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MORAL AND RELIGIOUS CONVICTIONS AS CATEGORIES FOR SPECIAL TREATMENT: THE EXEMPTION STRATEGY

KENT GREENAWALT*

INTRODUCTION

My topic differs from the usual inquiries about morality and law, such as how far law should embody morality, whether legal interpretation (always or sometimes) includes moral judgment, and whether an immoral law really counts as law. Concentrating on exemptions from ordinary legal requirements, I am interested in instances when the law might make especially relevant the moral judgments of individual actors. I am particularly interested in whether the law should ever treat moral judgments based on religious conviction differently from moral judgments that lack such a basis.

A striking example for both questions is conscientious objection to military service. In the history of our country, objectors to military service have received exemptions from conscription; even in our present volunteer army, those who develop a conscientious objection to participation in any war are relieved from military duty they would otherwise have to perform as a consequence of their initial commitment to service.¹ The law as it is now written requires that an objection be based on "religious training and belief."² The Supreme Court has interpreted the law to include all genuine conscientious objectors.³

Before we tackle the difficult questions, I need to essay various distinctions and clarifications. In its broadest sense, morality may

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1. Military Selective Service Act, 50 U.S.C. app. § 456(j) (2000).

2. *Id.*

3. See *Welsh v. United States*, 398 U.S. 333, 339-40, 344 (1970) (plurality opinion).

include all actions that are obligatory or, on balance, desirable. I mean to invoke a narrower sense that includes responsibilities to other people and to nonhuman animals, and responsibilities to conduct oneself with a kind of dignity. According to this crude division, morality does not include a sense of obligation to worship God or to obey dietary laws established by religious texts; it does include a responsibility to tell the truth, to avoid needless cruelty to animals, and to avoid self-destructive acts. This division is far from perfect. One might find responsibilities to others in acts that I am treating as other than moral. For example, a person's worship of God might be thought directly to enhance the welfare of her community or to help make her a more moral individual. And treating a failure to observe dietary laws (which I place outside the realm of morality) differently from extreme substance abuse may seem arbitrary. If one takes the dietary laws seriously, one might think God will somehow punish infractions, so violations could harm oneself as much as does serious drug abuse. A scholar might undertake a careful study of actual usage and then attempt to shape the term "morality" in a way that would be more coherent philosophically. I am settling for something much less ambitious that nevertheless allows us to recognize the following points.

First, as in the conscientious objector illustration, people may develop otherwise similar moral convictions with or without relying on religious sources, as those are ordinarily conceived. One pacifist may rely on a biblical passage about turning the other cheek,⁴ another may develop his view based on a historical conclusion about the inevitable loss of innocent life in war. The connection between a person's religious affiliation or belief and his conviction about what he should be may be direct or somehow attenuated.

Second, whether a person's sense that he should (or may) do something is or is not based on religion, he may have a wide range of different attitudes about the matter—he may think he is obligated to do it, that doing it would be morally preferable but not obligatory, that doing it is morally permitted, and so on.⁵

4. *Matthew* 5:39.

5. See John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 785 (1986).

Third, because not all perceived religious obligations fit within the category of perceived moral obligations, some demands or requests for privileging religious behavior will not involve claims of moral obligation and will not have any parallel in nonreligious moral convictions. A recent potential illustration has emerged in New York City. According to the practice of some ultra-Orthodox Jewish groups, a mohel sucks the blood from the cut of a circumcised infant.⁶ On a few occasions, this practice has infected infants with herpes, and one infant died as a consequence.⁷ Thus far, the health commissioner has issued an open letter indicating the danger of the procedures.⁸ Some individuals want the practice to be forbidden.⁹ The religious claim *not* to have the practice forbidden does not involve morality in my narrower sense. And, while we could fantasize about someone who believed on nonreligious health grounds that such a procedure would be morally desirable, in reality no such claim is conceivable. For cases such as this, there is no nonreligious moral parallel to the religious claim.

How do personal preferences fit my categorization of morality? If we take preferences broadly to include all the things a person prefers, that would include preferences for the welfare of others that might encompass moral duties. I prefer to be allowed to assist my children; I believe I have a moral duty to assist them. While I talk about personal preferences in this Essay, I am excluding preferences that involve moral duty in this way. Preferences can be relevant to moral evaluation, nevertheless, in at least two ways. If I have an extremely strong self-interested reason to do something, I may believe others have a moral responsibility to let me do it. I may think, that is, that I have a moral right to do it. Further, I may think that what would otherwise be a moral duty on my part can be overridden by some very powerful matter of self-interest; I may break a promise to meet a friend for lunch if the opportunity to win \$100,000 presents itself. One of the questions that will engage us is whether strong preferences should sometimes be included with

6. Jeffrey Rosen, *Is Ritual Circumcision Religious Expression?*, N.Y. TIMES, Feb. 5, 2006, § 6 (Magazine), at 28; Jim Rutenberg & Andy Newman, *Mayor Balances Hasidic Ritual Against Fears for Babies' Health*, N.Y. TIMES, Jan. 6, 2006, at A1.

7. See Rutenberg & Newman, *supra* note 6.

8. *Id.*

9. See Rosen, *supra* note 6.

moral reasons as a basis for special treatment. I shall focus on one way in which moral judgments, or religious affiliations or convictions, may be afforded a special status under the law: exemptions from requirements that apply to other citizens.

I. THE EXEMPTION STRATEGY: A MATTER OF JUSTICE?

Let us suppose that the government has some good reason to compel or forbid behavior, such as requiring people to serve on juries. Some citizens believe that participating in this way involves immoral cooperation with the coercive apparatus of legal enforcement. What should the legislature do?

It has three options. One is to adopt the regulation without any exceptions. Another is to decide against requiring anyone to serve on juries. The third option is the exemption strategy. People, in general, are required to serve, but an exception is made for a limited class of persons. If the legislature pursues the exemption strategy, it must define the category of those who will receive the exemption.

An exemption might be cast in terms of an activity, a belief, a status, or some combination of these. Thus, an exemption from combatant military service granted to all those who are conscientiously opposed to such service is phrased in terms of belief.¹⁰ An exemption from a prohibition on the use of peyote given to members of religious congregations who standardly use peyote in worship services, is formulated in terms of activity (use in services) and status (membership in a group of this kind).¹¹

Any intuition we may have that the state should sometimes make concessions to strong moral and religious claims needs to be tested against arguments that exemptions are misguided, or at most are a subject of legislative grace. This exercise can help us to identify appropriate grounds for exemptions.

It helps initially to draw two distinctions. The first is emphasized by Jeremy Waldron.¹² The instances for which an exemption is sought may or may not present the danger that underlies the

10. See Military Selective Service Act, 50 U.S.C. app. § 456(j) (2000).

11. See 21 C.F.R. § 1307.31 (2006).

12. See Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3 (2002).

regulation.¹³ The extremely small amount of wine consumed during communion presents no danger of intoxication, the reason for forbidding consumption of alcohol.¹⁴ By contrast, if the reason to prohibit peyote is to prevent hallucinatory effects, that reason does cover religious ceremonies during which these effects are understood to have deep religious significance. A claim for an exemption is strengthened if the instances to be exempted do not involve the harm that underlies a regulation.

Drawing from a different dichotomy proposed by Christopher Eisgruber and Lawrence Sager, we can distinguish between claims that a belief or activity should be specially privileged and claims that a belief or activity should be protected against unfair treatment.¹⁵ The idea underlying privilege is that religion or conscience deserves special consideration, because it is particularly valuable or important, or because many people care intensely about it.

One argument based on privilege is that the state should aim to preserve a way of life that is intimately connected to the practice for which an exemption is sought. Reserving other claims of privilege for later consideration, we may dispose of the preservation argument, as far as religion is concerned. A liberal state cannot have the *aim* to preserve a religion, in the sense that some multiculturalists believe the state should try to preserve minority cultures.¹⁶

13. *See id.* at 5-9.

14. *See id.* at 5. However, a small sip might lead a congregant to want more to drink, and a priest who consumes consecrated wine remaining after the ceremony might possibly drink enough to become intoxicated.

15. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

16. DAVID MILLER, ON NATIONALITY 120 (1995). There is a complexity here that I will remark on but not try to resolve. If the government legitimately tries to maintain a minority culture, such as that of the Inuit, that culture will include religious elements, and these are not likely to be sharply distinguished from other aspects of culture. A policy to maintain the culture cannot easily aim to maintain the culture minus those religious elements. What is the government then to do? One might say it can include religious elements with all others, attempting to preserve them as aspects of culture, not because they are religious. But probably the government should concentrate on nonreligious elements, insofar as possible, allowing the religious elements to be preserved only because they are connected to other elements that are supported. In any event, this problem would not affect the legitimacy of a policy to preserve Christian Science or Mormonism, religions not connected to any minority culture.

A liberal state should be neutral among religious perspectives, not aiming to get citizens to adopt one particular religion or another. Barring past or present oppression by the government or other members of a society, the government should not try to preserve a religion that might otherwise disappear; doing so would be aiming to get some citizens to continue to adhere to that religion. It is true that in *Wisconsin v. Yoder*, the Supreme Court was apparently influenced by expert testimony that, were Amish children required to attend school until they were sixteen, this could threaten the existence of the Amish community.¹⁷ But, insofar as a group's survival is relevant, it matters because it shows the group's intense concern about the practice it wants to maintain, and bears on the harshness of the government's forbidding that practice, not because the state should have an objective to keep religions alive.

We can see the idea of protection as the safeguarding of those who seek an exemption to avoid treatment that is unfair in relation to how others are treated. Most straightforwardly, the claim may be that treatment is really unequal, despite formal or surface equality. When claims for exemptions are viewed in this way, proponents and opponents may dispute what kind of treatment is "really" equal, or, more precisely, which kind of equality is normatively most important.

Unfair treatment can take the form of self-conscious discrimination, but it can also be more subtle, involving only conscious indifference—regulators are not aiming to harm a group but they are aware the group will suffer badly and do not care—or inadvertent neglect—regulators are not aware of how a group will suffer. Two of the critical issues about protection of individuals against discrimination are whether the intentions and awareness of legislators matter and whether judges can reasonably decide why legislators have failed to grant exemptions.¹⁸

We turn now to what we may call exemption-skepticism. The most important arguments against a use of the exemption strategy are based on rule of law, equality, and administrability. As Waldron

17. 406 U.S. 205, 209 (1972).

18. One possible approach would be to "objectify" the inquiry, asking what a person who has voted as the legislators have voted, would probably think, rather than asking what the actual legislators probably thought.

has noted, one aspect of Dicey's concept of the rule of law is that laws apply to all persons, not providing one rule for officials, another for citizens, one rule for nobility, another for commoners.¹⁹ Dicey's main target was those in power privileging themselves,²⁰ but we can extend the rule of law concern to other special exceptions to ordinary standards of behavior. An exception granted exclusively on the basis of *activity* is not in tension with the rule of law, so long as any person may participate in the activity that enjoys the exception.²¹ But exceptions granted on the basis of belief or status do threaten the realization of this ideal.

The concern about equality relates closely to that about rule of law. An exemption treats some people differently from others; it allows some to do what others may not do. This difference in treatment requires justification.²²

The worry about administrability applies to beliefs and, less strongly, to status. Any exemption requires enforcement officials to identify who qualifies. That will be simple if the exemption extends to all those engaging in an easily observable activity, such as wearing a turban. Identification is more complicated if officials must ascertain membership or another kind of status, but *usually* determining whether someone belongs to a particular group or occupies a particular position will not be too hard. Ascertaining beliefs is much more troublesome. It may take a substantial administrative apparatus to determine if someone is a conscientious objector, and determinations may often be erroneous. Much the same is true if an exemption turns on how important a belief or practice is within an individual's or group's overall set of beliefs.

19. Waldron, *supra* note 12, at 3.

20. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 185 (photo. reprint 2004) (5th ed. 1897) ("We mean ... when we speak of the 'rule of law' ... not only that with us no man is above the law, but ... that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm ...").

21. If the activity is one that only some people can comfortably undertake, such as the practice that once existed of allowing men who paid a high fee to be excused from compulsory military service, an exemption cast in terms of an action may be regarded as unfairly depending on a kind of status. For any exemption based on action, one can ask if it connects unfairly to status or belief. With respect to some activities, such as wearing turbans, that only a specific group of people wish to engage in, an exemption based on an activity may in reality be limited to people with a particular membership or status.

22. Again, this problem does not arise if the exemption is cast in terms of an activity that does not connect significantly to membership or status.

The force of these various concerns may lead us to wonder if an exemption strategy is ever justified. If some people have a very strong reason not to be subjected to a regulation, that is a good reason not to impose the regulation on anyone; if the government has a powerful reason to regulate, perhaps it should make no exceptions. Withdrawing exemptions already granted would be impolitic, but, in principle, the government should be very hesitant to grant them. This view is powerfully defended by Brian Barry, who employs a pincers approach: "Usually, ... either the case for the law (or some version of it) is strong enough to rule out exemptions, or the case that can be made for exemptions is strong enough to suggest that there should be no law anyway."²³

Among the subjects Barry discusses are requirements of humane slaughter, the wearing of motorcycle helmets, the attachment of a red and orange triangle to the back of slow vehicles, and school clothing that excludes head scarves.²⁴ His rich discussion of these examples and others is not easily summarized, but I can provide enough of their flavor to indicate his overall position.

Humane slaughter laws require that animals be stunned before they are killed.²⁵ According to Jewish kosher and Muslim halal standards, slaughter should be by their traditional methods, which Barry characterizes as "a euphemism for bleeding animals to death while conscious."²⁶ Barry notes that in some countries that do not make exceptions, rabbis have accepted the stunning of animals and that Jews and Muslims unwilling to make this adjustment are free to become vegetarians.²⁷ Barry clearly believes that the interest in preventing animal suffering is sufficient to sustain an exceptionless law.

Barry's position about motorcycle helmets is more complex.²⁸ He is attracted by the idea that Sikhs, like everyone else, have an

23. BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 39 (Harv. Univ. Press 2001).

24. *See id.* at 40-49, 60-62, 184-87.

25. *See, e.g.*, 7 U.S.C. § 1902(a) (2000).

26. BARRY, *supra* note 23, at 41.

27. *Id.* at 35.

28. *Id.* at 33-34, 49. Barry writes that "it is questionable that the wearing of a turban is a religious obligation for Sikhs, as against a customary practice among some," *id.* at 33, but that doubt is not crucial for his analysis.

opportunity to ride with a helmet, and that if they do not wish to do so, they can forego riding motorcycles.²⁹ He also recognizes that there may be strong reasons of religion and custom, and of preference, to ride without helmets.³⁰ Given these reasons, it is arguable whether the helmet requirement should be imposed on anyone, despite the safety considerations, mainly paternalistic ones, in favor of the requirement.

These examples give us a sense of Barry's pincers. He acknowledges that once exemptions have been granted, eliminating them may create practical problems. But if we ask whether exemptions should be granted in the first place, Barry responds that, "[o]nce we accept ... that the case for exemptions must be based on the alleviation of hardship rather than the demands of justice, it seems to me much more problematic to make it out than is widely assumed."³¹ "To make sense," the exemption approach "requires a combination of very precise conditions that are rarely satisfied all together. It must be important to have a rule generally prohibiting conduct of a certain kind [But] having a rule must not be so important as to preclude allowing exceptions to it."³² Not "too many" cases fit these conditions.³³

Evaluating the strength of the argument against exemptions depends on assessing equality and rule of law concerns, and on deciding whether the reasons to exempt some persons can be fairly distinguished from reasons that those who do not benefit from an exemption may have not to comply. In one simple form, the anti-exemption claim is that people with strong preferences to commit otherwise illegal acts do not receive exemptions and that reasons of conscience, and religion, are not relevantly distinguishable from strong preferences. Therefore, the exemption strategy is misguided.

29. *Id.* at 45.

30. *See id.* at 47.

31. *Id.* at 39.

32. *Id.* at 62.

33. *Id.* Barry does present a formulation that sounds somewhat more receptive to religious exemptions, but he repeats his observation that exemptions are not required by justice. *Id.* at 175. In discussing my draft at a Columbia seminar in the autumn of 2005, Akeel Bilgrami suggested that the typical circumstance in which an exemption is warranted may be when the wisdom of a restriction is itself doubtful. Perhaps many justified exemptions may be so explained, but not all. For example, compulsory military service was undoubtedly warranted for World War II, but so was an exemption for conscientious objectors.

The argument, at least in this simple form, is misconceived not only in its equation of conscience and religious observance with strong preferences—the typical objection—but also in its assumption about the status of strong preferences.

Let me take the second point first. Prohibitive laws do not exempt those with strong desires to engage in the forbidden behavior. Indeed, many serious criminal laws are aimed primarily at just those who have such desires, as most people are effectively constrained by their moral sense from committing murder and rape. But when we come to regulations involving motorcycle helmets, regulations mainly designed to protect the very people whose actions are restrained, is it so obvious that no exception should be made for those with intense preferences not to wear helmets?

To pose this question in principle, we need first to put aside problems of administrability. Measuring intensity of preference is well nigh impossible,³⁴ and people with some desire to engage in a prohibited activity have an incentive to overstate that desire if those with strong preferences are to be excused. The only way in which a strong preference exception could be administered would be by having people purchase a license to ride without a helmet or make some other sacrifice that most people would not be willing to make. Short of such a scheme, a prohibition cannot, practically, make exceptions for those with strong preferences. But that does not tell us whether such exceptions would be otherwise desirable; and that alone is not a powerful reason to deny more limited exemptions that are administrable.³⁵

We need first to assume that the strong preferences in question are not immoral, self-destructive, or developed in a manner that perpetuates social inequality. A strong preference would be immoral if it is unduly neglectful of the interests of others. A preference would be self-destructive (and perhaps immoral) if its indulgence would harm its holder. Preferences of alcoholics to drink and of addicts to use hard drugs are self-destructive in this way, and a

34. More precisely, it is virtually impossible to measure the intensity of *A*'s desire to do *X* against *B*'s desire to do *X*. Determining whether *A*'s desire to do *X* is greater than *A*'s desire to do *Y* or *Z* is not so hard.

35. However, if strong preferences should be exempted, but for problems of administration, there could be some concern about whether those with such preferences are fairly treated if others are exempted.

legislature might well decide not to yield to preferences whose fulfillment is damaging. The idea about preferences that perpetuate inequalities is harder to pin down, but seems partly to underlie assumptions that those with expensive tastes should not be rewarded by getting a greater share of goods.

We should not leap from a conclusion about expensive tastes and the distribution of limited resources to a conclusion about all strong preferences and all prohibitions. Most people have intensely positive feelings about some activities in which they engage. The activity that most commonly creates intense physical pleasure and satisfaction is sexual relations. Let us imagine that for some few individuals—ecstatic riders—riding a motorcycle without a helmet is like a sexual experience, and riding with a helmet is terribly unsatisfying. Riding without a helmet definitely increases physical risk, but is the increase in safety supplied by such a restriction worth the cost? If we focused only on the pleasure of sexual relations, putting aside its connections to love, companionship, and procreation,³⁶ and we supposed that sexual relations carried risks comparable to those of riding without helmets,³⁷ we would still be very surprised if a legislature would forbid all sexual acts. Legislators would not deem the reduction in physical risk to be worth the cost to the quality of life. It follows that in regard to the ecstatic riders, viewed as a separate class, the balance of benefit and harm of regulation is unfavorable. Would it not make sense to exempt them *if* they could be easily identified?³⁸ Note that excusing the ecstatic riders would not impose on other riders who are required to wear helmets, in the manner that a shift of tangible resources does.³⁹ This hypothetical raises some serious questions about a premise that, in principle, those with strong preferences do not warrant exemptions; but I shall not pursue these further.

36. In the not too distant future, artificial means may suffice for procreation.

37. Of course, some sexual relations do carry grave risks.

38. If one reason to require helmets is to reduce medical expenses for society, we might require the riders to pay a special fee or carry insurance.

39. Those with weak preferences are denied a privilege afforded the ecstatic riders, but they are in the same boat, whether or not an exemption is given. I put aside here the reality that when accidents kill riders or render them unconscious, the roads are more dangerous for others.

Assuming that strong preferences do not warrant exemptions, how should we compare strong preferences with conscientious opposition? Here Barry's stance resists distinctions and comparisons that are often made. His basic position is that people have an opportunity to do things, whether or not their disinclination to do them is based on strong preference or conviction.⁴⁰ Remember that in discussing humane slaughter and motorcycle helmets, Barry points out that people with religious objections need not eat meat or ride motorcycles.⁴¹ The state does not demand that they violate their religious sentiments; their problem arises only because they have a powerful wish to eat meat or to ride a motorcycle.⁴²

Even when the government creates a direct conflict by forbidding an act a person thinks is required by conscience or religious practice, or by requiring an act the person thinks is forbidden, Barry does not see much of a distinction between these conflicts and conflicts with strong preferences.⁴³ If it is said that beliefs cannot easily be changed, the same can be said about many preferences.⁴⁴ Responding to the comparison between persons with claims of conscience and those with physical disabilities, Barry says that "[t]o suggest that they are similarly situated is in fact offensive to both parties."⁴⁵ A person with a physical inability to perform an act lacks an opportunity that is qualitatively different from a conviction against doing the act; and a person who "freely embraces a religious belief" does not perceive it "as analogous to the unwelcome burden of a physical disability."⁴⁶

In considering the comparison of strong preferences to convictions, and to desires to engage in religious or cultural practices with deep meaning, I shall start with direct conflicts, and then turn to restrictions that do not generate direct conflicts.

40. See BARRY, *supra* note 23, at 32.

41. See *id.* at 35, 45.

42. About kosher slaughter, Barry writes that "an appeal to religious liberty provides only spurious support for this and other similar exemptions, because the law does not restrict religious liberty, only the ability to eat meat." *Id.* at 44.

43. See *id.* at 35-36.

44. See *id.*

45. *Id.* at 37.

46. *Id.*

For direct conflicts, as when the government requires jury service that an individual resists, the difference between preference and conscience hits us in the face. If I have a conscientious belief that I should not perform an act, I believe it would be deeply wrong for me to do so; I believe I should not do so even if the cost is a very considerable sacrifice of my own welfare. A person with a conscientious objection to combatant military service believes it would be better to die than to kill in war.⁴⁷ A genuine objector to jury service need not believe service would be worse than death but she must believe she should undergo real hardship rather than serve. The person who has only a strong preference feels she should forego satisfying the preference if the advantages are substantial. Moral conviction is not a barrier. The government should usually not try to compel people to do what they are opposed in conscience to doing. A conflict between legal requirement and conscience creates a much more severe opposition⁴⁸ than a conflict between legal requirement and strong preference, even a very strong preference. To summarize this discussion of direct conflicts, we cannot easily move from an assumption that strong preferences do not deserve exemption to a conclusion that claims of conscience do not either.

Analysis of situations when the law does not impose direct conflicts involves an extra element. To take the motorcycle example, why not say with Barry that all the law forbids is riding a motorcycle without a helmet and that no Sikh believes that as a matter of culture or religion he must ride a motorcycle? Thus, all that the law frustrates is a strong preference. The appeal of this argument depends in part on how essential the activity is to the frustrated individual. If motorcycles and bicycles were the primary modes of transportation for poor people, a helmet requirement would severely circumscribe enjoyment of a wide range of opportunities for poor Sikhs, even if all their difficulties could be capsulated as involving preferences rather than convictions or acts with deep meaning. But even if the frustrations are minor, there is a problem with the law

47. This is not to say the sincere objector necessarily will have the courage to die, but he believes he should. Some objectors believe they can serve in noncombatant roles, and if their applications for conscientious objector status are granted, they are assigned to such roles.

48. Either the requirement fails to compel, as with objectors to military service who go to jail, or the requirement succeeds and the objector feels he has been forced by the state to violate his deepest moral sense.

effectively preventing people from enjoying some opportunities, because they are barred from performing other acts that would correspond with their consciences or with deep religious practice. If virtually everyone in the culture has an opportunity to ride a motorcycle, it seems unfair to deny that chance to someone because he cannot bring himself to comply with an ordinary condition for use. A similar conclusion, applies to a doctor or a nurse who feels she cannot participate in an abortion. It is not enough to say, "Well, you don't need to be in this profession if you don't want to perform the ordinary procedures."

An exemption strategy can make sense, in principle, if *either* (1) exemptions might make sense for strong preferences; *or* (2) claims of conscience and of religious needs can be relevantly distinguished from strong preferences. Although because of difficulties of administration, it *might conceivably* always be a bad idea to grant exemptions, a legislature can make a principled decision to have a general requirement from which some people are exempt.

Could an exemption be a matter of justice, that is, could those who want to receive an exemption have a valid claim of justice on their behalf? Barry writes that the case for group-differentiated rights is that "departures from equal liberty ... can be supported pragmatically"⁴⁹ and that "the case for exemptions must be based on the alleviation of hardship rather than the demands of justice."⁵⁰

In addressing the question of whether exemptions may be required by justice, we need initially to clarify six points. One major issue about exemptions is whether they should be determined by legislatures, administrators, or courts. Americans, accustomed to the notion that an exemption required by constitutional right falls within the domain of justice, can easily slip into the fallacy that, if legislatures are the proper bodies to determine exemptions, these must be subjects of discretion, or grace, or pragmatic judgment. However, in some countries, no constitutional rights enforceable by courts exist.⁵¹ Even in countries like the United States, with its

49. See BARRY, *supra* note 23, at 12.

50. *Id.* at 39; see also *id.* at 33, 175 (making a less absolute statement).

51. Great Britain has long been the most notable example, but membership in the European Community now carries obligations not to violate basic rights that are enforceable by European tribunals. See generally Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

extensive constitutional rights, many issues of social justice are left to legislative decision. In the United States, legislatures decide whether to impose capital punishment for murder,⁵² an issue that certainly concerns justice. Legislative determinations about tax rates mix issues of prudence and justice. Scholars who argue for no or limited judicial review of legislation commonly contend that legislatures, not courts, *should* be the final arbiter of disagreements over what justice requires.⁵³ Because a claim that legislatures should typically decide about exemptions does not resolve whether they may be required by justice, we should not conflate Barry's preference for legislative choice with his assertions that exemptions are matters of (mere) prudence.⁵⁴

Second, saying exactly when a claim of hardship becomes more than a prudential claim and turns into a claim of justice is not simple. The basic claim about just treatment concerns fairness, what burdens one can fairly be asked to bear and what benefits one is entitled to as a member of the political community. Although a claim of justice can be overcome by competing considerations, the claim involves something more than an assertion about the balance of advantages.

Third, the fact that people may reasonably disagree about whether an exemption should be given does not establish that if one is given, the reason is a prudent exercise of discretion rather than a valid claim of justice. A claim of justice may be both debatable and, on balance, convincing.

Fourth, arguments about exemptions often mingle discussions about justice and more prudential considerations, especially the ease or difficulty of administering whatever exemption might be granted. If the arguments for an exemption that are based on justice are strong, and the prudential and justice-based arguments against the exemption are not too powerful, justice might require an exemption.⁵⁵

52. See *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976) (plurality opinion).

53. *E.g.*, JEREMY WALDRON, *LAW AND DISAGREEMENT* 15 (1999).

54. The two issues are, however, connected in the following way: if Barry is right that claims for exemption are not based on justice, that is a substantial reason to assign decision making to legislatures.

55. The phrasing of this statement does concede that strong prudential arguments against an exemption might lead to a conclusion that justice does not require what justice might

A fifth clarification is that when we ask about claims *of justice*, we must be careful what alternative we have in mind. The standard argument of justice supposes that legislators have adopted, or will adopt, a regulation, and the question is whether they should grant an exemption. If one compares an exemption with the option of no regulation, things will look different. Unless a regulation protects innocent victims,⁵⁶ no one has a complaint *of justice* if the state decides not to regulate. Thus, it could be a matter of prudence whether to have no regulation or regulation with an exemption, a matter of justice whether to have regulation of all persons or to create an exemption for some.⁵⁷

Finally, we need to understand that a valid claim of justice could be based on a sound argument either about privilege or about equal or fair treatment. Not every claim of justice is based on a comparison of how different people are treated. The conscientious objector urges that society acts unjustly if it demands that people who object in conscience to killing, prepare themselves to kill others. Put in this simple form, the claim is one of justice based on the violation of an objector's moral right not to be forced to kill. That is a claim of privilege.

A claim of justice based on protection is perhaps even easier to identify, but we must work harder to pin it down satisfactorily. Against the view that he is treated equally with all those who are subjected to a regulation, the person who claims he should receive

require in the absence of the prudential considerations. I prefer this way of speaking to the following alternative: "Justice requires an exemption, but it would be imprudent; therefore, on balance, the government should not grant an exemption required by justice."

56. If a regulation would protect innocent victims, they may have a claim of justice to have it imposed. In that event, for the claim of justice of those who seek an exemption to be sound, it must be powerful enough to offset or outweigh the claim of justice of victims to have the regulation apply across the board. Thus, imagine that a draft is to be introduced because a volunteer army unjustly casts the burden of dying for one's country on the poor. If the mostly affluent and educated conscientious objectors are to receive an exemption on grounds of justice, their claim must be strong enough to outweigh the concern that the exemption will have some tendency to burden the poor. In all cases in which the claim for exemption is to allow some people (especially parents) to treat others in a manner that would normally be regarded as unjust, as imposing serious corporal punishment, concern for potential victims is a central factor.

57. Even if we focused on no regulation or regulation with an exemption, we might think the arguments for regulation with exemption are mainly prudential ones, and the arguments against exemption mainly ones of justice.

an exemption urges that his treatment is unequal (or at least unfair). He contends that he is not situated similarly to others who are subject to the regulation. The issue of how strong preferences compare with claims of conscience now emerges as part of the question whether exemptions are required by justice.

The member of the Native American Church who wants to use peyote in his religious ceremonies can offer two useful comparisons. He first points out that when legislatures have adopted prohibitions of alcohol use they have made exceptions for the sacramental use of wine.⁵⁸ Given that alcohol is at least as damaging to people as is peyote,⁵⁹ the church member argues that his treatment is unfair in comparison with the position of those who use (and have used) wine in religious ceremonies within jurisdictions that forbid use of alcohol.⁶⁰ He asserts with confidence that the government would not ban all use of peyote were it a common feature of worship in mainstream churches. He should not be denied an exemption because he is part of a small, powerless minority.

The church member's second comparison is with those who want to use (or would use)⁶¹ peyote for recreational purposes. If he does not think it is positively mandatory to use peyote in a religious ceremony, he nevertheless regards it as the central element of his deepest religious (and cultural) experience. The prohibition operates on him much more harshly than it does on a recreational user, even one who believes use of peyote yields profound experiences and insights. Thus, the church member claims he is not similarly situated to others who are subject to the law. Though the law

58. See *supra* note 14 and accompanying text.

59. I am putting aside Waldron's point that use of peyote in worship involves some "harms" against which a regulation is aimed, Waldron, *supra* note 12, at 8, something not true about minimal use of alcohol. This point could be developed as part of a counterargument. My aim here is to exhibit the structure of the claim, not to resolve whether, on balance, it is convincing.

60. He may, of course, add that a total ban on religious use of peyote reflects a kind of contempt for Indian religion.

61. It is commonly said that peyote is not a drug of choice, see, e.g., Arnold H. Loewy, *Rethinking Free Exercise of Religion After Smith and Boerne: Charting a Middle Course*, 68 MISS. L.J. 105, 145-46 (1998), a fact which might suggest that if the members of churches that use peyote have a strong claim, the result should be no regulation, rather than rule and exemption. Insofar as the "not a drug of choice" conclusion rests on the availability of an illegal drug, marijuana, it seems to me a dubious starting point for analysis. Probably one has to ask if people would choose to use peyote if related prohibitions were effective.

operates with formal equality, it operates unfairly by imposing a deprivation that a legislature would never impose on a substantial part of the population.

On examination, the force of this argument cannot depend exclusively on a particularly intense desire to ingest peyote or on the fact that there would be no ban if most people badly wanted to use peyote. Barry points out that all criminal laws operate with unequal effect.⁶² That some people would like to commit particular crimes much more than would other people does not make the laws unequal or unfair in their operation.⁶³ And what any society regulates depends largely on the values held by most members of that society. An activity that is forbidden in Society A, say riding a motorcycle without a helmet, is allowed in Society B, where many people highly value riding without a helmet. To some extent, majorities in various societies regulate on the basis of their values, and the minority with different values must go along. That legislation would be different if most people had the values of the minority does not necessarily show injustice.

What more is needed to sustain the protection argument for injustice? Perhaps claimants must show that they are being disregarded in terms of some form of identification, such as religion or culture, as to which the majority should not ride roughshod over a minority; that their ground of action has some claim to being privileged (this approach combines aspects of privilege and protection); or that what the legislature has done in respect to them imposes harm so disproportionate to benefit that it amounts to comparative unfairness.

In any event, the central points I have made so far are that an exemption may be required by justice even if the decision is rightly assigned to the legislature, even if the wisdom of an exemption is arguable, even if considerations of prudence mix with those of justice, and whether the fundamental reason to exempt is to privilege certain activities or to assure fair treatment. Once we grasp these points, we can see that some exemptions are more than a good idea: they are required by justice.

62. BARRY, *supra* note 23, at 34.

63. *See id.*

This is not to say that every warranted exemption is required by justice. Sometimes the crucial arguments will be ones of mere prudence; and often the arguments against an exemption will be strong enough so that a legislature may properly deny it without acting unjustly. A reasonable decision to grant the exemption will then not be required by justice.

It is not my aim here to say just when justice, rather than utilitarian or prudential considerations, is dominant, or to say just what exemptions justice may require. It is simply to rebut any contention that justice *never* requires exemption,⁶⁴ that whenever legislatures are considering exemptions, they need focus only upon prudential considerations.

To show that the exemption strategy is desirable in a considerable number of circumstances *and* that exemptions are sometimes required by justice, one would need to consider a wide range of possible examples.⁶⁵ I have tried to do that elsewhere.⁶⁶

II. RELIGION AND MORALITY AS POSSIBLE BASES FOR EXEMPTIONS

Religious claims indisputably form one possible basis for various exemptions; claims based on nonreligious convictions and on strong preferences are others. Any sorting of claims into qualifying and nonqualifying can be avoided by a system of self-selection. As I have argued elsewhere about conscientious objection to military service, a workable system of self-selection is actually preferable to having officials decide whether someone qualifies for an exemption.⁶⁷ Self-

64. I should say that taking Barry's book as a whole, it is doubtful whether it does advance such a contention, although some individual sentences support it. See, e.g., BARRY, *supra* note 23, at 38 ("I have argued so far that the differential impact of a general law cannot in itself found a claim that the law is unjust."). At a workshop of the Columbia Center for Law and Philosophy discussing the book, Barry was clear that some exemptions might be required by justice.

65. The claim that justice requires an exemption is easiest to make when the activity the claimants want to protect does not present the dangers that concern the government, but I am assuming, that justice may require an exemption on some occasions in which the dangers do arise.

66. See generally KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006).

67. *Id.* at 49-67. Self-selecting *might not* be fair, if the alternative needs to be so onerous to exclude others than those with reasons of conscience, that the cost to those with reasons of conscience is too great. If, for example, it was necessary to conscript ninety-five percent of

selection *is feasible* only when those who badly want an exemption pay for it or make some other sacrifice that most people would not be willing to make to receive the same privilege.⁶⁸ Thus, to take an example we have considered, a state might allow motorcycle riders to go without helmets if they pay \$1000 a year for the privilege. Insofar as such a market approach favors the rich—for a millionaire who rides for recreation \$1000 may be only a minor annoyance, but for a farm worker who rides to work \$1000 may be prohibitively expensive—a state might make the fee proportional to income or wealth, or impose nonmonetary service, such as the alternative service that conscientious objectors have had to perform.⁶⁹

Short of instituting a scheme of self-selection, a state should not extend an exemption to all those with strong preferences. We may take strong preferences here as the *same kinds* of wishes and desires that many people have, but that greatly exceed their ordinary strength. As I have explained, the reason why people with strong preferences should not receive an exemption is not that, in principle, one could never be warranted.⁷⁰ Rather, such an exemption would generate three related problems connected to its administration. First, even if claimants are honest and articulate, and possess morally acceptable preferences developed independent of the regulation in question, officials (whether law enforcement officers on the spot or administrators issuing licenses) would find it difficult to decide when the standards for the exemption had been satisfied. Second, claimants would have powerful tactical incentives to overstate their preferences in order to gain a cost-free exemption. If all that was at issue was someone's strength of preference, administrators would not easily spot liars. Third, claimants might

the young population for military service and alternative civilian service had to be set at six years (compared with two years of military service) in order for self-selection to yield adequate military personnel, that could be unfair.

68. One might say that self-selection is feasible if ordinary people would not be interested in engaging in the prohibited behavior. But if the only people who want to perform the acts are those who seek the exemption, granting them an exemption will produce the same practical effect as not having a regulation; thus, the state can decide between exceptionless regulation and no regulation. This is the situation with a possible ban on sucking the blood of circumcised babies. See *supra* notes 6-9 and accompanying text.

69. See GREENAWALT, *supra* note 66, at 51.

70. See *supra* notes 34-39 and accompanying text.

actually form and articulate their preferences in response to the boundaries of an exemption.⁷¹

For all these reasons, governments cannot grant exemptions to all those whose strength of preference exceeds a certain margin. The grounds for an exemption must rest on something qualitatively different from the typical reasons that would lead most people to wish to perform acts forbidden by law. Two major candidates are religion and nonreligious morality.

Before I proceed, I want to narrow the relevant category of nonreligious morality somewhat. People base their moral judgments on a variety of sources, and these judgments may be powerful or weak. Suppose Ben is a utilitarian who works as a nurse. He has a sense that the practical operation of the system for jury participation is highly inefficient and he also thinks that nurses play a social role that is so valuable that he should be excused from jury duty. But he has no intrinsic objection to being on a jury, and he thinks it would be much better to serve than to go to jail for any period of time. One might say Ben perceives moral reasons not to serve, even that he has a moral objection to serving, but he is not the sort of person who should be getting an exemption. Any system of conscription would be hard to maintain if everyone like him were exempted. Something stronger is needed. A person should be exempted only if he has an objection in conscience or is a conscientious objector to doing what is required of most people. Now, the line between an objection in conscience and other moral reasons not to comply is far from simple, but when we say someone objects in conscience to doing something, we assume that he thinks he *should* be willing to undergo significant hardship rather than do that thing. (He may or may not have the strength of character to undergo such hardship.)

71. I recently talked to a Lutheran who said he was still troubled by his successful claim to be a conscientious objector. He initially put the point as if the issue was whether, as a faithful Lutheran, he could be a pacifist. I pointed out that, as he well knew, the law did not require membership in a pacifist denomination and that some Roman Catholics—not members of a pacifist religion—were pacifists. I also pointed out that his claim was certainly religious, and asked whether the crux of the problem did not come down to whether, in some sense, he was really a selective objector rather than a pacifist. He said the answer was “yes,” although there was no doubt that at the time he applied, he did believe himself to be a general objector. The matter that troubled him was not whether he had lied, but whether he was a victim of some subtle self-deception.

In what follows, I assume that the relevant nonreligious moral claims to be exempted should amount to an objection in conscience.

This conclusion leads naturally to two questions. First, is there a separate category of nonreligious claims of conscience or are all claims of conscience rendered religious because of their strength or their centrality in an individual's life? Two Supreme Court cases interpreting the Selective Service Act move toward treating all claims of conscientious opposition as religious,⁷² but I think clarity of understanding is better served if we grant that extremely powerful moral claims that bear no connection to religious beliefs or organizations, as these are ordinarily understood, are not religious.

Our second question is more difficult. Should religious claims for exemptions be limited to objections in conscience? The short answer is no. Religious groups and individuals may have strong reasons to preserve various religious practices that do not amount to claims of conscience. Perhaps an inmate should be allowed to wear a cross around his neck even though applying a general prohibition against such items of dress to him would not violate his conscience. This short answer does not resolve a more refined inquiry. If we grant that when religious claims for exemption that do not involve moral reasons at all (except in the sense that adherents claim that denying the exemptions would be unjust) need not amount to objections in conscience, what of claims that are distinctly moral, such as not participating in military service? Should these religious claims have to amount to objections in conscience? This possible approach has considerable appeal and not least because it might lead to equality of treatment of religious and nonreligious moral conviction. However, I am hesitant to embrace it as an exceptionless principle, in part because the line between moral and nonmoral reasons to act can be so elusive.

How should religious claims for exemptions be regarded in relation to nonreligious claims of conscience? Many of the most powerful reasons people have not to adhere to general regulations concern their religion. For most religious people in the United States, religious responsibilities involve a sense of duty to a

72. See especially the plurality opinion in *Welsh v. United States*, 398 U.S. 333, 339-44 (1970). The predecessor case giving a very broad meaning to the statutory requirement of "belief in a relation to a Supreme Being" was *United States v. Seeger*, 380 U.S. 163 (1965).

transcendent power, but even for those who do not believe in God, or gods, religion can be a powerful source of identification and community.⁷³ It would definitely not make sense to exempt nonreligious conscientious objectors and fail to exempt religious conscientious objectors; such a comparative hostility to religious grounds would be unjustified.

Harder questions are posed by the possibility of restricting an exemption to religious persons, to members of religious groups, or to members of named religious groups. Analysis is simplest if we take these possibilities in reverse order.

A fundamental principle of liberal democracy, though one not observed to its fullest extent in countries with established churches, is that the government should not favor one religious group over others.⁷⁴ An exemption limited to members of named religions begins with an initial strike against it. If two religious groups are relevantly similar, they should be treated similarly.

The best that can be said for an exemption restricted to a named group is that no other group may be relevantly similar. Part of the rationale for excusing the Amish from paying Social Security taxes is that members of that community will not receive Social Security from the government, and that because the Amish have a long historical continuity and relatively few members leave the community,⁷⁵ the government is assured that not many elderly former Amish will need government assistance. If no other group quite meets these requisites, why not cast an exemption in terms of the Amish? The problem is that over time some other group might qualify. Were legislatures constantly attentive to such developments, one might say, "Let them include another group when, and if, it comes along." But legislators are not attentive in this way, and success in legislation often depends on political pressure. A statute limited by name to the Amish invites future unfairness. A legisla-

73. JOHN WILSON, *RELIGION IN AMERICAN SOCIETY: THE EFFECTIVE PRESENCE 189-90* (1978) (discussing the relationship between religion and community).

74. See U.S. CONST. amend. I; ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 12.2.2 (2d ed. 2002).

75. BARRY, *supra* note 23, at 191-92, 242 (asserting that twenty percent leave before baptism, and that a powerful reason for the elderly not to leave is that they have no external means of support).

ture should adopt a general formula that fits the Amish and could include other groups in the future.⁷⁶

Is it all right to name the Amish at all? I think the answer here is “yes,” though the point is debatable. If the legislature knows it wants to exempt the Amish, it may say so. The risk is that over time, the Amish may lose some of the characteristics that warrant an exemption. Further, one may worry that naming constitutes a subtle endorsement. However, when the group named is a small minority obviously not being endorsed as the “true faith,” the convenience of naming an obvious beneficiary should outweigh the concerns about future inappropriate application and implicit approval.⁷⁷

Turning to the question of whether group membership should ever be a requirement of exemption, we can distinguish between exemptions that are intrinsically *for* groups, or require group participation, and those that are intrinsically *for* individuals. An exemption from a requirement that applies to organizations obviously would cover organizations; for example, religious organizations may discriminate on grounds of religion in their employment decisions. Other exemptions presuppose group concerns and activities. Thus, the government might decide to allow indigenous groups to kill a limited number of a protected species of whale.⁷⁸ The general prohibition on killing whales would apply to individuals (as well as companies); the exemption would turn on the need of some identifiable group.

Other exemptions could, in principle, go to individuals whose claims need not attach to membership in groups. Two examples are exemptions from military service and exemptions from bans on the use of peyote. Here, much depends on the nature of an exemption, how it is administered, and the possibility of fraud. Conscientious objection to military service is an individual matter, and an administrative screening process allows scrutiny of sincerity.

76. Finding a general formula *may* prove somewhat difficult, especially if individual legislators disagree over just *why* the Amish deserve an exemption.

77. Nevertheless, the position that legislation should operate only by general formulas, even when the obvious aim is to reach a particular group, is a reasonable alternative.

78. See Sarah Kershaw, *In Petition to Government, Tribe Hopes for Return to Whaling Past*, N.Y. TIMES, Sept. 19, 2005, at A16 (describing the Makah tribe's attempt to legally revive its tradition of whale hunting).

Especially given the fact that those committing outright fraud can easily join a pacifist religious group and feign pacifist beliefs, it does not make sense to require group membership. However, an individualized privilege to use peyote or marijuana as a personal act of worship, applied after the fact, opens up the law to extreme administrative difficulties and abuse. If an exemption is to be given, requiring that use be within a group setting (and possibly requiring that the user be a member of the group) makes sense.

Our most serious question about categorization is whether non-religious conscientious beliefs and deep-seated practices should be treated as favorably as religious ones? The answer could be "always," "sometimes," or "never."⁷⁹

We can reject the "never" answer straightaway. In some circumstances, nonreligious conscientious claims will seem about as pressing as religious ones and roughly as easy to administer. That is the case in respect to conscientious objection. An administrative structure that determines whether claimants are honest can assess the convictions of nonreligious pacifists about as well as those of religious ones.⁸⁰

The hard issue is whether, if exemptions are to be given to people with religiously grounded moral reasons, they always, or only sometimes, should extend to conscientious nonreligious claimants. My answer is "sometimes," because for some exemptions religion may be special.

One might offer prudential, historical or cultural, and principled grounds for treating religion as special. By prudential grounds, I refer to convenience in categorization and administration.⁸¹ Even though a perfect categorization, perfectly applied, might not draw the line at religion, religious claimants could overlap nearly

79. One might think that in some situations, a choice either way would be reasonable. One might believe even that the choice comes down to a close prudential judgment that precludes saying either decision is right or wrong. I mean here not only that making the assessment is extremely difficult, but that even someone with full information and having done the assessment of values would not use the terminology of right and wrong.

80. No doubt, a member of a pacifist church needs to explain less about his own point of view, but some religious claimants will not belong to pacifist churches. Further, one who sets out to commit systematic fraud will not find it very difficult to feign whatever religious beliefs, if any, are required to join a pacifist church. I add the "if any" because my impression is that many Quaker congregations are extremely inclusive in terms of belief.

81. See *supra* text accompanying note 77.

completely with those who should be exempted, and sorting out the merits of nonreligious claimants might be very difficult. Under these conditions, a law justifiably would limit an exemption to religious claimants. An exemption of the Amish, and other similar religious groups, from requirements of schooling beyond a particular age, provides an illustration. We can imagine a stable nonreligious community whose members feel as strongly as the Amish that schooling beyond the eighth grade is destructive of values they hold dear and jeopardizes the fundamental welfare of the children exposed to further school, and we can further imagine that few children leave this community upon becoming adults. But, after a careful look at historical sources, suppose we fail to discover any such community that has ever existed. Given the evanescence of virtually all nonreligious voluntary communal experiments within the United States and the countries of Western Europe, which history also reveals, we further conclude that the emergence of such a community is extremely unlikely. Under these circumstances, a legislative choice to limit an exemption to religious groups would make prudential sense.

By a historical or cultural justification, I mean that, within a particular society, religion is considered special.⁸² Such a view might actually be embodied in a constitution. Thus, it may plausibly be claimed that the religion clauses of our federal Constitution instantiate the view that religion is special. An argument that the special place of religion is enshrined by history or accepted in modern society need not rest on a principled defense of the special place of religion; it is enough for political leaders, and judges, to implement the fundamental cultural values—at least it is enough if giving religion that place is not positively unjust.⁸³

Can one offer a principled defense for treating religion as special, a defense that does not rely only on history, existing culture, or prudence, and that could counter arguments that affording a

82. This conclusion might, or might not, lead to a judgment that it is always constitutionally permissible to limit an exemption to religious claimants.

83. If the special place of religion is not solidly entrenched in constitutional law, the argument that it justifies limiting exemptions to religious practices is open to the counterargument that societies have long accepted all sorts of unjust inequalities, that legislators should counter these, and that, if no principled distinction favors religion, a legislature's granting exemptions only for religious beliefs and practices is unjust.

religion a special place is unjust? Here we may begin with defenses that rely on the truth, or possible truth, of religious premises. Defending a special place for religion is easiest if one relies directly on religious premises, such as the premises commonly held in the United States that religion concerns the relation of human beings to a transcendent God and that this relation supersedes in importance all human relations, including one's responsibility to comply with law.

This defense of distinguishing religious claims for exemption from nonreligious ones faces three difficulties. First, a reasonable representative government is not likely to adopt measures that legislators believe require citizens to violate actual obligations to God. So, the more precise justification for an exemption must be that the government, insofar as is feasible, should not require people to violate what *they* perceive as their obligations to God. To this extent, at least, the exemption will go to people who are seen by most members of a society as having a mistaken sense of their obligations to God.⁸⁴

Second, this particular justification seems not to cover people who have a radically mistaken view about religion. What about religious people who worship ancestors, or thousands of divinities, or do not believe in any god? Why should they get an exemption?⁸⁵ Third, it is highly doubtful in a liberal democracy, especially one with a rule against an establishment of religion, that the government should legislate on the basis of what is a "correct" theological view.⁸⁶

84. I can imagine at least one qualification. People might believe that various individuals have special vocations and that some of these vocations would preclude actions in which others engage. Thus, it might be thought that monks have a religious obligation not to serve on juries, although such service is fine for lay persons.

85. Perhaps "religion" is the best way to categorize, and these people will benefit indirectly from a justification based on sound religious views, but that justification does not directly apply to them.

86. Instead of supposing that a religious view based on a transcendental God is true, the government might instead assume that such a view may be true, and act accordingly. Michael McConnell writes of a political theory that includes the possibility of a transcendent God. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15. A government would sensibly rely on such a theory only if it thought the probability of truth to be high (something very close to adopting it as a "correct" view) or if it deferred to the sentiments of most, or many citizens (the theory to follow).

A more modest approach is to say that within the individual lives of many citizens, religion has a special place. Many people perceive *their religion* as involving relations with a transcendent God. Whether they are wise or foolish, the government should not demand that they do what they believe God forbids them from doing, or does not want them to do. This justification does not depend on a claim about the actual existence of God and about God's nature and will. This justification does not itself pick up religious claims that do not posit any such obligations, but one might conclude that religion is the reasonable or required criterion of classification and that a high percentage of religious claims (in our culture) will concern perceived transcendent obligations. For officials, this version of the "in principle" argument is preferable to one that depends on the claimed truth of any religious view, but many citizens attracted to the stronger assertion will reasonably accept exemptions on that ground.

A rather different basis for distinguishing most religious claims from most nonreligious claims of conscience is that the former derive from regimes of social regulation that are separate from the state's legal norms.⁸⁷ There may be value in letting such systems flourish, not supplanting them at every turn with the state's rules.⁸⁸

With respect to the question whether any particular proposed exemption should be limited to religious claimants, officials should consider "in principle," historical and cultural, and prudential arguments. Sometimes, these will justify limiting the category of claims to religious ones.

III. CONSTITUTIONAL RIGHT OR LEGISLATIVE CHOICE

In regard to whether exemption issues should be viewed as matters of constitutional right or left to legislative choice, one cannot prescribe in general for all liberal democracies.⁸⁹ Some

87. See Waldron, *supra* note 12, at 16-18, 23-24. However, one could be a religious conscientious objector after developing individual convictions about war without being a member of any group with a norm against military service.

88. See *id.* at 17-18 (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983)).

89. We shall look at those questions, insofar as possible, without a general predisposition for or against judicial resolution of problems as matters of constitutional law. A person who

assign greater responsibilities to the courts than do others, and the textual meaning and underlying understanding of specific constitutional provisions count. For various challenges to classifications, it could make a controlling difference whether a constitutional text protects a right to conscience or a right to the exercise of religion, or both, and whether it forbids an establishment of religion. I assume in most of what follows that, as in the United States, the Constitution guarantees the free exercise of religion, but not freedom of conscience, and that it forbids an establishment of religion.⁹⁰ Readers should be aware that many constitutions and international documents have no guarantee against established religion, and that some protect freedom of conscience, understood more broadly than religious conscience.⁹¹

Unconstitutionality in the United States is most apparent when a classification favors some religions over others. A rule against establishment bars favoring particular religions, and a principle of free exercise implies, at least in a regime with no establishment, that peoples of different faiths will have equal rights of religious exercise.⁹² If some religions cannot be favored over others, an exemption given to members of one religion must be given to members of another similarly situated religion.⁹³ Suppose two different religions require use of wine in family religious ceremonies; were a state that prohibits the drinking of alcoholic beverages to make an exception for family devotional use in one of the two religions, but not the other, its classification would be unconstitu-

believes that judicial review is unhealthy, that virtually all political issues should be decided by bodies that are politically responsible, will oppose judicial review if it is proposed and will wish to limit its scope if it is already entrenched.

90. See U.S. CONST. amend. I.

91. See, e.g., TÜRKİYE CUMHURİYETİ ANAYASASI [Constitution] art. 24 (Turk.) (guaranteeing everyone "freedom of conscience").

92. There is an argument that in the United States the original religion clauses contemplated that Christian religions could be favored over non-Christian religions, but virtually no one has defended this position for modern constitutional law, and I shall not pause to address it. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 99-100 (1985) (Rehnquist, J., dissenting).

93. The sentence in the text equivocates about what constitutes being similarly situated. If members of each group have the same interest in an exemption, clearly one group cannot be favored because officials want to advance it or regard its theological position as more sound. If the government is to distinguish among religions, it must have neutral, secular reasons for doing so.

tional (unless the state could present a powerful nonreligious reason why the exemption should go to members of one religion and not the other).⁹⁴ This, indeed, is what the Supreme Court held regarding a benefit of tax reporting that it assumed a state legislature designed to reach some religious groups and not others.⁹⁵ Any exemption formulated in terms of named religions risks such a finding of unconstitutional classification, because a court may find some other religion to be similarly situated.⁹⁶

The reality that an exemption will benefit members of some religions more than members of others does not itself create a constitutional problem—a higher percentage of Quakers than Presbyterians happen to be pacifists—but ordinarily a legislature should not be allowed to make membership in a particular kind of religion a condition of receiving an exemption. Such a strategy—for example, exempting only pacifists who belong to pacifist religions—might be defended on grounds of administrative convenience, but, in general, courts should regard it as unconstitutional

94. The issue of favoritism will look different in a country that has an established religion or a constitution that fails to guarantee nonestablishment. If a country has a traditional established church, with the government contributing to the salaries of clergy and to the upkeep of buildings of the established church, a constitutional right of free exercise would not assure equality in religious exercise, since members of the established church enjoy advantages that others do not. An exemption that went only to members of the established church or its members might be viewed as an aspect of the permitted establishment.

By a somewhat paradoxical logic, an exemption given to all but members of the established church might also be all right. Here, the reasoning would be that members of the established church have various political and financial advantages; a government might be able to offset these by extending exemptions to others. If an exemption aided members of some nonestablished religions but not the members of others, the argument would be stronger that a principle of equal free exercise was violated, but the government could argue that the existence of a religious establishment sets the understanding of free exercise as not involving an equality principle. We need not pursue how these various arguments would play out if the country has some kind of multiple establishment (in which some religions receive benefits others do not) or is allowed constitutionally to create an established religion although it does not then have one.

95. *Larson v. Valente*, 456 U.S. 228, 255 (1982). As Michael McConnell has written, “[t]he test seems to be that accommodations need not be equal if there are ‘neutral, secular reasons,’ not based on religious favoritism, for distinguishing among religious beliefs.” Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 708 (1992) (quoting *Gillette v. United States*, 401 U.S. 437, 458 (1971)). In many contexts the government would need more than some such reason and would have to satisfy the compelling interest test that applies to suspect classifications.

96. Upon such a finding a court may hold the existing exemption invalid, extend it to similarly situated groups, or give the legislature a limited time in which to resolve that issue.

when the exemption concerns individual activity. Among other reasons, the law should not encourage people who seek the exemption to join one religious group rather than another. When the exemption involves participation in worship services, or otherwise directly concerns the practice of a collectivity, an exemption may turn on the nature of the group in which one participates.

The distinction between religious and nonreligious claimants is most troubling. The hard question is whether an exemption cast in terms of religion needs to be extended to all individuals whose sentiment about engaging in the prohibited act is otherwise similar to that of the religious claimant. Nonreligious conscientious opposition to participating in war is a striking example.⁹⁷

I have suggested that in some instances, it makes sense, on principled, historical or cultural, and prudential grounds, to limit an exemption to religious claims. Although one can reasonably argue that a principle of nonestablishment or a more general principle of equality *always* prevents the government from distinguishing religious from comparable nonreligious claims,⁹⁸ I think this approach is too formalistic and demanding for situations in which a parallel nonreligious claimant is highly unlikely to arise.

This leaves the central question whether the government should be able to exempt a religious person, but not a nonreligious one, when a belief (such as pacificism) or action has roughly the same significance for them? There is a constitutional argument flowing from the Free Exercise Clause that the government may always make that choice: the Constitution permits free exercise accommodations, even when it does not demand them; thus, a legislature may choose to accommodate religious exercise without accommodating similar nonreligious beliefs or practices.⁹⁹

A technical legal argument to the contrary may be mounted on the basis of *Employment Division v. Smith*, which held, with limited qualifications, that the Free Exercise Clause guarantees no right to

97. See *supra* text accompanying notes 1-3.

98. In its strongest variety, the argument asserts that the government must classify exemptions in a more general way, even if it expects the only persons who will qualify will be religious.

99. This argument is not implausible, and three Justices accepted it in *Welsh v. United States*, 398 U.S. 333, 371-74 (1970) (White, J., Burger, C.J., & Stewart, J., dissenting).

exemptions.¹⁰⁰ On that understanding, perhaps one should not think of religious exemptions created by legislatures as somehow extending a principle already built into the Free Exercise Clause itself. Scholars, like myself, who continue to be dismayed by *Employment Division v. Smith* will not find it a comforting premise from which to reason about limits on legislative power; but even if one accepts the principle of *Smith*, one may also believe that the Free Exercise Clause signals something special about religion, including the appropriateness of exemptions directed to religion.¹⁰¹ It is not obvious that either the Establishment Clause or the Equal Protection Clause bars such exemptions, but they may bar some motivations for exemptions.

A broader argument against religion-only exemptions acknowledges that the Constitution and other legal materials are inconclusive, but relies on modern constitutional premises that when people are otherwise similarly situated, people with certain kinds of beliefs should not be favored over people with other kinds. On this view, the combined effect of the Free Speech, Establishment, Free Exercise, and Equal Protection Clauses bars a preference limited to religious grounds, unless the government has a reason for the limitation that goes beyond preferring religion. This broader argument can fit with a recognition that the Free Exercise Clause does require some exemptions. In these circumstances, that clause directly protects religious claimants; people with nonreligious but otherwise similar convictions may be swept into the ring of protection by the force of other constitutional clauses.

According to my understanding, courts should recognize a principle of prima facie equality between religious and nonreligious beliefs and activities, such that the government cannot treat religious activities more favorably than otherwise similar nonreligious ones, *unless* it has some substantial reason to do so *other than* a theological premise or popular opinion that religious beliefs and actions are more deserving than nonreligious views. The issue whether a legislature can treat similar religious and nonreligious

100. 494 U.S. 872, 878-83 (1990).

101. Someone who thinks *Smith* is fundamentally correct about the limits of judicial competence may believe that legislatures have a constitutional obligation to create some exemptions that is not judicially enforceable.

beliefs and activities differently is a significant one for courts to resolve. They should leave a degree of discretion to legislatures, but sometimes declare that the exclusion of similarly situated nonreligious people is a constitutional violation.

The central question that remains for us is whether any exemptions from valid laws are constitutionally required and should be enforced by courts in the face of legislative inaction.¹⁰² Let us assume that the constitutional language and history are indecisive, as they are in the United States. Here we have the fundamental issue the Court addressed in *Employment Division v. Smith*, when it switched *from* a judicial test that allowed significant interferences with the exercise of religion only if they were supported by compelling state interests *to* a rule that a religious challenge (unsupported by any *other* constitutional right) could never succeed against a valid law of general application.¹⁰³ Thus, given a law against the use of peyote, members of the Native American Church had no right to use peyote in their worship services, although that use was the very center of their worship, the church's most basic activity. According to the Court's principle, it was irrelevant whether the state had any need to extend its law to worship services and whether use in worship was supremely important. The reaction of many, including myself, was that this result was a travesty of free exercise protection, but perhaps that judgment was hasty.

The Court's approach might be defended on pragmatic or principled grounds. By pragmatic grounds here, I refer mainly to the functioning of courts. Perhaps judges are ill-equipped to decide when exemptions should be given. A constitutional decision in favor

102. In describing a law as valid, I am assuming that the law is not, despite its general wording, actually aimed against a particular religion and does not in its purpose discriminate among religions. Rather, the complaint against the law's enforcement is that it effectively infringes on an important religious belief or practice, in the manner that a general law about humane slaughtering would infringe Jewish beliefs and practices concerning kosher slaughter. See *supra* text accompanying notes 25-27.

I leave aside here whether a law that may not be intended to discriminate and does not actually classify in terms of particular religions can nonetheless be regarded as discriminating between religions if the grounds of classification turn out clearly to include some religions and exclude others—a possible understanding of the issue in *Larson v. Valente*. See *supra* notes 95-96 and accompanying text.

103. *Smith*, 494 U.S. at 878-79. A similar question arises if, during the period of constitutional design, the framers might or might not provide for constitutionally mandated exemptions.

of an exemption requires an assessment of sincerity, some measure of how much a belief or practice matters to an individual or religion, and some assessment of whether the government's interests will be unduly sacrificed by granting the exemption. These are not inquiries, the argument goes, that courts should be making; they are especially troublesome because courts should not enter the thicket of making judgments about religion. An alternative constitutional course of courts sustaining virtually all religious claims is even less palatable. Thus, courts should not be in this business at all, and free exercise rights should not include rights to exemptions. That, indeed, is the gist of Justice Scalia's opinion for the Court in *Smith*.¹⁰⁴

Insofar as the critique of judicial assessment of claims for free exercise exemptions is sound, it also reaches any broad legislative authorizations to courts to "balance" such claims against competing government interests, and shows that statutes like the Religious Freedom Restoration Act¹⁰⁵ are unwise, if not unconstitutional, in the burdens they impose on courts.¹⁰⁶

Winnifred Fallers Sullivan has challenged general protection of religious exercise in a recent book strikingly titled *The Impossibility of Religious Freedom*.¹⁰⁷ Sullivan recounts a Florida dispute involving families who had installed upright monuments to commemorate loved ones in the City of Boca Raton, which had restricted that part of its cemetery to flat memorials.¹⁰⁸ The case involved the interpretation and application of the Florida Religious Freedom Restoration Act.¹⁰⁹

104. *Id.* at 887-90. If this pragmatic approach provided the main support for the rule of *Smith*, one might believe that the legislature enforcing free exercise rights in good faith must, or should, provide exemptions, but that courts cannot correct any failures on the part of legislatures. This understanding would have powerful implications for how legislators should regard their constitutional responsibilities.

105. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

106. The critique does not condemn specific legislative exemptions that courts can enforce without making difficult judgments on their own.

107. WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 1-3 (2005).

108. *Id.* at 15-18.

109. *Id.* at 22-23. Two of the complexities of the case were that the rules clearly barred upright monuments and that cemetery employees had told people they could be installed. *See id.* at 17, 20. As long as other cemeteries were available, it is hard to see how religious exercise could be substantially burdened for someone who, knowing the rules, chose to use an area limited to flat monuments. A reliance argument would not seem dependent on a religious

Sullivan rightly points out how hard it is to interpret the Act's requirement that a person's religious exercise be substantially burdened, when people advance religious reasons that connect to their respective faiths but do not involve standard requirements of the faith.¹¹⁰ Most of the reasons individual plaintiffs gave for choosing particular memorials fit into this category.¹¹¹ Sullivan rightly criticizes the trial judge's conclusion, subsequently embraced by the state supreme court, that a substantial burden on religious exercise necessarily involves a prohibition or requirement of a person's religion.¹¹² Considering both the statutory language and the U.S. Supreme Court's approach to religious claims, the interpretation of the courts in the case is both too institutional—not adequately focused on an individual's beliefs and practices—and too demanding—excluding choices that someone thinks are supported by her religion but not required.

But Sullivan's main point is that the whole enterprise of discerning a substantial burden is too difficult. Early on, she writes that “[f]orsaking religious freedom as a legally enforced right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities.”¹¹³ And the last sentence of her text suggests that a right to religious freedom “may not be best realized through laws guaranteeing religious freedom but by laws guaranteeing equality.”¹¹⁴ Greater clarity yes, but also better realization of religious freedom? It is hard to see how in the very case she discusses religious freedom would benefit. If someone just preferred an upright monument in an area limited to flat monuments, she would be out of luck. Perhaps Sullivan would favor specific exemptions given to people on grounds of morality or conscience. This, in fact, is the general approach of the vast majority of laws that allow medical personnel to refuse to engage in certain medical procedures,¹¹⁵ and I believe it is often the

claim.

110. *Id.* at 107-08.

111. *See id.* at 35-53 (detailing the plaintiffs' reasonings and explanations).

112. *See id.* at 97-99.

113. *Id.* at 8.

114. *Id.* at 159.

115. *See* Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 820-21, 823-24.

best approach.¹¹⁶ In respect to upright markers, distinguishing nonreligious claims of conscience from choices based on “mere” sentiment or aesthetic judgment would be very hard. So, as far as grave markers are concerned, the option of equality almost certainly entails in practice that religious claims will end up being grouped with all other sorts of preferences and will inevitably yield to regulation.

Concerns about judicial competence undoubtedly have some force, but Justice Scalia’s approach in *Smith* allows the effective destruction of a religion on a slight state interest in general regulation.¹¹⁷ That hardly seems a robust protection of the free exercise of religion. Granting that work needs to be done to develop the best formula for constitutional review of neutral laws that impinge on religion, the *Smith* alternative of no review whatsoever emasculates free exercise. Difficulties in standards of judicial review, hardly unique to free exercise, are preferable to sacrificing a fundamental constitutional guarantee.

What can we say about the principle of free exercise? Does it reasonably include only a right against discrimination? Without trying to answer this question for every political society, we shall assume a modern liberal democracy with citizens of diverse religious views and many small religious groups, with idiosyncratic practices, who are not well represented in the legislative process. This certainly describes the United States, and with increased immigration to other Western democracies, it also describes those liberal democracies.

Early in this Essay, we saw that exemptions are sometimes required by justice.¹¹⁸ That does not itself show that exemptions should be matters for the judiciary, but when we add that a crucial aspect of constitutional rights should be the protection of minorities against disregard in the legislative process, the argument for judicial assessment builds. Of course, minorities cannot be protected in every respect—far from it—but religious practice is of great importance, and has long been regarded as a fundamental right.

116. One might argue that the Free Exercise Clause itself somehow requires exemptions for conscience, religious or not, but Sullivan makes no such claim.

117. See *supra* note 104 and accompanying text.

118. See *supra* Part I.

And religion has been a fertile source of unjust discrimination. Among minority beliefs and practices that should be protected, religion has a powerful claim.

One reason for constitutional exemptions is to prevent outright intentional discrimination, achieved by apparently neutral legislation, that courts are not in a position to identify. In this respect, the direct right to exemption is an indirect means to avert purposeful discrimination. But legislative neglect, which comes in the form of attentive indifference or ignorant disregard, is of much broader concern. Legislators may be aware that their general law will probably have detrimental, even devastating, effects on some religious practices or beliefs; but because those religions seem alien, strange, and indefensible, the legislators do not regard these effects as anything to worry about. This self-conscious attitude about effects approaches intentional discrimination, but does not quite move over the line according to some understandings of discrimination.¹¹⁹ When an adversely affected minority religion is so far off the "radar screen" that legislators do not consider it at all when they adopt a general rule, we can talk of ignorant disregard.

Both these problems are well-addressed by courts considering claims as ones of constitutional right. Indeed, Eisgruber and Sager build a complete theory of constitutional exemptions on the basis of protection against discrimination broadly conceived.¹²⁰ According to their approach, courts considering claims for constitutional exemptions should pose counterfactual questions about how legislators would have treated similar religious interests had they been part of mainstream religions.¹²¹ One need not accept either their rejection of all "privilege" arguments for exemptions, or their precise recommendations about judicial approaches, to see that protecting against unfair indifference and neglect is a strong reason for constitutional exemptions.

Ira Lupu has urged that judicial exemptions are constitutionally preferable to legislative ones.¹²² He is concerned partly that

119. In standard criminal law terminology, one might speak about recklessness regarding these harmful effects.

120. See generally Eisgruber & Sager, *supra* note 15.

121. *Id.* at 1289.

122. See generally Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 780 (1992).

legislators will undervalue minority religions and be insufficiently respectful of establishment limits.¹²³ Whether one accepts or rejects his recommendation that legislative exemptions be considered unconstitutional, he provides strong reasons for welcoming some judicial exemptions.

If we conclude that courts should enforce some constitutional exemptions for religious claims, it *does not follow* that nonreligious conscientious claims must suffer by comparison. That religious claimants must be treated better than most people who are subject to a restrictive law does not entail that they may be treated better than others whose nonreligious objections to a law resemble their own.

In summary, it is troublesome for courts to decide that some citizens will be relieved from obligations imposed generally, and it is troublesome for courts to make the necessary assessments about religious needs and state interests; but the *Smith* alternative involves such a blatant inattention to the fundamental political rights of citizens that it should be abandoned. If this analysis is correct, it leaves open the question of just how courts should exercise their protection of free exercise rights and, particularly, just how much latitude they should leave for reasonable legislative judgments. But a constitutional rule that permits the prohibition of practices deemed fundamental by religious individuals and groups on the slenderest of public needs is intolerable. The combination of positions that I defend is that free exercise demands certain exemptions but that nonestablishment, equal protection, and free speech sometimes require extension to similarly situated nonreligious claimants.

123. *See id.* at 776-79.