceful Coexistence of Religion with the Secular State?', *BYU Journal of Public Law* 203 (1999), p. 218, freedom from religion is now paradoxically considered more central than freedom of religion (''The hostility [to religion] has grown to the degree that the free exercise clause has been turned on its head, with the concern being 'freedom from religion' rather than 'freedom of religion'''.)

concept assumes a symmetry between the need to protect believers in the practice of their religion, on the one hand, and the need to protect non-believers in the pursuit of a non-religious life-style, on the other. Thus, it is assumed, just as believers should be allowed to worship according to the dictates of their beliefs so non-believers should not have their life-style infringed by religious demands. In this vein, it has been argued that if a road running through an orthodox Jewish neighborhood were to be closed to traffic on the Sabbath, it would violate the right from religion of the non-observant whose use of the road would be restricted[2] and, similarly, a law prohibiting the sale of goods on the Sabbath would violate the would-be vendors' freedom from religion. The main purpose of this paper is to challenge this assumed symmetry. We seek to show (a) that freedom of religion does not include freedom from religion, and (b) that, in any case, restrictions on liberty motivated by religious considerations do not violate, *per se*, any separate right beyond the usual rights granted to citizens in a liberal democracy. Our argument takes the following form. First, in Section II, we set out a theory on freedom *of* religion, a theory that is generally assumed to include or entail freedom *from* religion. We then point to two routes, one through conscience and the other through culture to justify the special protection afforded to religion. We explore the relation between them and we compare their normative force. We show that while these routes do provide protection to religion in certain domains, at the same time, they undermine its special status and, ultimately, diminish the degree of protection it can hope to gain.

We then turn to develop the implications of our argument regarding the normative status of claims for protection from religion. We begin by arguing that a right to F does not entail a right not to F unless it is assumed that rights only protect personal autonomy but, in such a case, a right not to F does not really derive from the right to F but directly from the idea of autonomy. We go on to present other arguments that seek to establish the right to freedom from religion and we reject most of them. We conclude that claims for freedom from religion are

[2] Horev v. Minister of Transport, *ibid.*

convincing only when non-observant individuals are forced to participate actively in religious ceremonies, especially when these ceremonies touch upon central events in their lives, such as marriage. Only in such cases is it possible to talk about an offense to the conscience of non-observant individuals, in a way which is analogous to the offense to the conscience of observant individuals who are forced to violate the dictates of their religion.

Some 20 years ago, a legal scholar stated that constitutional law on religion was in "significant disarray".[3] Two years later, it was declared to be "in a mess"[4]. After his review of the literature, Mark Tushnet concluded that "contemporary constitutional law just does not know how to handle problems of religion".[5] It is our hope that the present article will help to make order in some of this "mess" and will contribute to greater understanding of the constitutional theory of religion.

II. FREEDOM OF RELIGION

By definition, liberal states respect the freedoms of their citizens, i.e., such states seek to minimize the limitations imposed on the behavior of individuals. But together with this general policy of limiting violations of freedom, the liberal tradition recognizes the importance of specific freedoms, such as freedom of occupation, freedom of expression, and freedom of religion. The basis for this recognition has to do with the value of the protected activities, for the individual or for society, and with their special vulnerability to attempts to restrict them. Any consideration of these freedoms leads to two related questions: What is the value that we seek to protect, and, after this is clarified, what degree of protection should be awarded to each of these freedoms? We shall address each of these questions in turn.

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[3] Stephen Pepper, 'The Conundrum of the Free Exercise Clause – Some Reflections on Recent Cases', *Northern Kentucky Law Review* 9 (1982), 303.

[4] Phillip Johnson, 'Concepts and Compromises in First Amendment Religion Doctrine', *California Law Review* 72 (1984), 839.

[5] Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988), 248. The last two references are *Id.*, p. 247 note 1.

A. *The Justification for Freedom from Religion*

What special value might religion have which could justify granting it special protection? Within liberal democracies, this special value cannot be anchored in the assumed truth of religious propositions, but must be related to the kind of considerations accessible to a liberal framework. Four justifications for the special protection of religion come to mind. According to the first, in the long run, violation of this freedom has a negative moral effect on society. According to the second, it also has a negative effect on the average level of happiness. The third kind of justification posits that violation of this freedom constitutes a severe blow to the conscience and to the integrity of the religious individual. And, finally, according to the fourth justification, such violation weakens the religious culture. The distinction between these different justifications is not always obvious and some overlap exists. Nevertheless, they provide a useful framework for our analysis. Note – as indicated above – that none of these justifications assumes the truth of the religious worldview on which to base its claim. We are dealing here only with non-religious arguments for freedom of religion. Let us now discuss them in detail.

According to the first claim, thanks to its ability to act as a counterweight to the power of the state, religion makes a critical moral and social contribution to society. In the modern state, religion remains one of the last remaining forces able to fulfill this role, a role so vital to the democratic play of checks and balances. Religion also contributes to the moral level of society by providing inspiration for social and moral behavior. A study conducted by Bibby in the US and Canada showed that the chances of people investing time and money in voluntary activities for the social good were twice as high among churchgoers than among their secular counterparts.[6] The conclusion of the research is that religious groups are a major source of interpersonal values. If this claim is correct, then

[6] Reginald W. Bibby, *The Bibby Report: Social Trends Canadian Style* (Totonto: Stoddart, 1995), quoted and referred to by Von Heyking, John, 'The Harmonization of Heaven and Earth? Religion, Politics, and Law in Canada', *University of British Columbia Law Review* 33 (1999–2000), 669.

religious groups should be seen as a social and moral asset which states have an interest in preserving, if not actively promoting.

A further possible advantage of religion stems from its constant preoccupation with the major questions concerning human existence; the meaning of life, good and evil, death and immortality, and so on. By constantly raising these issues, religion plays a part in preventing society from sinking into a form of hedonistic materialism. It helps to preserve within it a sort of spiritual interest and aspiration. This advantage has a liberal aspect too: Liberalism should be interested in widening the scope of options in society, especially options regarding fundamental questions about good and evil and about the meaning of life.

Needless to say, these claims do not assume the *truth* of religious beliefs, because the utility of beliefs does not depend on their truth-value. Nor does it justify the coercion of non-religious people to adopt a religious life-style or to accept religious beliefs in order to increase social activity. The argument merely wishes to justify the special *protection* afforded to religious members of society on the basis of their contribution to the ethical level of society.

This line of reasoning is not particularly prevalent, to say the least, despite the work of Bibby and others. This is due mainly to the view that even if these studies are correct, they present only a partial picture of the relationship between religious adherence and social morality. Although religion has a positive influence in some areas and in some contexts, it also has negative effects and these – the danger of fundamentalism, to give just one example – seem to act as a counterweight to any positive contribution. Thus, the view that freedom of religion can be justified on the grounds of its contribution to morality should be rejected or, at least, suspended until it can be convincingly proven that the social and moral advantages of the religious life outweigh its disadvantages.

While the first justification focuses on the moral contribution of religion to society, the second relates to its contribution to the wellbeing of its adherents. Put simply, the idea is that a religious life endows believers on average with a greater sense of

wellbeing than that enjoyed by non-believers. The positive correlation between religious belief and psychological wellbeing has been demonstrated in empirical research.[7] If enhancing the wellbeing of its citizens is one of the objectives of a modern, liberal state, then the state has special reason to avoid limitations on religion so as not to weaken one of the strongest resources for the happiness of its citizens.

This claim can be challenged with the counter-claim that the advantages of religious practice for the psychological wellbeing of its adherents are offset by its negative results, such as the maintenance and fostering of prejudices, authoritarianism, discrimination against women etc. Moreover, from a liberal point of view, religion may be perceived as a way of directing human beings from the liberal ideals of self-direction, critical thinking and personal responsibility. These shortcomings of the religious way of life will not lead the liberal to *restrict* the freedom of believers to live in accordance with their beliefs, but they could provide a reason to refuse to extend any *special* protection to them. Of the remaining two justifications for freedom of religion, the first – based on the importance of freedom of conscience – is the most prevalent. The notion of conscience refers to a person's innermost normative beliefs; those that constitute his or her personal identity. As Nicholas Dent explains in his entry 'conscience' in the *Routledge Encyclopedia of Philosophy*, there are different aspects to this concept, including "[t]hose fundamental moral convictions by keeping to which they retain a sense of their moral integrity and decency as people. In this sense, something is 'a matter of conscience', or raises 'questions of conscience', if it touches on such central personal principles."[8]

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[7] Witter, R.A., Stock, W.A., Okun, M.A., and Haring, M. J. 'Religion and Subjective Well-Being in Adulthood: A Quantitative Synthesis', *Review of Religious Research* 26 (1985), 332; Daniel Kahneman, Ed Diener, and Norbert Schwarz, *Well-Being: The Foundations of Hedonic Psychology* (New York: Russell Sage Foundation, 1999).

[8] Dent, Nicholas, 'Conscience', in Craig, Edward (ed.), *Routledge Encyclopedia of Philosophy* (London and New York: Routledge, 1998), Vol. II, p. 579.

The use that Dent makes of the concept of morality here (*moral* convictions) is a bit misleading, for he does not refer to a set of morally universal rules, but rather to personal beliefs where the content may differ from person to person. What one person's conscience directs him to do may be what another person's conscience will tell her not to do. A favorite example relates to the pangs of conscience suffered by Mark Twain's Huckleberry Finn when he considers allowing Jim, the escaped slave, to remain on the run, for according to his conscience, this is forbidden.[9] The concept of conscience is therefore essentially individual and subjective and our understanding of it is historically related to the use made of it by Martin Luther and his followers. For them, acting according to one's conscience means acting according to the dictates of the heart, rather than in accordance with the instructions of religious leaders or politicians. Luther himself placed conscience above law, declaring: "I lift my voice simply on behalf of liberty and conscience, and I confidently cry: No law, whether of men or of angels, may rightfully be imposed upon Christians without their consent, for we are free of all laws."[10]

This represents a profoundly subversive and antinomist understanding of the concept of conscience,[11] one which presents a threat to the existing religious, social and political order.[12] Given this threat, the obvious question that emerges is, Why is it so important that people should act in accordance with their conscience, in accordance with the dictates

[9] For use of this example see, for example, Alan Donagan, 'Conscience', *Encyclopedia of Ethics* (New York: Garland Pub., 1992), Vol. I, p. 298.

[10] Martin Luther, *Works* (Jaroslav Pelikan ed., St. Louis: Concordia Publishing House, 1958), Vol. 35, p. 72, quoted in Edward Andrew, *Conscience And Its Critics: Protestant Conscience, Enlightenment Reason, and Moral Subjectivity* (Toronto and Buffalo: University of Toronto Press, 2001), 21.

[11] For a different view, maintaining that the concept of conscience is not inherently anti-authoritarian, see Mark Murphy, 'The Conscience Principle', *Journal of Philosophical Research* 22 (1997), 387–407.

[12] In a recently published study, Andrew, *supra* note 10, points to a state of tension between the Protestant idea of conscience and the rational approaches of the Enlightenment and suggests that modernity is the result of the tension between these two ideals.

of their heart? There are two main answers to this question, one religious, the other non-religious. The religious answer, manifest in the thinking of Luther and other Protestant philosophers, teaches that the Divine will is revealed to human beings through human conscience,[13] such that when they cleave honestly and righteously to their consciences, they are carrying out God's will. This is the well-known response attributed to Luther when called upon by the Diet of Worms to abandon his misguided conscience: "My conscience is subordinate to the word of God. Here I stand and I cannot act otherwise."[14] This answer is not intelligible to secular-liberal thinking (or, for that matter, to religious philosophies that do not assume that the way to reveal the Divine will is through human conscience), and its supporters are therefore faced with the following question in all its starkness: Why respect the conscience of someone who holds misguided moral beliefs? The standard answer is that coercing people to act against their deepest normative beliefs presents a severe threat to their integrity[15] and makes them experience strong feelings of self-alienation and loss of identity;[16] therefore, it should be avoided as far as possible.[17] It is this sort of

[13] Cf., for example, the following words placed in God's mouth by Milton: "And I will place within them as a guide/My umpire Conscience" (*Paradise Lost*, Vol. III: 194–195).

[14] Luther, *supra* note 10, Vol. 32, p. 112.

[15] Concerning the connection between protection of conscience and respect for moral integrity in conscientious objection in such instances as abortions or doctor-assisted suicide, see Mark Wicclair, 'Conscientious Objection in Medicine', *Bioethics* 14 (2000), 205–227.

[16] In light of this understanding of the concept of conscience, it is difficult to accept the position of the Canadian Supreme Court, which ruled that obligating workers to join one of the recognized workers' unions represents a violation of their freedom of conscience. It is difficult to see how joining such a union could represent a violation of the deeply held principles that constitute the personal identity of the worker. See R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209.

[17] For a comprehensive defense of the concept of conscience, maintaining that it is vital to any theory of virtue, see Douglas C. Langston, *Conscience and Other Virtues* (University Park: Pennsylvania State University Press, 2001).

argument that underlies the liberal requirement to show tolerance for certain dissenters, in instances where some law severely violates their conscience. As Chaim Ganz explains, the reason that such violation should be avoided is not the assumption that the dictates of conscience are correct, but the very fact that the conscience is inclined that way: "[F]reedom of conscience means the freedom to act on the dictates of conscience for the sole reason that they are given by the conscience, regardless of their justness or of the correctness of their contents."[18]

If we accept that, from a liberal point of view, conscience is worthy of protection regardless of the content of its beliefs, it is clear why freedom of religion should be protected. Religious beliefs belong to the category of what Dent calls[19] fundamental convictions through which their holders retain a sense of their moral integrity and decency as people. Forcing believers to act contrary to their beliefs means forcing them to act contrary to their consciences,[20] therefore freedom of religion deserves special protection. Note that this protection does not depend on the religion in question placing a high value, or, indeed, any value at all, on the conscience of the believer. The protection is granted simply by virtue of the fact that conscience is valuable, for the reasons explained above, not because some individual, or some organized religion, happen to *believe* this is so. This, of course, holds true for all cases concerning protection of conscience: When a conscientious objector is exempted from military service, he

[18] Chaim Ganz, *Philosophical Anarchism and Political Disobedience* (Cambridge and New York: Cambridge University Press, 1992), p. 156.

[19] *Supra* note 8.

[20] Cf. the Canadian Supreme Court's assertions that "Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously held beliefs and manifestations and therefore protected by the Charter" (R. v. Big M Drug Mart [1985] 1 SCR 295); "Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society" (Church of New Faith v. Commissioner for Pay-Roll Tax 49 ALR 65, 68–69 (1983)).

is exempted because of the value *society* ascribes to conscience, not because of the value the *objector* ascribes to it.[21]

How can a person's conscience be offended or violated? The answer seems simple: by coercing her to act contrary to her deeply held principles, as explained above. But it is important to remember that here, as in many other contexts, the concept of coercion refers not to actual physical coercion, but rather to placing a heavy price on some behavior, behavior perceived by the coerce as undesirable. Forcing a person to participate in a war that contradicts the dictates of conscience means setting a price of, let us say, a hundred days in prison for refusal to participate – a price that some would be willing to pay, while others would not. We might say that the state coerced the former group to act contrary to their conscience, while, with regard to the latter group, we would have to say that the state did not respect their conscience. Coercion in general is a matter of degree, and this applies equally to coercion of conscience: the higher the price – in terms of either sanction or incentive – for adherence to personal principles, the greater the violation of freedom of conscience. The lower the price, the lower the degree of violation, to the point where the claim of offense to conscience sounds artificial. After all, one cannot expect that commitment to one's principles will never carry any price whatsoever.[22]

Seeing freedom of conscience as the basis for freedom of religion enables one to understand why religion needs protection, but it fails to explain why the violation of freedom of conscience that occurs when freedom of religion is violated is more disturbing – and therefore requires greater protection –

[21] For the question of whether honoring freedom of conscience requires granting people the right to reject freedom of conscience as a value, see Chandran Kukathas, *The Liberal Archipelago* (New York: Oxford University Press, 2003), p. 116.

[22] These comments obviously do not exhaust the concept of coercion, around which a wide, philosophical literature has grown. See, for example, Alan Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987); Denis G. Arnold, 'Coercion and Moral Responsibility', *American Philosophical Quarterly* 38 (2001), 53–67.; Grant Lamond, 'Coercion and the Nature of Law', *Legal Theory* 7 (2001), 35.

than the violation of freedom of conscience in other contexts.[23] A good example of this problem is the exemption from military service granted in the U.S. to those who oppose it because of their religious beliefs.[24] This leads directly to the following question. If the basis for exemption on religious grounds is protection of freedom of conscience, why should it be limited only to those who hold *religious* beliefs?[25] It seems

[23] McConnell answers this with the claim that there is a difference between conscientious decisions whose source is religious and those whose source is not. The first type arises from subjugation to God's command, and from this point of view they lie outside man's range of control. The second type arises from voluntary personal choice. See Michael M. McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion', *Harvard Law Review* 103 (1990), 1497; Gidon Sapir, 'Religion and State: A Fresh Theoretical Start', *Notre Dame Law Review* 75 (1999), 641–642; Fredrick M. Gedicks, 'An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemption', *University of Arkansas at Little Rock Law Journal* 20 (1998), 562–563.

[24] Section 6(j) of the Universal Military Training and Service Act of 1948, 50 USC s. 456(j) (1958).

[25] An original way to solve this problem was proposed by the U.S. Supreme Court in *United States v. Seeger*: to broaden the scope of religious belief to include any conscientiousness – i.e., honest attachment to principles. In this case, Seeger appealed to the court after not receiving exemption because of doubt as to the religious basis, required by law, for his objection to military service. The court ruled that "the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers" (Unites States v. Seeger, 380 U.S. 163, 187 (1965)), and to strengthen this claim the court quoted the theologian Paul Tillich: "And if that word [God] has not much meaning to you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God." (Paul Tillich, *The Shaking of the Foundations* (New York: C. Scribner's Sons, 1948), p. 57, quoted in *Unites States v. Seeger*, *id.* According to this claim, there is therefore no instance of freedom of conscience that is not at the same time also an instance of freedom of religion. For a proposal, in the American context, that protection of freedom of religion be called protection of freedom of conscience, both for historical reasons and because of the lack of justification for distinguishing between the two, see Laura Underkuffler-Freund, 'The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory', *William & Mary Law Review* 36 (1995), 961–968.

that liberals have trouble answering this question, and the result is that freedom of religion becomes weakened to the point where it becomes emptied of all content, as we shall see in Section IIB.

Let us now turn to the last justification for freedom of religion among the four just listed . Developed some years ago by Gidon Sapir, it is based on the right to culture.[26] According to this claim, religion is a clear example of an all-encompassing culture, a culture whose protection is of great importance to its members. Two explanations are offered for this importance: One assumes that culture is necessary for the realization of autonomy[27]while the other claims that culture is necessary for the retention of personal identity.[28] Either way, the need to protect religion has to do with the marginal and therefore threatened status of religions within liberal states. In Sapir's words, ''Freedom of religion is understood in this setting as a measure aimed to guarantee the survival of minority cultures that have lost in the majority cultural battlefield.''[29] Obviously, a refusal to agree to requests by members of religious groups for preferential treatment does not immediately destroy their culture, but, in the long term, it makes it difficult for that culture to develop and thrive. The right to culture is extended only to minorities and not to members of the majority culture, because the latter have no need for special consideration in order to develop and to pass on their message to the next generation. In the words of Halbertal and Margalit, reflecting the generally accepted wisdom on this issue: ''The state is meant to be neutral towards the majority culture'', for this culture can ''by its very

[26] Sapir, *supra* note 23, pp. 625–641

[27] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press and New York: Oxford University Press, 1995); Idem, *Liberalism, Community and Culture* (Oxford: Clarendon Press and New York: Oxford University Press, 1989).

[28] See, for example, Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture', *Social Research* 61 (1994), 491–510.

[29] Sapir, *supra* note 23, p. 634. Cf. Margalit and Halbertal, *id.*, p. 510: ''[I]f the matter [constructing the public space] were left to the forces of the market, the majority culture would soon take over the entire public space.''

essence maintain a more or less homogenous environment, even without enjoying special rights''.[30]

As with freedom of conscience, the justification based on culture is not underpinned by the truth-value of theological propositions or founded on assumptions about the intrinsic value of religious practices. Rather, it is based on the nature of religion as a culture. Like any culture, religion has value for its members. Like any *minority* culture, religion needs special protection in order not to be swallowed up by the majority culture, though, as we show later, it deserves no privileged protection compared with other minority cultures.

What is the relation between freedom of religion in the sense of freedom of conscience, and freedom of religion in the sense of the right to culture? On the face of it, they seem to be clearly different: While conscience is an individual matter, culture belongs to a group. Yet despite this difference, the similarity between the two concepts is significant. Firstly, assuming that collectives are not the kind of entity that can have interests, in both instances, protection is granted to the interests of *individuals*. The difference relates to the nature of the interest being protected; in the case of offense to conscience, the interest is the preservation of moral integrity (''to be able to look at oneself in the mirror''), while in the case of interference with culture, the interest is personal autonomy or identity (depending on the type of theory adopted as grounds for the importance of culture).[31] It is not culture itself that we seek to protect, but the individuals who identify with it and who are likely to suffer if their culture is weakened or undermined. If the importance of their culture to them is understood in terms of personal identity,[32] then the similarity is even stronger, since attacks on integrity are often formulated in terms of attacks on personal identity. When people are forced to give up the

[30] Margalit and Halbertal, *id.*, p. 509.

[31] See *supra* notes 27 and 28.

[32] ''[T]he individual's right to culture stems from the fact that every person has an overriding interest in his personality identity – that is, in preserving his way of life and the traits that are central identity components for him and the other members of his cultural group'' (Margalit and Halbertal, *supra* note 28, p. 505).

essentials of their *culture*, they often undergo a sense of self-alienation, and feel that their identity is threatened, feelings similar to those suffered by people who are forced to act contrary to the dictates of their *conscience*.

Secondly, protection of conscience is not altogether an individual matter. On Raz's view, the tendency to anchor rights in the freedom of the individual ignores the fact that rights sometimes relate to collective goods[33], goods which enable them to exist, and which grant meaning to their lives. Raz illustrates this claim with the right to freedom of religion:

> While religious freedom was usually conceived of in terms of the interest of individuals, that interest and the ability to serve it rested in practice on the secure existence of a public good: the existence of religious communities within which people pursued the freedom that the right guaranteed them. Without the public good the right would not have had the significance it did have. Furthermore, the existence of the right to religious freedom served in fact to protect the public good.[34]

Moreover, on Walzer's view, a refusal to obey the law on the basis of freedom of conscience "is almost always a collective act, and it is justified by the values of the collectivity and the mutual engagements of its members."[35] Etymologically, the word "conscience" indicates common moral knowledge, and just as this moral knowledge is acquired within a group and is common to its members, so the obligation of the conscientious person is "at the same time an obligation to the group and to its members"[36]; it is an obligation towards other people, from whom or together with whom her principles were acquired. According to Walzer, if disobedience truly rested upon individual conscience then it would always be justified, but would never take place, for "[a]n individual whose moral experiences

[33] Collective goods are public goods whose benefit is available to anyone belonging to the society in which they exist – for example, the fact that a society is tolerant, educated, has respect for human beings, etc. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press and New York: Oxford University Press, 1986), pp. 198–199.

[34] *Id.*, p. 251.

[35] Michael Walzer, *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge: Harvard University Press, 1970), p. 4.

[36] *Id.*, p. 5.

never reached beyond "monologue" would know nothing at all about responsibility and would have none."[37]

These considerations support an interesting connection between freedom of conscience and the right to culture: on the one hand, despite its collectivist appearance, the right to culture also has an individualist aspect, for, ultimately, it protects the interests of individuals. On the other hand, despite the individualist nature of freedom of conscience, it also has a collectivist aspect, for it is related to collective goods[38] and is exercised in connection with and commitment to a collective. Furthermore, according to a prevalent understanding of the right to culture, there is a real overlap between the two concepts, for both rest upon the desire to protect personal identity.

This connection would seem to undermine the distinction between the two rationales for freedom of religion, for, at the same time, both include a collectivist aspect and an individualist one, and in both – at least according to one theory – the aim is to protect personal identity. Hence, any violation of freedom of conscience is seemingly also a violation of the right to culture, and vice versa. However, such a conclusion is too simplistic. Firstly, although both rationales have both a collectivist and an individualist aspect, their emphases nevertheless differ: Culture is a public issue, and therefore the test of whether it has been violated requires an examination of the social reality. Conscience is an individual issue, and therefore the way to test whether it has been violated requires an examination of the worldview and psychology of the individual in question.

Secondly, even if it is true that in both arguments the interest being protected is that of personal identity, the violation of personal identity caused by restrictions on culture is weaker and more indirect than that caused by coercing individuals to act against their conscience. Coercion of the latter type arouses strong emotional reactions in the form of guilt feelings, or pangs of conscience – which is not usually the case in restrictions of the former type. The violation of identity caused by

[37] *Id.*, p. 22.

[38] For an example of a matter of conscience related to the collective, see Raz's discussion of conscientious objection (*ibid.*, p. 252).

forcing a religious Moslem to drink wine – a clear example of violation of conscience – is not the same as that caused by driving through an Orthodox Jewish neighborhood on the Sabbath – an instance of disregard for culture.[39] The concept of violation of integrity appears far more appropriate in the first example than it does in the second. In other words, not every disregard for culture – even if understanding it as the right to identity – is simultaneously an offense to conscience. In contrast, an offense to conscience usually represents a disregard for culture, for it represents a direct and overt threat to the ability of the religious community to preserve its special culture.

Against this analysis one might argue that the distinction between the two rationales does not really make a difference, because one can turn any encroachment on freedom of culture into an encroachment on freedom of conscience by, for example, lying down in front of the bulldozers to prevent them from profaning a stretch of land sacred to Indians, or sitting in front of the tractors clearing the area for the construction of a pub in a Muslim village, actions where we would be expressing freedom of conscience. But, first, the fact that a behavior which is an encroachment on freedom of culture at t1 can be turned into an attack on conscience at t2, does not show that the two rationales are one and the same; after all, at t1, only the former existed, not the latter. Second, as mentioned above, conscience refers to those fundamental convictions by keeping to which their subjects "retain a sense of their moral integrity and decency as people."[40] While this sense of integrity and decency might be affected by an individual's own actions – in cases in which they manifest a betrayal of basic convictions – it is rarely affected by the actions of *others*. What others do might annoy, injure, or harm me in various ways, but they cannot through *their* agency, touch my conscience. As Donagan points out, "the conscience of the agent is limited to the actions of the

[39] Vehicular traffic through ultra-Orthodox Jewish neighborhoods on the Sabbath is one of the examples mentioned by Margalit and Halbertal as to what may be forbidden in the name of protection of the right to culture in the sense of the right to identity. (Margalit and Halbertal, *supra* note 33, pp. 506–507).

[40] *Supra* text accompanying note 8.

agent himself''.[41] Hence, it is false to argue that any offense to culture could be turned into an offense to conscience.

The rationales of conscience and culture are different in other respects too – in terms of the *scope* of the right that results from them and in terms of the *weight* of that right in relation to conflicting interests. Let us begin with the issue of scope. Since the main focus of the right to culture is on social processes, while the focus of freedom of conscience concerns internal processes within the individual, the scope of what is required to constitute protection of culture is broader than that required to constitute protection of conscience. Culture is a broad and multifaceted phenomenon; hence a very broad variety of activities on the part of the state may undermine it. While it is difficult to present lack of monetary support for religious educational institutions as an offense to the religious conscience, it would seem possible to present it as a violation of the right to culture, for without a strong educational system, it is difficult for the minority to mold the attitudes of the next generation and, thereby, preserve its culture.[42] Hence, the scope of instances that may fall within the bounds of freedom of religion in the sense of the right to culture is broader than that which falls within the bounds of freedom of conscience.

Regarding the weight of these rights, the attack on identity required to constitute an offense to conscience is usually more serious and more direct than that required to substantiate interference with culture (which helps to explain the relatively limited scope of freedom of religion in the sense of freedom of conscience). A person whose conscience is threatened needs more urgent and powerful protection than someone whose culture is undermined or weakened. Therefore, freedom of

[41] Donagan, *supra* note 9, p. 298.

[42] An effective attempt at setting out and defining the various arguments and justifications raised within the framework of the right to culture was conducted by Jacob Levy, who describes eight fundamental ways in which the State respects the right to culture. See Jacob T. Levy, 'Classifying Cultural Rights', in Ian Shapiro, and Will Kymlicka (eds.), *Nomos XXXIX: Ethnicity and Group Rights* (New York: New York University Press, 1997), pp. 22–96. The second of these eight ways is ''Assistance to do those things the majority can do unassisted.'' *Id.*, p. 25.

religion in the sense of freedom of conscience has a better chance of overriding conflicting considerations than does freedom of religion in the sense of right to culture. But this holds true only in general, and one can think of cases of attack on culture which are more severe and more direct than cases of offenses to conscience. For instance, think of a perceived desecration of a holy place when a government builds a highway through a space that is sacred to a faith. Depending on the centrality of this space in the specific faith, such a project might have destructive effects on the relevant culture.[43]

Another reason for the relative weakness of freedom of religion perceived as the right to culture has to do with the potential danger it poses to the secular population by the restrictions it places on them. Since the very success of the secular majority culture and its dominance in the public arena and in the media threaten the religious community, the temptation to use the right to culture as the basis for a demand for restrictions on the secular culture is great. The weaker the religious culture, the more difficult it is for the culture to survive, and, therefore, the greater the number of restrictions that one might want to impose on the secular majority, thus creating the danger that religious minorities might demand unreasonable and unfair restrictions on the majority. Thus, the right must be limited to instances where the damage to the religious culture is significant and direct, and where the price to be paid by the majority is not high.

In reality, religious minorities that wish to shield themselves from the influence of secular culture tend to enclose themselves within their own neighborhoods or areas, to develop their own educational institutions, and to limit contact with the majority culture to a minimum. Well-known examples include the Christian Amish and ultra-orthodox Jews. Within this socio-geographical reality, the demand that the right to culture be respected amounts to a demand for respect for the autonomy of the religious community within its geographical boundaries.

[43] Such a problem was discussed by the US Supreme Court in the *Lyng* case, see Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988). For an account of the Indians' claim in this case based on their right to culture, see Sapir, *supra* note 23, pp. 639–641.

Outside these boundaries, there will hardly ever be a justification – on the basis of the right to culture – to place restrictions on the liberty of the surrounding non-religious community.

Finally, and to complete this analysis of the rationales for religious freedom, we should add that freedom of religion is not the only basis on which religious individuals or groups try to establish their claims before the courts. Another basis is the perceived right to protection from *having religious feelings hurt*. In typical cases, to hurt feelings is to behave in a way that is interpreted by some individuals as expressing deep disrespect for the values which they hold dear and with which they identify. This perception of disrespect causes painful feelings, or "hurts" the feelings of those individuals.[44]

Elsewhere it has been shown that complaints about hurt feelings are quite limited in their ability to ground demands for the restriction of liberty.[45] For the purpose of the present discussion, it is worth saying a few words about the relation between this notion of hurt feelings and that of (violation of) freedom of religion.

Let us begin by noting the clear distinction between claims to violation of freedom of religion and claims to hurt religious feelings which derives from the fact that the former does not rely on any kind of emotional pain, and does not expect support solely because some individual, or some group, feels hurt. Nevertheless, the two concepts are closely related, which explains why it is not always easy to distinguish between them. If freedom of religion is understood in terms of freedom of conscience, it is natural to describe violation of freedom of religion in terms of suffering some kind of emotional pain, or emotional distress, as a result of the necessity of acting contrary to the dictates of one's conscience. In such circumstances, the believers would probably sense a loss of dignity because their most profound beliefs are being scorned. Thus, a violation of freedom of religion appears to be, at the same time, an offense to religious feelings. But even on the other understanding of reli-

[44] For a detailed analysis of this notions, see Daniel Statman, 'Hurting Religious Feelings', *Democratic Culture* 3 (2000), 199–214.

[45] *Ibid.*

gious freedom, the one based on the right to culture, there is an interesting connection between the notion of hurt feelings and that of freedom of religion. This is because complaints about hurt feelings always refer to some direct offense to religion, defined in terms other than offended feelings. If, for example, religious people complain that opening a sex store in their neighborhood hurts their religious feelings, what really bothers them is not *the emotional pain*, but the fact that the nature of their neighborhood is transformed, or, more accurately, *that their culture is threatened*. It turns out, then, that claims about hurt religious feelings often assume claims about violation of freedom of religion, understood as the right to culture.

B. *Where is Freedom of Religion Headed?*

As emphasized at the outset, freedom of religion as a separate category can be justified only if religion is considered worthy of special protection. But the arguments that supposedly testify to this in liberal thinking are not convincing.[46] If freedom of religion in understood in terms of freedom of conscience, then the onus of proving that, nevertheless, it deserves a separate status within the latter is on those who make this suggestion, and we don't think they have been successful in their argument. The same applies to the right to culture: if freedom of religion is understood in terms of this right, why should the right to culture be insufficient – why should freedom of religion be granted special status within it? What we have at stake here is more than just conceptual economy; there is a normative problem too, for awarding freedom of religion a separate status gives a religious conscientious claimant an advantage that does not sit well with the principle of equality. If the law is concerned for the conscience of all people, if it respects all cultures, then it cannot award the religious conscience or culture a special status.

[46] *See* the edifying analysis by Steven D. Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse', *University of Pennsylvania Law Review* 140 (1991), 149–240, in which the author discusses all the non-religious rationales to justify special protection for religion, and demonstrates that they are not convincing.

Steven Smith demonstrates nicely how non-religious rationales for freedom of religion become trapped in an internal tension, a tension that undermines the ground upon which they stand. As explained at the beginning of Section IIA, if freedom of religion is not anchored in assumptions about the truth of the religious view, it must be anchored in general assumptions of secular-liberal law. But the moment we base freedom of religion upon such assumptions, the special status of religion comes into question, for the same assumptions also anchor the freedom of activities and institutions that are not religious. "The double strategy" (as Smith terms it) for the justification of freedom of religion, which as a first stage places religion on the same level as non-religious human activities and institutions and then, as a second stage, attempts to isolate it from them, "acts to nullify the force of the non-religious rationales".[47]

In our view, there is no way of avoiding this tension and its implication, namely, the relinquishing of freedom of religion as an independent category. Given that religious considerations cannot be used to establish this category, we are left only with non-religious rationales, but these necessarily lead to the tension described by Smith. The idea of equality, so central to modern political and legal thought, cannot tolerate the possibility that of two activities protected by the same rationale, one is awarded a more preferential status. Therefore, whether we understand freedom of religion as a branch of freedom of conscience or as a branch of the right to culture, there is no justification for granting it special status within the framework of these rights.

In light of these difficulties, it is not surprising that, in the last few decades, court rulings in liberal countries have tended consistently towards limiting the protection covered by freedom of religion to the point of emptying it of all content. This tendency runs counter to the one that prevailed in the past, especially in the US. As Conkle explains at length, to the Founding Fathers – as well as to many subsequent generations of Americans – it was clear that religion (or, more precisely, Christianity) should play a unique role in the molding of the life and character of the American nation. In 1892, the Supreme

[47] *Id.*, p. 219.

Court ruled unequivocally that "This is a Christian nation",[48] and 40 years later, in 1931, this was affirmed again in the statement, "We are a Christian people".[49] This self-perception had far-reaching implications concerning the court's attitude towards laws and norms of a religious nature.[50] Christian prayers in public schools, for example, were perceived as lawful until the beginning of the 1960's.[51] This preferential treatment awarded to religion echoes on in the *Yoder* case,[52] but did not prevail for long. The *Smith* case of 1990[53] expressed a different approach, which has since become dominant, greatly restricting freedom of religion. In Carter's view, the *Smith* ruling marks the direction in which the current interpretation of the constitutional demand for the free exercise of religion is going. It is

[48] Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1982).

[49] United States v. MacIntosh, 283 U.S. 605, 625 (1931).

[50] It is almost superfluous to repeat here the prevalent illusion which maintains that, in the U.S., there always existed a strong separation of church and state (a "Wall of Separation", in Jefferson's words), inspired by the First Amendment's demand for an absence of institutionalization. In a recently published comprehensive study, Hamburger demonstrates that freedom of religion in the First Amendment should not be understood in terms of separation of church and state. Such an understanding began to develop in the U.S. only during the 19th century, in the wake of increasing apprehension towards organized religion, especially the Catholic Church, and it came to control legal and public thought only in the 20th century. In Hamburger's view, not only is the idea of separation not included in the freedom of religion included in the constitution, but in fact it undermines this freedom. While the prohibition against institutionalization and the freedom of religion mentioned in the constitution are meant to limit the government with regard to religion, the idea of separation has come to be interpreted as limiting *religion*. See Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002).

[51] Because of the perception of Christianity as central to the identity of the American nation, and because of the perception that it was vital to the establishment of a cultural society, the Supreme Court also approved various laws of a religious character until the end of the 19th century. These include, for example, laws against blasphemy, laws against opening businesses on Sunday, etc. See, for example, H. Frank Way, 'The Death of the Christian Nation: The Judiciary and Church-State Relations', *Journal of Church and State* 29 (1987), 509–529.

[52] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[53] Employment Division v. Smith, 494 U.S. 872 (1990).

moving towards a world in which citizens who adopt religious customs that are not compatible with the official policy of the state may expect restrictions to be enforced by the state, without real chance of judicial intervention.

An analysis of the *Smith* case, as well as other subsequent rulings, leads Conkle to the conclusion that "the assumption that religion is distinct and distinctly important has not yet been abandoned, but it has been placed in serious question."[54] Carter similarly argues that interpretation of the law in the last few decades shows a decrease in the protection of religion.[55] Some scholars welcome this reduction[56] while others deplore it,[57] but no-one disagrees that such a trend exists in current U.S. rulings and jurisprudence.[58] A similar trend may be detected in other countries as well, but the scope of this article does not allow us to address them.[59]

III. FREEDOM FROM RELIGION

A. *From Freedom of Religion to Freedom from Religion*

Daphna Barak-Erez and Ron Shapira demonstrated some years ago how claims concerning symmetrical rights are pre-

[54] Daniel O. Conkle, 'The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future', *Indiana Law Journal* 75 (2000), 2.

[55] Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: BasicBooks, 1993), p. 130.

[56] See, for example, David A. J. Richardson, *Toleration and the Constitution* (New York: Oxford University Press, 1986).

[57] See especially Carter, *supra* note 55, and Michael W. McConnell, "Accommodation of Religion: An Update and Response to the Critics," *George Washington Law Review* 60 (1992), 685–742.

[58] The use of 'reduction' here should be clarified: To say that a right X *is reduced to* some other right Y is to say that X is just one instance of Y and that the rationales for X are the only ones that ground Y too. In this sense we shall also say that X *depends on* Y, i.e. that the validity of X wholly depends on the validity of Y.

[59] Concerning the situation in Canada, see Von Heyking's analysis, which claims that the current interpretation by the Canadian court of the Canadian Convention of Rights and Freedoms 'collapses religion into conscience.' Von Heyking, *supra* note 6, p. 678.

valent in legal debates, and why such claims are problematic.[60] They illustrate their point with the Israeli case of *Nachmani* v. *Nachmani*. In this case, the court was required to decide the fate of the frozen, fertilized ova of a couple that had separated after the fertilization. The wife was unable to produce any further ova as a result of a hysterectomy and claimed her right to parenthood while her husband did not want a child from the union. Some of the judges maintained that the wife's right to be a parent was equal to the husband's right not to be a parent.[61] Against this view, Barak-Erez and Shapira argued that the justification for the right to parenthood is not based only on the autonomous nature of the decision to become a parent (which is equivalent, in this regard, to the autonomous decision not to become a parent), but rather on the profound human interest in parenthood and the significance of parenthood for human beings. More generally, to return to our argument, if all we wanted to protect was the autonomous actions of people, regardless of their content, we would not speak of specific rights – of association, movement, speech, etc. Recognition of such rights teaches that there is something in the content of these activities, and in their connection with the good of the individual or of society that justifies special protection and there are no grounds to think, *a priori*, that the reasons grounding the importance of these activities also ground the importance of refraining from them. In other words, there are no grounds to think that the reasons underlying the right to F – reasons related to the special value of F-ing – also underlie the right not to F, and clearly there is no reason to think, *a priori*, that the right to F *has the same weight* as the right not to F (if such a right exists at all).

What might explain the mistake in assuming that the right to F entails the right not to F is the thought that because of the closeness between permissions and rights (we often say interchangeably 'I am allowed to do so and so' and 'I have a right to

[60] Daphne Barak-Erez and Ron Shapira, 'The Delusion of Symmetric Rights', *Oxford Journal of Legal Studies* 19 (1999), 297–312.

[61] Nachmani v. Nachmani, 50(4) P.D. 661 (1996), especially the statement by Justice Strassberg-Cohen.

do so and so'), they are governed by the same logic. Thus, just as 'S is permitted to F' logically entails 'S is permitted not to F' (a standard principle in deontic logic), 'S has a right to F' also entails 'S has a right not to F'. But the analogy is misleading. 'S has a right to F' means that the value of freely doing F should override conflicting interests and values, but it does not follow that the value of not doing F also overrides conflicting interests and values.[62]

The relevance of this argument for the issue at hand is obvious. There is no basis for thinking *a priori* that freedom of religion includes or entails freedom from religion. Freedom of religion, like other freedoms, is not based solely on the value of personal autonomy. It has to do with the unique characteristics of religion that explain its importance for the individual or for society. Since the relevant characteristics are related to the nature of religion, or of religious attachment, one cannot assume in advance that they will also apply to protection from them , therefore one cannot assume in advance that they entail freedom from religion.

Note that even if 'S has a right to F' did entail 'S has a right not to F', the content of F would have to remain constant in both parts of the entailment, which is not the case in the present context. Freedom of religion is usually perceived as narrower, and as having a different focus than freedom from religion. The former concerns *a right to engage in some practice*, while the latter concerns *a right to be free of laws motivated by a certain set of reasons* (laws enjoining a wide range of behaviors, including, but not limited to, religious practices). Hence, the only kind of freedom from religion that might be in some sense parallel or analogous to freedom of religion is freedom from religious practice, a point we shall substantiate later in this section.

Our position regarding the relation of freedom *of* religion to freedom *from* religion is opposed to that taken by many scholars and judges in the U.S. with regard to interpretation of the First Amendment. The Amendment protects the free exercise of religion, and according to the generally accepted interpretation

[62] We are grateful to Shapira and Barak-Erez for clarifying these issues in correspondence.

this should include not only the freedom to act in accordance with religion, but also the freedom to *refrain* from doing so. Kathleen Sullivan presents this line of thought as follows:

> The right to free exercise of religion implies the right to free exercise of non-religion. Just as Caesar may not command one to transgress God's will, he may not command one to obey it. To do either is to run afoul of free exercise. As the Court put it in Wallace *v* Jaffree, "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." The "conscience of the infidel [or] the atheist" is as protected as any Christian's… [T]he affirmative right to practice a specific religion implies the negative right to practice none.[63]

But, in our view, and further to what was said earlier, the right to adopt a certain religion or to act in accordance with it does not entail the right not to adopt any religion. A conclusion of this type would be valid only if the sole basis for freedom of religion were personal autonomy, but as explained above, additional reasons are needed in order to justify rights in general, and the right to freedom of religion in particular. A different interpretation of the constitution, similar to the position that we have presented here, is suggested by Michael McConnell, who sharply criticizes the line of interpretation presented by Sullivan. On his view –

> The Free Exercise Clause does *not* protect the freedom of self-determination (with respect to abortion, working on Sunday, or anything else); it does protect the freedom to act in accordance with the dictates of religion, as the believer understands them.[64]

Let us see, then, whether the reasons justifying freedom of religion also support freedom from religion. If the special protection for religion is based upon its unique contribution to the moral level of society, then it is clear that the secular majority should not be awarded similar protection since, in terms of this argument, it contributes less. Likewise, if the special protection for religion is based upon the contribution of religion to the welfare of the believer, then obviously such protection would

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[63] Sullivan, *supra* note 1, at 197.

[64] Michael McConnell, 'Religious Freedom at a Crossroads', *University of Chicago Law Review* 59 (1992), 174–175.

not apply to the secular lifestyle. Another justification we can reject immediately is that based on the right to culture. If the religious community needs special protection because it is a minority that finds it hard to survive in the face of the majority culture, then this kind of justification cannot apply to the majority group too; the majority culture needs no preferential treatment or special protection in order to preserve itself and to develop.[65] Of course, this does not mean that the majority culture does not have interests that can be harmed by the minority culture. The point is that these interests do not require special protection in the way that those of the minority culture do.[66]

We may add to this that even if the right to culture applied to the majority group, it would be misleading to formulate it in terms of protection from the minority. Let us think of a country with a Protestant majority and a minority made up of Catholics, Jews and Moslems. If we accept the idea of a right to culture, then the Catholics, Jews and Moslems in this country have a right to special protection in order to enable them to develop and thrive. If the Protestants, too, have such a right, then it is the right to special protection and preferential treatment *of Protestantism*, not the right to *protection from* Catholics, Moslems or Jews. In other words, the right of a group to preserve and develop its culture is defined in terms of the importance of that culture for the group, not in terms of the importance of protection from some interference with its cultural life, which is merely derivative. For the purpose of the current discussion: even if the secular majority in a liberal-

[65] See *supra* text accompanying note 36.

[66] Sometimes members of the minority group represent a majority in a given geographical area, and therefore in this area it may be the members of the majority group who actually deserve cultural protection. Think, for example, of secular Jews in Bnei Berak – an ultra-religious suburb in Israel, close to Tel Aviv – who are a minority relative to the ultra-Orthodox majority in Bnei-Berak, but a majority relative to the ultra-Orthodox minority in Israel. Another example would be Anglophiles in Quebec, where there is a Francophile majority. The right of Francophiles in Quebec to protect their culture may collide with and violate the right of the Anglophile minority in Quebec to protect its own culture. A conflict of this type arose in the famous *Ford* case and in its associated controversy. See Ford v. Quebec (A.G.) [1988] 2 S.C.R. 712.

secular country has a right to culture, it is first and foremost the right to the preservation and development of *secular* culture, and only secondarily the right to protection from various forces that may threaten it, whether they have their source in religion or elsewhere. Finally, if we accept the idea that a right to culture includes an additional right to protection from other, threatening cultures, then this would apply to religious groups too, which would mean they would have both *a right to freedom of religion*, understood in terms of a right to culture, and another *right from secularism*. But one can easily see how the normative picture is thereby obscured rather than clarified by this proliferation of rights.

If we are unable to establish a symmetry between freedom of religion and freedom from religion on the basis of the right to culture, the only remaining path is one based upon the connection between freedom of religion and freedom of conscience. As we saw, violation of the latter takes place when people are forced to perform acts to which they are strongly opposed; acts that generate in them feelings of self-alienation and undermine their personal integrity. In the eyes of the victim, the actions whose performance causes an offense to conscience are *mala per se* and not *mala prohibita*. Under normal circumstances, secular people would not sense any offense to their *consciences* if they were forced to travel a long and circuitous route because of a religious procession, a military parade, or a political demonstration. They may feel anger at the inconvenience and think that the road ought to be open for traffic, but it would be strange and artificial if they presented their complaint as one against a violation of *conscience*. The reason is, obviously, that there is nothing in the secular value system that is profoundly opposed to a circuitous drive, and therefore the journey is not an attack on their integrity.

When can laws arising from religious considerations violate the conscience of a secular person in such a way as to correspond to the violation of the conscience of a religious person when forced to act contrary to religious dictates? This occurs when a secular person is forced to participate in a ceremony of a clearly religious character, one which, at best, is foreign to her and, at worst, profoundly opposed to the principles in which she be-

lieves. Consider, for example, a secular couple being married in a religious ceremony in church, not out of any desire to do so, but because that is what the law requires. These two people live in a cultural world that is very far removed from priests and other church attendants. But here they are, forced to cooperate with them in a ceremony that is foreign and strange, and which naturally arouses in both of them feelings of absurdity and self-ridicule. It is only in instances such as these, i.e., where secular people are forced to participate in religious ceremonies, that the claim to freedom from religion parallels the claim to freedom of religion, understood as freedom of conscience. A positive relation exists between the degree of involvement in the religious ceremony and its significance for the person involved, on the one hand, and the possibility of claiming an offense to conscience, on the other: The more actively the secular person is required to participate in the religious ritual (reciting a blessing, for example) and the more significant the ceremony (a marriage ceremony, for example), the more convincing her claim that she is being forced to act contrary to her conscience.

This conclusion seems inconsistent with the condition presented above, according to which a violation of freedom of conscience occurs when one is forced to carry out an action seen by one as *mala per se*. For most secular people, participation in religious ritual – reading a chapter from the Book of Psalms, visiting a church, removing shoes before entering a mosque, donning a skullcap, reciting a blessing, holding a Torah scroll – is not perceived as problematic *in itself* and hence they are willing to do so if a relative or friend asks them nicely.[67] In such circumstances, they have no sense of inner

[67] We do not deny the existence of instances where opposition to participation in a religious ceremony arises from opposition to certain ideals or values expressed in it, perceived by the secular person as negative. Hence, for example, a secular person may oppose participating in a religious marriage ceremony because of the non-egalitarian status of the man and woman as expressed in the ceremony or in the relationship that it comes to establish. In such cases, the basis for the secular person's opposition to the ceremony is not based on the fact that the ceremony is a religious one, but rather on the fact that he views the ceremony as being morally problematic. It would therefore be wrong to define the secular person's claim in such instances in terms of freedom from *religion*.

conflict, and no feeling that they are betraying their innermost principles.

Let us try to define more clearly the nature of the offense to conscience that is involved when a secular person is forced to participate actively in a religious ceremony. The uneasiness that is felt does not stem from the content of the religious act itself, but rather from its meaninglessness for the secular person and in the implications of this meaninglessness for her. In such circumstances she feels self-alienated, as if she is acting out a role in a play where she does not belong. This sense of self-alienation is reinforced according to the degree to which the circumstances reflect her unique identity. The marriage ceremony is an excellent example of such circumstances, since it is one of the major events in a person's life. If this ceremony does not allow a person to express her personal identity and worldview but forces her instead to express the identity and view of others by participating in what she regards as a strange ritual, then her sense of alienation is natural. According to the definition formulated in Section IIA, offense to conscience involves carrying out an act, which is opposed to the profound normative principles of the agent. This definition is appropriate here, for people who refuse to participate in a ceremony that is foreign to them are acting on the principle that people must be true to themselves, particularly when it comes to the most important events in their lives .

We, therefore, propose that protection of freedom from religion should be limited to protection from coercion to participate in religious ceremonies. It is unreasonable to extend it to every instance of legislation motivated by religious reasons, such as a prohibition against traveling through Ultra-Orthodox Jewish neighborhoods on Saturdays. Such a prohibition cannot be seen as *mala per se* nor does it cause the driver feelings of alienation or lack of authenticity. To broaden the application of freedom from religion beyond the proposed limits is not only theoretically unjustified, but also ethically problematic, as it implies discrimination against the religious communities by limiting their ability to participate in the political arena. On such an extension, while laws based upon religious considerations violate the right to freedom from religion of the secular

population and therefore require special justification, laws arising from other ideological considerations (vegetarianism, for example) are not perceived as violating freedom from the relevant ideology, and are therefore acceptable (or don't require special justification). No-one would claim that the law prohibiting the consumption of whale meat, for example, violates the freedom of *conscience* of those who enjoy eating it, because refraining from eating this meat does not fall into the category of *mala per se* for whale-meat connoisseurs. It is unclear why citizens require special protection against legislation based upon religious considerations as compared to legislation based upon other ideological or practical considerations.[68]

An example of the problematic use of the concept of freedom from religion as freedom of conscience is to be found in the Canadian ruling in the case of R. v. Big M Drug Mart Ltd.[69] This company was accused of selling goods on Sunday, in contravention of the Lord's Day Act.[70] In response, the company claimed that this Act violates of Section II of the Canadian Convention of Rights and Freedoms, which guarantees freedom of conscience and of religion. The Canadian Supreme Court accepted this argument, claiming that the freedom of religion mentioned in the convention applies principally to the freedom to maintain religious beliefs and practices, but also includes freedom from religion, which means freedom from state coercion that is motivated by some religious view. In this instance, the court claimed, the law required that all citizens, including non-Christians, remember that the day is holy to Christians and even non-believers are obliged to protect its sanctity – a demand that is incompatible with Section II of the convention. But, in our view, this is an artificial and contrived description of the situation. No non-Christian citizens are required to "protect the sanctity of the Christian Sabbath", i.e., to participate actively, as it were, in any type of belief or reli-

[68] This last discussion makes it clear that proponents of freedom from religion cannot base their position on a conception of political neutrality, because such a conception falls short of explaining why a liberal state would need a separate category for protection from *religion*.

[69] R. v. Big M Drug Mart [1985] 1 SCR 295.

[70] Lord's Day Act, R.S.C. 1970, c. L-13.

gious service to which they are opposed. All that is required of them is to close their businesses on Sunday – a restriction that is far removed from forcing a person "to affirm a specific religious belief or to manifest a specific religious practice".[71] It is true that if I am Jewish or Moslem then my religion allows me to work on Sunday, but – contrary to the conclusion of the court[72] – this does not imply that if I am prevented from realizing this right then my freedom of religion is being violated, for my religion does not *require* me to work on Sundays.[73]

At this stage one might argue that we overstate the significance of the *mala per se*/*mala prohibita* distinction in the present context. Though the business owner does not him- or herself affirm a religious belief by shutting down on Sundays, one could argue that he or she takes part in a collective action the aim of which is to manifest a specific religious practice. Consider the following analogy: Suppose that the building manager at my office tells me to leave my light on when I vacate the office. Surely there's nothing in my conscience to prevent me from complying. But then it turns out that the point of the order is that it is part of a series or orders given to various persons, the aim of which is to generate a hateful racist message out of the pattern of lit and unlit office windows. In these circumstances, leaving my lights on would seem to signify participation in the expression of a message to which I deeply object, one that horrifies me and that would violate my integrity. Similarly, one could argue that closing my store on Sun-

[71] R. v. Big M Drug Mart [1985] 1 SCR 295, at 106.

[72] *Id.*, at 105.

[73] The Constitutional Court of South Africa drew a distinction between the Canadian case and a law prohibiting the sale of liquor on Sunday (the Liquor Act), claiming that the latter does not represent a violation of freedom of religion. On our view, the claim that the above Canadian law has a "purely religious purpose" while the South African law has no intention "to promote any specific religion" (S. v. Lawrence, 1997 (4) S.A. 1176) is not convincing. On the one hand, both cases deal with laws that emphasize the importance of Sunday in the Christian tradition, and seek to express this importance on the public level. On the other hand, in neither case is anyone being coerced to participate actively in any religious ritual or to maintain religious beliefs in which he does not believe; in this sense, his freedom of conscience is not being violated.

day is problematic because doing so would mean participating in a plan to which I might strongly oppose, i.e., a plan to express and strengthen some religious beliefs. Hence – so the objection goes – the right to freedom from religion should include not only freedom from participation in religious rituals, but also freedom from various collective actions the point of which is to manifest, to spread, or to strengthen religious practices.[74]

But, in our view, widening the scope of actions that are protected under the freedom of conscience to include participation in such ''collective actions,'' leads to unreasonable results. Think, first, about taxes. When citizens pay taxes, they participate in a very real way in projects they often strongly oppose. Yet, nobody would suggest that therefore some of them can be released from the payments they oppose in order to avoid a violation of their conscience. Second, if the liberal state must respect the individual conscience even in cases of collective action, then, once again, it is unclear why participation in *religious* collective action (by closing a store on Sundays) is more threatening to the secular conscience than participation in national collective action (by closing a store on Independence Day) is to citizens of national minorities, or participation in animal-liberation collective action (by refraining from selling whale meat) to anti-animal-rights citizens, who believe that the animal rights project is immoral as it denies the unique value of humanity. Since freedom of conscience would not grant protection in these latter cases, it should not do so in the former either. Consciences should be protected only when *directly* threatened, which usually happens when action of some kind is required (''individually'', not ''collectively'') an action which goes against the deepest convictions of an individual.

In the *R. v. Big M Drug Mart* case, one may detect a different line of argument, based upon the state's need to remain neutral with regard to all the cultures existing within it, so as not to cause any of them – generally the minority cultures – to feel alienated

[74] We thank an anonymous reviewer for *Law & Philosophy* for raising this objection and for making the provocative analogy.

and slighted.[75] However, putting aside questions on the validity of the ideal of neutrality,[76] it is unclear why, within the framework of this ideal, protection from preferential treatment to the religious sector should have a special status in comparison with protection from preferential treatment to other sectors.[77] If the symbols of the state – the national flag, for example – express a type of preference for the majority national culture, then members of other ethnicities that live within the state may claim a lack of neutrality and a lack of respect towards them, but they cannot, in *addition to this,* claim "freedom from nationality".

The limitations that we propose on the concept of freedom of conscience within the framework of freedom from religion are compatible with the common view according to which freedom of religion applies to actions that religious people are *obliged* to perform, rather than to actions that are *permitted* by their religion. In this spirit, the U.S. Supreme Court ruled that although the Mormon religion permits polygamy, the law against polygamy does not violate the Mormon's freedom of religion, for their religion does not require them to marry more than one woman.[78] The secular parallel to this is the distinction between acts that secular people feel morally obliged to avoid, and those that secular people feel no obligation to refrain from performing, but to which they are opposed for various non-moral reasons. Usually only attempts to coerce performance of

[75] See especially the quotation of Section 27 of The Canadian Constitution (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), requiring that it be interpreted in such a way as to respect and promote "the multi-cultural tradition of Canada" (*id.*, *id.*).

[76] In our view, the state cannot and should not be neutral concerning different views of what is good. See, in this direction, Raz, *supra* note 33, ch. 5, and at length in George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge and New York: Cambridge University Press, 1997).

[77] For broad criticism of this ruling, see Von Heyking, *supra* note 6, Section IV, claiming that the ruling demonstrates that the Court perceives itself as "a secularizing force in society", while ignoring the importance of religion and the religious character of Canadian society (*id.*, p. 677), in which 90% of citizens state that God is "important" or has become "more important" in their lives, and more than a third of children under the age of 12 attend religious prayers at least once a month (*id.*, p. 669).

[78] Reynolds v. United States, 98 U.S. 145 (1878).

actions of the first type can establish claims to violation of freedom of conscience.

Before concluding this discussion, it might be worthwhile to speculate briefly about its implications for the fascinating case currently pending in the US Supreme Court about the constitutionality of the American Pledge of Allegiance. Putting aside the question of how American law should solve this case on the basis on the religious clauses of the First Amendment, in particular the non-establishment clause,[79] what concerns us here is whether the mandatory recital of the pledge in US schools be seen as a violation of *freedom from religion*, understood as freedom of conscience. On the one hand, one might answer in the affirmative, because the recital of the pledge is a kind of a ceremony, a form of ritual with what feels like a built-in religious element, hence forcing an individual to recite it is like forcing participation in a religious ceremony or service. Yet on the other hand, the recitation of the pledge is not really a religious ceremony, even though the expression 'one nation under God' appears there. The purpose of the pledge is to express allegiance *to the US*, not to God or the Church. To be sure, one might object fiercely to the insertion of this expression in the pledge, as well as to the reference to religious notions or doctrines in other state documents, symbols or ceremonies. But rarely could such references be considered as amounting to coercing individuals or state officials to participate in a religious ritual or ceremony. Mentioning the accepted religious conception of the state is no more offensive to the conscience of those who object to this conception than mentioning the *secular* or the *national* conception of the state by those who object to these conceptions.[80] At any rate, even if

[79] For a preliminary discussion of this topic, using American constitutional doctrine terms, see John E. Thompson, 'Note: What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance',*Harvard Civil Rights-Civil Liberties Law Review* 38 (2003), 563–597.

[80] Imagine a religious Frenchman having to pledge allegiance to the French constitution, which states in article 2 that France is a secular Republic. Or, think of a Slovac citizen who belongs to the Hungarian minority, who is asked to express loyalty to the Slovak constitution that commits itself in Article 7a to supporting ''national awareness and cultural identity of Slovaks living abroad.''

reciting 'one nation under God' is perceived as participation, in the relevant sense, in a religious ceremony, and thus as a violation of freedom from religion if forced upon the citizens, this cannot be true for other cases, such as using a dollar bill that declares 'In God We Trust,' or waving the flag of a country that has a cross drawn on it (as in many countries with a Christian history).

To sum up: If freedom of religion is understood within the framework of freedom of conscience, then only a partial parallel between freedom of religion and freedom from religion emerges and this only in instances where non-religious people are forced to perform an act, or to participate in a ceremony, of a clearly religious nature,[81] especially where the ceremony constitutes a significant event in their lives. In such instances, people feel that they are alienated from themselves, that they are forced to behave in a manner that is inauthentic and against their integrity. Coercion of other behaviors – such as refraining from serving non-kosher food at some party, or refraining from driving a car through a certain route – cannot be interpreted as a violation of freedom of conscience, and, in such circumstances, constitutional protection on the basis of freedom from religion cannot be claimed. Freedom from coercion in such cases should not be given special status in comparison with freedom from coercion based upon other worldviews.

B. *Other Rationales for Freedom from Religion*

In the previous section, we attempted to demonstrate that the rationales supporting freedom of religion do not apply to freedom from religion except, in a limited degree, to cases of freedom of conscience. Nevertheless, one could argue that there is something particularly problematic about religious laws that invalidates them in political-legal discourse, thereby justifying special protection from them. This line of argument may be detected among certain liberal writers, who maintain that basing laws upon religious attitudes is illegitimate. Kent Greenawalt raises two arguments in this respect. Firstly, he

[81] Cf. the ruling of the U.S. Supreme Court that coercing a public servant to declare his belief in God is a contravention of freedom of religion. See Torcaso v. Watkins, 367 U.S. 488 (1961).

claims, using religious arguments as a basis for legal rules may cause those who do not agree with these arguments to feel alienated and excluded. They may feel that they are being treated as "second class citizens".[82] Their sense of alienation, even humiliation, is related to the covert message of those who rely upon religious arguments, namely, that the believer has access to fundamental truths about reality which others have not merited:

> At least for many religious arguments, the speaker seems to put himself or herself in a kind of privileged position, as the holder of a basic truth that many others lack. This assertion of privileged knowledge may appear to imply inequality of status that is in serious tension with the fundamental idea of equality of citizens within liberal democracies.[83]

However, as Michael Perry rightly argues, this claim is unconvincing. It is unclear why basing an action or a law upon religious arguments is worse than basing them upon secular arguments, for, in both cases, people may strongly oppose them. More generally: the fact that X does not agree with Y's position does not imply that accepting Y's position would violate X's dignity, or that it would cause X to feel self-alienation. And as to the argument concerning special knowledge, as Perry points out, many non-believers make similar claims presenting their proponents as possessing special knowledge concerning human nature, the structure of society, etc.[84]

The second claim raised by Greenawalt is based upon the damage that, in his view, may be caused as a result of the inequality and alienation felt by the secular individual. This feeling is admittedly not likely to lead to actual violence, but it may well cause social tension, and weaken the relationships of mutual tolerance and respect within society. This argument belongs to a family of arguments according to which religion is considered to endanger society. Perry's response to this argument is that an examination of centuries of religious influence

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[82] Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), p. 132.

[83] *Id.*, p. 157.

[84] Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (New York: Oxford University Press, 1997), pp. 50–51.

on American politics demonstrates that this concern is exaggerated – that "the sky hasn't fallen", as he puts it.[85] Moreover, as noted by McConnell, the social instability brought about by debates on religious issues has never come close to that caused by the fiery political debates surrounding such issues as the Vietnam War, racial separation, Communism, professional unions, or slavery[86] – and no-one would seriously suggest limiting the use of arguments such as those which gave rise to these controversies.

Lawrence Solum is correct in pointing out that conditions in modern democratic countries are so different from those that gave rise to the religious wars of the 16th century that we need no longer view religious debate as a significant source of civil strife.[87] In the absence of solid empirical basis for the assumed tendency of religion to arouse controversy and cause division in these countries,[88] there is no justification for limiting the use of religious arguments in either the political or the legal spheres on these grounds.

Furthermore, even if it were true that religion had a particularly dangerous social potential, it is unclear whether this implies that religion should be restricted or, on the contrary, that its freedom should be reinforced. At times, dangerous individuals and groups grow even more dangerous if they feel oppressed and marginalized, while if they are afforded some privileges, they are more controllable.[89]

So much for Greenawalt's arguments. A different argument contends that the only considerations that may be allowed in the liberal-democratic discourse are those that, in principle,

[85] *Id.*, p. 53.

[86] Michael W. McConnell, 'Politics and Religious Disestablishment', *Brigham Young University Law Review* 1986, 413.

[87] Lawrence B. Solum, 'Faith and Justice', *DePaul Law Review* 39 (1990), 1096.

[88] Obviously, we do not deny that religion also has the potential for conflict, violence and destruction, and the events of September 11th 2001 serve as a painful reminder to anyone who may have forgotten this.

[89] Smith calls this rationale for freedom of religion the "Civil Strife Rationale", and maintains that it should be rejected. See Smith, *supra* note 46, pp. 207–210.

may be understood by every member of the political community. Religious considerations, so the argument goes, do not fulfill this condition, as they are unintelligible to non-believers, hence they are not legitimate.[90] This means that there is, after all, something special about religious laws that renders them invalid for participation in legal discourse, in comparison with other laws based on other ideologies, and, therefore, there is a special need to protect non-believers against "religious" laws that restrict their freedom.

This argument has aroused extensive debate in the legal literature in the U.S. to which we cannot do justice within the scope of this article.[91] For the purposes of our discussion, suffice to say that even if this argument were valid, in reality it is difficult to find instances where some legislation or court ruling is based upon a religious argument, such as "God said that it is forbidden to do X", or "The Book of Leviticus says such and such".[92] The arguments raised by religious parties or individuals in public and political discourse are almost always of the sort that may be acceptable to non-believers as well, arguments that do not presuppose any theological assumptions. For instance, in the Israeli context, we are not familiar with a single example of religious speakers demanding that law X be adopted, or that an amendment X be passed, *because that is what the Torah teaches*. The two types of reasons that are most often invoked by them are always acceptable to the secular mind: the one concerns the Jewish character of the state, implying that the proposed basis for the legislation is national or cultural, not religious. The other focuses on various rights of the religious

[90] This argument is to be found in various forms among various liberal thinkers. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 212–54; Cass Sunstein, 'Beyond the Republican Revival', *Yale Law Journal* 97 (1988), 1539–1590; Suzanna Sherry, 'Enlightening the Religion Clauses', *Journal of Contemporary Legal Issues* 7 (1996), 473–495.

[91] For an extensive and edifying critique of this argument, see Paul J. Weithman, *Religion and the Obligations of Citizenship* Cambridge and New York: Cambridge University Press, 2002), ch. 2.

[92] This is Perry's example of such an argument: basing a law against homosexuality on the claim that it is prohibited by the Book of Leviticus. See Perry, *supra* note 84, at 36.

community; to a certain autonomy within its residential areas, to protection against offense to its feelings, etc.

Finally, we can now see that the idea of equality, which plays a central role in the claim that religion should not be given *more* protection than that extended to other activities and institutions, also leads to the conclusion that it does not deserve *less* protection than they do. The religious position is entitled to a hearing in political and legal discourse in an attempt to promote its needs and interests. The fact that such legislation or rulings may not please some citizens or groups does not constitute a reason not to proceed any more than in any other instance in which legislation or a ruling is perceived as misguided, annoying or foolish. To award citizens special protection from a certain annoying religious legislation, but not from another annoying legislation, expresses discrimination against religion which the principle of equality cannot allow.[93]

V. SUMMARY AND CONCLUSIONS

1. Within a liberal world-view, the special protection granted to the freedom of religion cannot rest either upon a claim for the truth of religious belief or upon an assertion as to the benefits of religion for the individual or for society. Rather, its justification must be anchored in the rights and freedoms that are recognized by the liberal view and that are extended equally to all citizens – especially freedom of conscience and the right to culture.[94] But such reasoning leads to the reduction of freedom of religion in relation to these other rights. Thus, the claim of

[93] This discrimination sometimes arouses the suspicion that it stems from real hostility towards religion. For a comprehensive argument concerning such hostility in the Supreme Court of the U.S., *see* Frederick Gedicks's provocative and informative article, 'Public Life and Hostility to Religion', *Virginia Law Review* 78 (1992), 671–696. See also David M. Smolin, 'Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry', *Iowa Law Review* 76 (1991), 1067–1104.

[94] Just to recapitulate, we do not suggest that religion and its value should be understood solely in terms of subjective attachments, whether individualist or collectivist, only that such attachments have the best chance of grounding claims for religious freedom within liberal countries.

religion to a special status requiring unique protection is undermined.

2. The trend in many western democracies is to protect freedom of religion in the same way and using the same categories as would be done in relation to the rights and freedoms of any other individual or group. Officially, religion still retains its special status, but practically this is becoming increasingly irrelevant. If this trend continues – and at this time we see nothing to stop it – the sections dealing with freedom of religion "will quietly retire from active duty", as Steven Smith vividly puts it.[95]

3. Denying the uniqueness of religion does not withhold all protection from it, but limits such protection to the boundaries defined by freedom of conscience and the right to culture. Since violation of the freedom of religion is a prime example of violation of each of these rights, religion may obtain a reasonable degree of protection within their framework. These are the moral, political and legal rationales with which claims of violation of freedom of religion should be measured. They are not completely separate from one another as some degree of overlap between them exists.

4. Within the framework of freedom of conscience, freedom of religion protects against coercing individuals to act contrary to the dictates of their religion. Within the framework of the right to culture, freedom of religion protects against interference with or threats to the religious life, usually within the geographical area in which the religious minority represents a majority. Extending protection of freedom of religion beyond these circumstances is almost always unjustified, especially if it involves attempts to place restrictions upon the secular majority within its own residential areas.

5. Just as it is difficult to justify the claim that freedom *of* religion is worthy of special protection in comparison to other human practices, beliefs or institutions, so it is difficult to justify the claim that freedom *from* religion is worthy of such protection. While the first claim expresses an unjustified preference for religion, the latter expresses unjustified discrimination against

[95] *Supra* note 46, p. 225.

it. There are no grounds for awarding citizens special protection against ''religious'' legislation or activity beyond the regular protections against restrictions on their freedom.

6. In contrast to the prevalent position, freedom of religion does not include freedom from religion. A kind of symmetry between these two freedoms (both understood as falling under the protection of conscience) occurs only when secular people are coerced to participate actively in religious ceremonies. Only in such cases can secular people claim offense to their conscience as a result of the restriction of their freedom.

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