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San Diego Law Review

Volume 51 • No. 4 • Fall 2014

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How Much Autonomy Do You Want?

MAIMON SCHWARZSCHILD*

How much legal autonomy—and how much exemption from otherwise applicable laws—ought religious groups to have? When government grows larger and more ambitious, laying down the law in more and more areas of life, these questions arise more often and more urgently.

It is a common motif that without some special accommodation or exemption from various laws, it would be difficult for religious communities or even individuals to live religious lives.[1] If public law forbids employment discrimination on the basis of religion, for example, religious groups have an obvious claim for exemption when choosing their clergy and a claim for autonomy to decide who qualifies to be a rabbi, priest, or pastor.[2]

The controversy in recent months over the Obama Administration's mandate to Roman Catholic institutions over abortive drugs and contraception is just one example of the almost limitless situations in which the question of special accommodation can arise.[3] Should Native American or Rastafarian sects be exempted from drug laws that forbid peyote or marijuana? Should Mormons or Muslims be exempted from laws against polygamy? Should Christian Scientists be exempted from

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1. *See* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 556 (1991); *see also* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992) (noting that even critics consider "accommodation" the "central motif of religion clause thought").

2. *See, e.g.*, Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 391–93, 396–97 (1987).

3. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

laws requiring parents to provide for medical treatment for sick children? Should Sikhs be exempted from laws prohibiting carrying knives in public? Should observant Jewish soldiers or officers be exempted from military uniform rules that would not permit wearing a *kippah* (head covering)? Should religious individuals be exempted from duties that would otherwise be required on the job, such as a nurse who refuses to assist abortion or contraception, a police officer who refuses to arrest antiwar or antiabortion protesters, or postal workers who refuse to deliver mail that they consider blasphemous, or—as is now an issue in Israel—who refuse to deliver pamphlets proselytizing for Christianity, or who refuse to deliver military conscription documents?

In the United States, these questions—as with so many things in American life—are often framed as constitutional issues. The First Amendment says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] So perhaps some or all of the claims for religious exemption must be granted in order to satisfy "free exercise." On the other hand, if they are granted, people who might want to smoke peyote, marry polygamously, and/or carry ceremonial but sharp knives in public for nonreligious reasons are prohibited from doing so, and this can be said to be an "establishment of religion": it would certainly discriminate in favor of religion and against people who might want exemptions from the law for secular—but perhaps for serious or conscientious—reasons. Free exercise and establishment, especially if each is construed broadly, notoriously threaten to collide with one another.

The U.S. Supreme Court has followed a notably up-and-down course in recent decades about special religious accommodation. In two famous cases decided in 1963 and 1972, the Court held that the First Amendment requires exemptions from generally applicable federal and state laws unless there is a "compelling state interest"—or something close to it—for enforcing the law: a constitutional standard that usually means the government has to give way to a claim under the Bill of Rights. The first case, *Sherbert v. Verner*, involved a Seventh Day Adventist who wanted an exemption from a requirement to be available for work on Saturday as a condition of receiving unemployment benefit;[5] the second, *Wisconsin v. Yoder*, involved an Amish community that wanted its children excused from compulsory school attendance past the eighth

4. U.S. CONST. amend. I.
5. Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963).

grade.[6] The Court held that Free Exercise requires a religious exemption in both cases.[7]

But in 1990, in *Employment Division v. Smith*, the Supreme Court reversed course and said that the Free Exercise Clause does not require religious exceptions from generally applicable laws that are enacted for secular purposes.[8] The idea clearly implicit in the decision is no official preference for religion over nonreligion.[9] The U.S. Congress reacted sharply to the decision by enacting the Religious Freedom Restoration Act of 1993 (RFRA), seeking to restore the pre-*Smith* "compelling state interest" standard that favored religious exemptions.[10] In 1997, the Supreme Court struck back and struck down RFRA as unconstitutional on the basis that Congress has no power to impose this pro-exemption requirement on the states.[11] Recently, in yet another turn, the Court tacitly upheld RFRA for religious exemptions from federal laws—although Congress cannot require such exemptions from state laws.[12]

In practice, there has been less change in public policy toward religious exemptions than a reading of the somewhat dizzying Supreme Court decisions might suggest. In the era before *Smith*, exemptions were by no means granted as readily as *Sherbert* and *Yoder* might imply, and after *Smith* they are still available in various guises. Even in the post-1960s but pre-*Smith* era, the Supreme Court rejected all religious claims for exemption from tax laws and from all claims arising from prisons and the military, and it also rejected a claim for exemption from the Fair Labor Standards

6. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

7. *Id.* at 234; *Sherbert*, 374 U.S. at 409. Justice William O. Douglas's provocative dissent in *Yoder* suggested that a high school child may or may not want to be "harnessed" for life to the Amish community: "He may want to be a pianist or an astronaut or an oceanographer. To do so, he will have to break with the Amish tradition. . . . The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today." *Yoder*, 406 U.S. at 244–46.

8. Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990).

9. *See id.* at 890.

10. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

11. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

12. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (holding that under RFRA the federal government can only seize and preclude the use of an otherwise illegal substance for religious ceremonial use upon a compelling state interest).

Act.[13] Virtually the only claims the Court accepted were, like *Sherbert*, for religious exemption from requirements to be available for Sabbath work under unemployment benefit laws.[14] And after *Smith*, religious claimants still sometimes win in the Supreme Court. For example, the Court says that where the government actually considers individual eligibilities—as it does in unemployment cases—it still has to grant religious exemptions.[15] The Court also strikes down laws that it finds to be discriminatory against particular religions or their practices, such as, in a famous case, animal sacrifices by the Santeria sect.[16]

Perhaps more importantly, federal and state laws—even, or especially, after *Smith*—have been strongly favorable towards religious exemptions.[17] RFRA was enacted by unanimous vote in the House of Representatives—better than the Declaration of War after Pearl Harbor—and by almost unanimous vote in the Senate,[18] and it still applies to the federal government, requiring religious exemption unless a "compelling government interest" militates against it.[19] About half the states have enacted their own RFRA-like laws or interpreted their state constitutions in RFRA-like terms.[20] Twenty-three states and the federal government allow sacramental use of peyote.[21] Congress granted the Amish an exemption from social security taxes after the Supreme Court turned it down.[22] Congress granted members of the armed forces the right to wear religious apparel after the Supreme

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13. *See* William P. Marshall, Smith, Ballard, *and the Religious Inquiry Exception to the Criminal Law*, 44 TEX. TECH L. REV. 239, 244 (2011).

14. *Id.* at 244–45.

15. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 832 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987); Thomas v. Review Bd., 450 U.S. 707, 720 (1981).

16. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527, 546 (1993).

17. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 466–67 (2010). Smith and the ensuing Supreme Court decisions are about whether religious exemptions are required as a matter of free exercise by the Constitution. But federal or state statutes are free to grant more "special accommodation" than the Constitution—minimally—requires, so long, of course, as the special accommodation is not viewed as rising to the level of an establishment of religion.

18. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994).

19. *See* 42 U.S.C. § 2000bb-1(b)(1) (2012).

20. *See* Eugene Volokh, *1A. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/.

21. *See* Emp't Div. v. Smith, 494 U.S. 872, 912 n.5 (Blackmun, J., dissenting).

22. *See* 26 U.S.C. § 3127(a) (2012); United States v. Lee, 455 U.S. 252, 261 (1982).

Court turned down a claim by an Air Force doctor, an observant Jew, to wear a *kippah* on duty.[23]

Some of these enactments might really give cause for second thoughts, even if one supports generous religious exemptions. The federal Civil Rights Act of 1964, for example, prohibits employment discrimination on account of race, religion, sex, or national origin.[24] But under a 1972 amendment, religious corporations and institutions may discriminate on the basis of religion.[25] The original 1964 law had allowed such religious discrimination more narrowly, only in relation to religious activities.[26] The Supreme Court upheld the broadened exemption in the case of a gymnasium—open to the paying, not necessarily praying, public—operated by the Church of Latter Day Saints, which fired a janitor for failing to live by Mormon standards of religious practice.[27] This exemption from antidiscrimination law is not merely for a few religious groups or for a narrow range of religious employees. Religious organizations employ more than a million Americans, and religious bodies can have large-scale business interests with a lot of leverage over would-be employees.[28] Churches own, or have owned, a major secular news agency, the United Press International; the largest beef ranch in the United States; and a major life insurance company.[29] With the broad, or overbroad, exemption, there is the potential for enterprises owned by religious bodies to swallow the antidiscrimination law, at least in some localities or in some trades.[30]

Meanwhile, there have been increasing calls in recent years both in the United States and in other Western democracies, not merely for religious

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23. *See* 10 U.S.C. § 774 (2012); Goldman v. Weinberger, 475 U.S. 503, 510 (1986).

24. 42 U.S.C. § 2000e-2 (2012).

25. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending Civil Rights Act of 1964 § 702, Pub. L. No. 88-352, 78 Stat. 255 (1964)).

26. *See* Civil Rights Act of 1964 § 702, Pub. L. No. 88-352, 78 Stat. 255 (1964).

27. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338–39 (1987).

28. *See* Nancy L. Rosenblum, Amos*: Religious Autonomy and the Moral Uses of Pluralism*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALISTIC DEMOCRACIES 165, 186 (Nancy L. Rosenblum ed., 2000).

29. *Id.*

30. *See generally id.* at 183–87 (arguing that broadened religious accommodation of employers under the amended provisions of Title VII undesirably enables the use of economic power to compel adherence to religious practice).

exemptions from secular laws but also for actual power to adjudicate under religious law.[31] There are already steps in this direction with binding arbitration in religious courts: halakhic or Sharia tribunals, for example, created by Jewish and Muslim groups respectively.[32] An extensive network of *batei din*, or rabbinical arbitration courts, now exists in the United States.[33] More recently, Islamic groups have called for the establishment of comparable Sharia courts.[34] With such tribunals, business people can contract to arbitrate future disputes in a religious court or a couple might sign a prenuptial agreement to arbitrate family disputes, including divorce, under religious law.[35] Going further, there have been suggestions in the academic literature that insular or self-contained religious groups might be given public judicial powers by analogy to the powers of tribal courts on Indian reservations.[36] The Archbishop of Canterbury recently provoked a flurry when he called, in somewhat general terms, for aspects of Islamic Sharia law to be adopted in Britain.[37] The role of religious courts in Israel is sometimes cited as an example of how religious adjudication might function in a democratic society.[38]

In a sense, even special accommodation or religious exemption from secular law implies that religious groups must have some autonomy and power to decide—in a more or less formal sense, to adjudicate—relevant questions by their own standards: to decide, for instance, at what age Mennonite children should leave school, which day is the Sabbath and what are the rules of Sabbath observance, what apparel is religious apparel, what use of peyote is sacramental, and so on.

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31. *See* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS AND WOMEN'S RIGHTS 14, 149 (2001) (supporting expanded "jurisdictional autonomy" for religious and cultural minorities); *see also* Donald Brown, *A Destruction of Muslim Identity: Ontario's Decision To Stop Shari'a-based Arbitration*, 32 N.C. J. INT'L L. & COM. REG. 495 (2007) (arguing against the Province of Ontario's ban on judicially-enforced religious arbitration). For a more extensive review of these controversies, see Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011).

32. *See* Helfand, *supra* note 31, at 1248, 1250.

33. *Id.* at 1248.

34. *Id.* at 1250.

35. *See id.* at 1253.

36. *See, e.g.*, Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 942–43 (2002).

37. Helfand, *supra* note 31, at 1237–38.

38. *See generally* Daphna Hacker, *Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts*, 27 J.L. & RELIGION 59 (2011–2012) (demonstrating that the Israeli Rabbinical courts can serve as a valuable example for theoretical debates regarding religious tribunals in liberal states).

The prospects for actual state—or federal—religious courts in the United States comparable to the Israeli religious court system, are slim, to put it gently, given separation of church and state under the First Amendment.[39] But to the extent that halakhic or Islamic arbitration awards are enforceable in the secular courts, such religious judgments can have binding force under American law.[40] Supporters of religious multiculturalism and increased autonomy for religious groups have suggested that the usual rules of arbitration law should be relaxed for religious tribunals.[41] For example, Professor Michael Helfand, in an erudite essay, suggests that whereas a standard arbitration award is unenforceable if a court finds it to offend "public policy," a religious arbitration should be enforced by the secular courts unless the judgment is "unconscionable."[42] Moreover, a religious arbitral decision, unlike the typical secular arbitration, should presumptively be enforced even if it prejudices "third-party interests"—the interests of anyone other than the actual parties to the arbitration.[43] But one such third-party interest potentially among quite a few others that would apparently be discounted is the interest of liberal society in avoiding a tendency toward group separatism and balkanization that might be implicit in this policy.[44] And quite apart from whether *unconscionablity* and *against public policy* are two almost interchangeably vague forms of words, it might appear that Professor Helfand is trying to have it both ways, that is, both to empower religious courts to impose judgments that would otherwise not be enforceable and yet to reserve the right not to enforce an ill-defined category of religious decrees that judges, or Professor Helfand, might be sufficiently offended by as to declare unconscionable.

Another able advocate of legal multiculturalism, Professor Mark Rosen, might be less open to the charge of having it both ways.[45] In a series of articles, Professor Rosen has explored—and implicitly or explicitly endorsed—how radically power might be devolved to "insular" or "perfectionist" groups, notably religious groups.[46] One model cited by

39. *See* Rosen, *supra* note 36, at 952.
40. Helfand, *supra* note 31, at 1281.
41. *See id.* at 1283, 1292 (citing SHACHAR, *supra* note 31, at 68–87, 117–45).
42. *See id.* at 1288–1300.
43. *See id.* at 1304.
44. *See id.* at 1275–76.
45. *See* Rosen, *supra* note 36, at 1009.
46. *See, e.g.*, Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribunal Courts and the Indian Civil Rights Act*, 69

Professor Rosen is the power given to tribal Indian courts on federal Indian reservations.[47] Some of these tribal courts have virtually unreviewable power, by treaty or by statute, to interpret the rights of tribal Indians "in light of [the tribe's unique] needs, values, customs, and traditions."[48] These values, as construed by the tribes' leaders, include "bolstering the traditional respect that is to be accorded to tribal leaders."[49] In many instances where tribal courts diverge from standard American law it is in a purportedly communitarian direction, curtailing individual rights as normally construed under the Constitution or under otherwise applicable law.[50] The normative question, of course, is whether greatly enhanced adjudicative autonomy for an indefinite number of "insular" groups would be worth the potential costs in terms of authoritarianism within such groups and separatism or balkanization within the broader society.[51]

On the other side, opposition to religious courts—in particular to the spread of Islamic Sharia law—has also grown.[52] Oklahoma adopted a

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FORDHAM L. REV. 479 (2000); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999); Mark D. Rosen, *The Educational Autonomy of Perfectionist Religious Groups in a Liberal State*, 1 J. LAW, RELIGION & STATE 16 (2012) [hereinafter Rosen, *Educational Autonomy*]; Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053 (1998); Rosen, *supra* note 36.

47. *See* Rosen, *supra* note 36, at 933–34.

48. *Id.* at 936–37.

49. *Id.* at 938.

50. *See id.* at 1001–02.

51. Rosen, *Educational Autonomy*, *supra* note 46, at 35–41. In a recent article, Professor Rosen suggests that "perfectionist" groups should be eligible for self-governing "regulatory authority" in a liberal society, provided that (1) they have a peaceful disposition toward their nonperfectionist neighbors and do not seek to compel others to live in accordance with their views of the good; (2) those raised in religious perfectionist communities are educated to respect the essentials of liberal society—this requirement to be understood "modestly" so as not to interfere with religious autonomy "unnecessarily"; and (3) members of the religious communities retain some right to opt out—this, too, to be understood modestly lest it dilute the power of the group, a "softer opt-out" meaning no more than the absence of physical restraints against would-be defectors or perhaps merely the knowledge that there exists a different world out there. *See id.* This is a thoughtful and nuanced article, but it seems to me that Professor Rosen greatly underestimates the separatist and socially fragmenting tendencies that such autonomy for religious perfectionist communities would foster over time and also the potential for abuse and petty—or not so petty—tyranny by the empowered authorities of such groups over their members. For an example of how newly granted group autonomy can promote separatism and social break up, see Charles King, *The Scottish Play*, FOREIGN AFFAIRS, Sept.–Oct. 2012, at 113, an account of how "devolution" of power to Scotland beginning in the 1990s after many centuries of union fostered a separatist independence movement virtually nonexistent at the outset of devolution that now seriously threatens to break up the United Kingdom.

52. *See* Helfand, *supra* note 31, at 1232–33, 1238.

referendum in 2010, subsequently struck down by the federal courts, forbidding state courts to consider Sharia.[53] At least six other states have considered similar measures, which might forbid state courts from enforcing the judgments of religious arbitral courts.[54] Along the same lines, after public statements by an Islamic leader in Toronto that only "bad" Muslims would fail to submit their disputes to Sharia arbitration panels,[55] the Canadian province of Ontario now bans the enforceability of religious family law arbitration.[56] In the words of the Premier of the province "There will be no religious arbitration in Ontario. There will be one law for all Ontarians."[57] But despite occasional rebuffs, halakhic tribunals and their caseloads—and Muslim interest in Sharia tribunals—have grown in the United States in recent years.[58] It remains an open question to what degree and on what terms the secular courts will accept and enforce their judgments.

The attractive side of increased religious autonomy is fairly obvious. Generous exemption from secular laws and increased availability and enforceability of religious adjudication all provide a framework for people to live more religious lives, under religious law if they choose.[59] These developments empower religion accordingly. They might seem especially well suited to nomocentric or law-intensive religions like Judaism and Islam.[60] After all, Jews are obliged under Jewish law, at least under appropriate circumstances, to adjudicate disputes before halakhic courts and not to turn to secular tribunals.[61]

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53. *See* Awad v. Ziriax, 670 F.3d 1111, 1116–18, 1133 (10th Cir. 2012); *see also* Helfand, *supra* note 31, at 1233 (describing the November 2010 Oklahoma amendment).

54. *See* Helfand, *supra* note 31, at 1239.

55. Khalid Hasan, *Sharia Debate Rages On in Canada*, DAILY TIMES (Aug. 31, 2004), http://archives.dailytimes.com.pk/national/31-Aug-2004/ShariaSharia-debate-rages-on-in-canada.

56. Helfand, *supra* note 31, at 1237 & n.30.

57. *Id.* at 1237 (quoting Associated Press, *Ontario Will Ban Shariah Arbitrations*, N.Y. TIMES (Sept. 12, 2005), http://www.nytimes.com/2005/09/12/international/americas/12canada.html?fta=y&_r=0).

58. *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 498 (2013).

59. *See* Helfand, *supra* note 31, at 1275.

60. *See id.* at 1247–52.

61. *See* Babylonian Talmud, Tractate Gittin 88b. *But see* Babylonian Talmud, Tractate Sanhedrin 23a. *See generally* Yaacov Feit & Michael A. Helfand, *Confirming* Piskei Din *in Secular Court*, 61 J. HALACHA & CONTEMP. SOC'Y 5 (2011); J. David Bleich, *Survey of Recent Halakhic Periodical Literature: Litigation and Arbitration Before Non-Jews*, TRADITION, Fall 2000, at 58. Of course, Jewish law does not, because it cannot, prescribe to what extent—if at all—non-Jewish secular courts will enforce *halakhic*

When religious autonomy is enshrined in secular law, however, there are potential and actual problems and drawbacks as well. In the first place, the substance of religious law may be at odds with the values of a liberal society. This arises most obviously on the numerous points where Jewish or Islamic law, for example, are inegalitarian as between men and women. Divergences from liberal norms can arise in religious commercial law and in other areas as well. For example, it may conflict with federal and state antitrust laws in the United States for *batei din* or rabbinic arbitration tribunals to enforce the halakhic principle of *hasagat gevul*, which restricts competitive business practices that might put an existing business out of business.[62]

A plausible response to this sort of concern is that a liberal society is pluralist and does not require everyone to live by liberal norms—indeed that it would be illiberal to do so. So long as there are ample choices and full freedom to affiliate and disaffiliate, and so long as the interests of third parties are not compromised, liberal society should not be offended if some people and groups, including religious groups, voluntarily opt for non-liberal ways of life. In the case of *hasagat gevul*, this runs into the objection that third parties *are* compromised—that the purpose of antitrust and of public policy favoring competition is to promote lower prices and better quality goods and services for everyone because the public suffers whenever there is less competition.[63]

As for respecting people's free choice to submit to religious law, the more readily secular courts enforce religious arbitral judgments, the more this implies scrutiny by the courts into just how voluntary, and how fully informed, the parties were when they consented to religious adjudication. Religious communities might feel such scrutiny intrusive, both as to the community pressures—which in practice are often intense—that undoubtedly affect whether people agree to religious adjudication, and also as to how much—or how little—the parties might know in advance about the interpretive or ideological leanings or commitments of particular religious tribunals.

There is also a concern, in terms of social cohesion, about the balkanizing effects of group autonomy, especially where religious groups, identity groups, or other groups inspiring deep passion and commitment are involved. This concern traces back to Hobbes and Locke, who wrote during or just after a period of religious civil war and it has been a perennial

arbitration judgments in cases where the losing party does not submit voluntarily to the judgment.

62. *See* Simcha Krauss, *Hasagath Gvul*, 29 J. HALACHA & CONTEMP. SOC'Y 5 (1995).

63. *See id.* at 6, 10.

worry in the history of liberal thought.[64] The apprehension, of course, is that when such groups are empowered, it tends to diminish their members' loyalty to, or even involvement in, the broader liberal community. If things go too far, it threatens to begin pulling liberal society apart. This concern has reemerged sharply in Western European countries in recent years, where Muslim communities have grown, and where Islamic or Islamist leaders have achieved a degree of autonomy under multicultural policy. The concern, of course, is that group differences, far from shrinking, are growing more intractable and more threatening as a result of these policies.

If religions are granted exemption and autonomy that others might not be granted, there is also the ever more uncertain question of who or what is a religion. When Will Herberg's famous book *Protestant Catholic Jew* appeared in the 1950s, it was broadly true that those were the three religious alternatives in America—with subdivisions among each of course, but each with a recognizable identity as well— and a broad consensus about what is a religion, such that Americans could feel that they would know it when they saw it.[65] Today it would be fair to say that there is an ever-expanding psychic shopping mall of religious, semireligious, and quasireligious beliefs, notions, groups, and ideologies. In American prisons, for example— not an entirely representative subset of the country, to be sure—there has been dramatic growth in adherence to a variety of sects including the Nation of Islam (Black Muslims); pagan groups such as Wicca, Odinism, Asatru, and Druidism—often associated with White Supremacists among the prisoners; and Native American spirituality.[66] An American court today may confront not only

64. *See, e.g.*, RICHARD BOYD, UNCIVIL SOCIETY: THE PERILS OF PLURALISM AND THE MAKING OF MODERN LIBERALISM 56–59, 96–101 (2004).

65. *See* WILL HERBERG, PROTESTANT CATHOLIC JEW 38–39 (Anchor Books rev. ed. 1960) (1955).

66. For the religious situation in prisons, see U.S. COMM'N ON CIVIL RIGHTS, ENFORCING RELIGIOUS FREEDOM IN PRISON (2008), *available at* http://www.usccr.gov/pubs/STAT2008ERFIP.pdf, especially the statement of Commissioner Gail Heriot at 118. For a statistical survey of American religion generally, see THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY (2010), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf. The Pew Forum survey summarized that religious affiliation in the United States is both very diverse and extremely fluid. More than one-quarter of American adults (twenty-eight percent) have left the faith in which they were raised in favor of another religion or no religion at all. *Id.* at 5. If change in affiliation from one type of Protestantism to another is included, forty-four percent of adults

the question of whether an Air Force doctor who is an observant Jew may wear a *kippah* on duty but also a case of a free exercise claimant who asserts that his religious beliefs require him to dress like a chicken when going to court.[67]

If religions are granted exemption from otherwise applicable laws and even a degree of autonomous authority, there is an obvious temptation for all sorts of groups to claim to be religions and to demand special privileges and powers. A well-known but by no means unique example is the Church of Scientology, which began as an entirely secular marketing enterprise founded by the science fiction writer L. Ron Hubbard but went on to claim religious status, partly in hopes of a tax exemption.[68] Despite its considerable criminal history by then, Scientology was eventually granted tax exemption in 1993 as a bona fide religion.[69]

There is a further point, which perhaps deserves more emphasis than it sometimes receives. If the state offers a significant degree of religious autonomy—power over jobs, resources, and decisions that affect people's lives—it can encourage the take-over of religious communities by authoritarian and factional religious leaders. This may partly be due to the attraction that autonomous power might have for the most enthusiastic people within a religious group or its leadership, who may tend to be the most extreme people. But autonomy has a perverse logic of its own, which more directly encourages extremism: namely, if autonomous rulings are not going to differ from the rules of secular, liberal society, then why is it important that the religious group should have autonomy? Whereas the more radically the group's rulings do differ—including the rulings of religious arbitration courts—the more necessary and justified the claim for autonomy. Once there is autonomy, in other words, there is liable to be a cascade effect towards more distinctive, which is to say more extreme, positions on the part of the autonomous institutions and those who steer them, if only to vindicate the idea that autonomy is necessary in the first place.

The religious courts in Israel are a cautionary example in this context. The State of Israel, as is also the case with many Muslim-majority

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have either switched religious affiliation or dropped any connection to a specific religious tradition altogether. *Id.*

67. *Compare* Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding prohibition of the *kippah*), *with* State v. Hodges, 695 S.W.2d 171 (Tenn. 1985) (quashing a contempt citation and remanding to the trial court for further consideration of the religious claim for the chicken costume). In effect, the *kippah* lost and the chicken costume, at least tentatively, won.

68. *See* HUGH B. URBAN, THE CHURCH OF SCIENTOLOGY: A HISTORY OF A NEW RELIGION 3, 17, 160 (2011).

69. *Id.* at 3.

countries, maintains a religious court system within the state framework with jurisdiction over family law including marriage and divorce and related questions of personal status—even who can be buried in a Jewish cemetery.[70] The religious courts trace back to the Millet system under the Ottoman Empire where the phenomenon of Balkanization originated and was kept on under the British mandate in Palestine and again after the establishment of the State in 1948.[71] It is common knowledge in Israel that the religious courts have increasingly been taken over by *haredi* (ultra-Orthodox) rabbinical judges in recent years.[72] The consequences of this are dramatically divisive in Israeli society.[73] The immigration of more than a million people from the former Soviet Union to Israel in the past two decades, in particular, has led to a situation in which there are hundreds of thousands of people living in Israel—most if not all of them Israeli citizens or eligible for citizenship—who identify with the Jewish people but whose matrilineal ancestry is not Jewish or cannot be proved to be so to the satisfaction of the *haredi* rabbinate.[74] These Israelis and their children are not recognized as Jews by the religious courts and cannot marry full-fledged Jews or be buried in a Jewish cemetery.[75] Many of them might be willing to undergo conversion to Judaism, but the religious courts increasingly refuse to accept non-*haredi* conversions.[76] There are notorious cases of the religious courts refusing to issue marriage licenses where one of the parties is a non-*haredi* convert to Judaism,[77] and the religious courts have even attempted to revoke retroactively

70. *See* MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 53 (1994); David Ellenson, *The Rock from Which They Were Cleft*, JEWISH REV. BOOKS, Winter 2012, at 41, 41.

71. EDELMAN, *supra* note 70, at 7, 48, 52.

72. *See, e.g.*, Etgar Lefkovits, *12 of 15 New Rabbinical Judges Are Haredi. Government Blasted for Sacrificing Agunot for Political Survival*, JERUSALEM POST, Mar. 20, 2007, at 3, *available at* 2007 WLNR 5428485.

73. *See id.*

74. *See* Ellenson, *supra* note 70, at 41.

75. *Id.*

76. *Id.*

77. *See, e.g.*, Dan Izenberg, *Petitioners Demand Marriage Registrars Recognize State-Approved Conversions*, JERUSALEM POST, Mar. 28, 2010, at 1, *available at* 2010 WLNR 7115001; Matthew Wagner, *Declaring Bride's Conversion Treif, Rishon Lezion Rabbi Nixes Marriage*, JERUSALEM POST, Aug. 12, 2009, at 1, *available at* 2009 WLNR 15955457.

Orthodox but non-*haredi* conversions and to render Jewish families abruptly non-Jewish.[78]

The polarization of religious life in Israel and the growing power of *haredi* ultra-Orthodoxy undoubtedly have complex origins and can surely not be laid to the existence of state religious courts alone. But, the religious court system and the autonomous power of the religious "establishment" in Israel have certainly not stopped the drift towards religious extremism in the Orthodox rabbinic world nor prevented the estrangement of Jews of various religious tendencies from one another, both in Israel and abroad.[79]

Extensive religious autonomy, in short, can lead to the creation—with state approval—of islands of authoritarianism in an otherwise free and democratic society. It can also promote corruption of various kinds, which often accompanies authoritarianism. Corruption, not on a modest scale, has certainly been one of the issues in Israel in the context of religious legal autonomy and political power.

A consideration of these various problems, both actual and potential, with religious autonomy is not to suggest that religious exemptions from secular law and a measure of a religious autonomy are simply undesirable. On the contrary, they may be indispensable for religious people and groups to be free to live religious lives. Special accommodation of religious needs under secular law and arbitral alternate dispute resolution in religious courts may actually work reasonably well if there is a degree of moderation on all sides. If the government authorities are basically respectful towards religious concerns, which they generally have been in American history,[80] if a rough consensus about who and what is a religion does not break down in a welter of opportunistic or unhinged

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78. *See* Marc D. Angel, *Diaspora Letter: Conversion Crisis*, HADASSAH MAG., Nov. 2008, at 16, 16; Zvi Zohar, *From Periphery to Core*, 10 CONVERSATIONS 93 (2011). For an account of a case in which the rabbinic court purported to revoke a conversion, see SUSAN WEISS ET AL., THE INTERROGATION OF THE CONVERT "X" BY THE RABBINICAL COURTS IN ISRAEL (2010), *available at* http://www.bjpa.org/Publications/downloadFile.cfm?FileID=11652. The Center for Women's Justice in Jerusalem is active on behalf of converts entangled in such cases and posts about recent developments. *See News and Updates*, CENTER FOR WOMEN'S JUST., http://www.cwj.org.il/en/news (last updated Oct. 23, 2014).

79. *See* Isi Leibler, *The Radicalization of the Haredi World*, JERUSALEM POST, Mar. 26, 2014, at 13, *available at* 2014 WLNR 9549631.

80. *See, e.g.*, Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76, 78 (1917) (repealed 1918) (providing exemption from combatant duty for members of religious organizations that forbid its members to participate in war); Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (allowing a monument of the Ten Commandments to be displayed on Texas State Capitol grounds); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the government may not require a child to salute the flag in violation of his religious beliefs).

claims, and if religious groups themselves do not seek to abuse either the host society or their own members, then there is the prospect of a reasonable balance of interests. All this presupposes a degree of social cohesion and good faith, of course: that all concerned should be "touched . . . by the better angels of our nature."[81]

Relying on everyone being touched by the better angels of our nature, unfortunately, can sometimes be uncertain. It is all the more uncertain in a fractious and polarized society, such as America has perhaps increasingly become. At root, the questions of special accommodation and religious adjudicatory independence arise most urgently when a government grows in its reach and ambition. After all, if most areas of life, including those that touch on religious life, are left to people's private arrangement, then not much special accommodation will be necessary. But when government takes control over more and more areas of life, regulating who shall do what and under what rules and conditions, then clashes with one or another religious way of life are almost inevitable. The dispute over government mandates to provide abortive drugs and contraception, in the framework of increasing government control and possible takeover of health care in America, is merely a well-known recent example.[82] With a relatively open market in health care and private health insurance, religious institutions needed no special exemptions to adopt their own approaches on questions of contraception and abortion as on other matters. But greatly increased government regulation implies more uniform standards and rules and hence more controversy over whether there should be religious exemptions, and if so, for whom, to what degree, and on what terms.

Special accommodation for religion and special adjudicatory powers are problematic for reasons I have tried to suggest. In the long run, especially under less than favorable social circumstances, they might not be workable. If not, then society may ultimately have to choose between big government—an ever-growing and ever-more-powerful administrative and redistributive state—on the one hand, and lively religious pluralism and thriving religious life on the other. This, it seems to me, and not the

81. JOINT CONG. COMM. ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989, S. DOC. NO. 101-10, at 141 (1st Sess. 1989) (quoting Abraham Lincoln's March 4, 1861 inaugural address).
82. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

dubious panaceas of religious exemption and group autonomy, is what religious people and groups ought to fix their attention on.